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THE
LAW JOURNAL REPORTS
FOR
THE YEAR 1890:
COMPRISING
REPORTS OF CASES
IN
The House of Lords and in the Privy Council,
IN
The Court of Appeal and the Court for Crown Cases Reserved,
AND IN
THE HIGH COURT OF JUSTICE
VIZ.
Chancery; Queen's Bench; and Probate, Divorce, and
Admiralty, Divisions.

MICHAELMAS 1889 TO MICHAELMAS 1890.

The Appellate Cases, in the House of Lords, and in the Court of Appeal, are with the Reports of Cases in the respective Divisions and Courts from which the Appeals come. These Cases form five distinct Volumes, having separate Indexes of Subjects and Tables of Cases: viz., the Privy Council Volume; the Chancery Volume; the Queen's Bench or Common Law Volume, including Bankruptcy Cases; the Probate, Divorce, and Admiralty Volume; and the Magistrates' Cases.

THE CASES RELATING TO THE POOR LAW, THE CRIMINAL LAW, AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM A DISTINCT VOLUME OF REPORTS, VIZ. THE MAGISTRATES' CASES.

THE PRIVY COUNCIL CASES, INCLUDING SCOTCH AND IRISH APPEALS IN THE HOUSE OF LORDS, HAVE THEIR OWN INDEX AND TABLE OF CASES, AND FORM A DISTINCT VOLUME OF REPORTS.

THE REPORTS ARE EDITED BY
FREDERICK HOARE COLT, Esq.,
AND
JOHN GEORGE WITT, Esq., BARRISTERS-AT-LAW.

CHANCERY DIVISION, VOL. LIX.

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EDWARD BULLOCK and LIONEL LANCELOT SHADWELL.

In Her Majesty's Court of Appeal,
W. DECIMUS I. FOULKES, ARTHUR CLEMENT EDDIS,
WILLIAM EDWARD GORDON, EDWARD NASH,
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JUDGES AND LAW OFFICERS.

MICHAELMAS 1889 to MICHAELMAS 1890.

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Sir RICHARD EVERARD WEBSTER, Attorney-General.
Sir EDWARD CLARKE, Solicitor-General.

PREFERMENTS AND MEMORANDA.

In Hilary Sittings, 1890, the Hon. Sir HENRY MANISTY, one of the Judges of the High Court of Justice, Queen's Bench Division, died.

In the same Sittings, Mr. ROLAND VAUGHAN WILLIAMS, Q.C., was appointed a Judge of the High Court of Justice, Queen's Bench Division.

In the same Sittings, the Hon. Sir WILLIAM VENTRIS FIELD, one of the Judges of the High Court of Justice, Queen's Bench Division, resigned, and was raised to the Peerage under the title of Baron FIELD.

In the same Sittings, Mr. JOHN COMPTON LAWRENCE, Q.C., was appointed a Judge of the High Court of Justice, Queen's Bench Division.

In the same Sittings, Sir AUGUSTUS KEPPEL STEPHENSON, K.C.B., of Lincoln's Inn; Sir WILLIAM HARDMAN, of the Inner Temple; Mr. EDMUND MACRORY, of the Middle Temple; Mr. ALBERT VENN DICEY, of the Inner Temple; Mr. CYRIL DODD, of the Inner Temple; Mr. RICHARD OUSELEY BLAKE LANE, of the Inner Temple; Mr. SIDNEY WOOLF, of the Middle Temple; Mr. CHARLES ALFRED CRIPPS, of the Middle Temple; and Mr. RICHARD BURDON HALDANE, of Lincoln's Inn, were appointed Her Majesty's Counsel learned in the law.

In the same Sittings, Mr. HERBERT HENRY ASQUITH, of Lincoln's Inn, and Mr. JOHN LAWSON WALTON, of the Inner Temple, were appointed Her Majesty's Counsel learned in the law.

REPORTS
OF
CASES ARGUED AND DETERMINED
In the House of Lords

*(ON APPEAL FROM THE COURT OF APPEAL IN ACTIONS
IN THE CHANCERY DIVISION),*

REPORTED BY
LIONEL LANCELOT SHADWELL,
BARRISTER-AT-LAW;

IN
Her Majesty's Court of Appeal
(ON APPEAL FROM THE CHANCERY DIVISION),

REPORTED BY
ARTHUR CLEMENT EDDIS, EDWARD NASH,
HARRY BAIRD HEMMING, and AMYAND JOHN HALL,
BARRISTERS-AT-LAW;

AND IN THE
Chancery Division
OF

THE HIGH COURT OF JUSTICE,

REPORTED BY
ARTHUR CORDERY, JAMES E. HORNE, GEORGE A. STREETEN,
LEWIS BOYD SEBASTIAN, JAMES EYRE THOMPSON,
REGINALD BRODRICK SCHOMBERG, JOHN FRANCIS WAGGETT,
HARRY BAIRD HEMMING, HENRY FREDERICK AMEDROZ,
and AMYAND JOHN HALL,
BARRISTERS-AT-LAW.

EDITED BY
FREDERICK HOARE COLT,
BARRISTER-AT-LAW.

MICHAELMAS 1889 TO MICHAELMAS 1890
53 & 54 VICTORIA.

SUPREME COURT OF JUDICATURE.

CASES ARGUED AND DETERMINED

IN

The Chancery Division

AND DIVISIONAL COURTS

OF

THE HIGH COURT OF JUSTICE,

AND ON APPEAL THEREFROM TO

THE COURT OF APPEAL AND HOUSE OF LORDS.

MICHAELMAS 1889 to MICHAELMAS 1890.

53 *Victoria*.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
BOWEN, L.J.
FRY, L.J.
1889.
Nov. 1.

In re ROYLE.
ROYLE v. HAYES.

Practice—Originating Summons—Jurisdiction—Question as to Validity of Gift made by Testator in his Lifetime—Rules of Supreme Court, 1883, Order LV. rule 3.

The Court has no jurisdiction under Order LV. rule 3 to determine, on an originating summons, questions which could not have been determined under a judgment for administration of a testator's estate or the execution of a trust. Consequently, there is no jurisdiction, on an originating summons, to determine the question of the validity of a gift of money made by a testator to his wife in his lifetime, the money being in her possession at the time of his death.

Decision of KEKEWICH, J., reversed.

In re Davies; Davies v. Davies (57 Law J. Rep. Chanc. 759; Law Rep. 38 Ch. D. 210) approved.

This was an appeal from a decision of Kekewich, J.

On the 13th of May, 1889, Alfred Royle, one of the executors of the estate of William Royle deceased, took out

an originating summons against George Hayes, the other executor of the said estate, and Sarah Ann Royle, the testator's widow, a person entitled to the income of the real and personal estate of the said William Royle, that the following questions in matters arising in the administration of the testator's estate might be determined under the Rules of the Supreme Court, Order LV. rule 3, subsections (a), (e), and (g):—

1. Whether or no the sum of 171*l.* 15*s.*, received by the said William Royle on or about the 24th of May, 1885, from Mrs. Hope, in part payment of the purchase-money due from her in respect of a plot of freehold land purchased by her from the said William Royle, belonged to the said William Royle and formed part of his estate at his death on the 29th of May, 1885.

2. Whether, if the said sum of 171*l.* 15*s.* or any part thereof belonged to the said William Royle at his death, the use of the same was or is necessary for carrying on his farming business.

3. Whether Sarah Ann Royle ought to render any, and, if so, what, accounts to the executors and trustees of the said William Royle in respect of the farming business. Consequential relief.

Sarah Ann Royle claimed that her

B

In re Royle, App.

husband William Royle had given her the sum in question during his life, and that after paying certain debts out of it she had placed the balance of the money in a bank in her own name.

When the summons came on before Kekewich, J., an objection was taken on behalf of Sarah Ann Royle that this was a hostile action against her, and that there was no jurisdiction to determine the question as to the sum of 171*l.* 15*s.* on an originating summons. Kekewich, J., overruled the objection, on the ground that the question was one arising in the administration, and, on the merits, held that a gift to the widow was not made out.

The defendants appealed.

Levett, for the appellants.—The question with regard to the sum of 171*l.* 15*s.* is whether there was a valid gift of this sum by the testator during his life to Sarah Ann Royle. That is, the plaintiff makes a hostile claim against Sarah Ann Royle, and there is no jurisdiction to determine this question on an originating summons. The question is not one between the executors and her as a legatee, and is therefore not within Order LV. rule 3, sub-section (a), and it is not a question arising in the administration. The test is that there is no jurisdiction on an administration action to make an order on a legatee to pay a debt to the estate; the executors must bring an action for payment. In *In re Davies*; *Davies v. Davies* (1), North, J., held that upon an originating summons under rule 3 of Order LV. of the Rules of Supreme Court, 1883, there is jurisdiction to determine such questions only as before the existence of the rule could have been determined under a judgment for the administration of an estate or execution of a trust, and consequently that there was not jurisdiction on an originating summons to decide a question between legal beneficial devisees under a will.

E. S. Ford, for the respondent.—The question with regard to the 171*l.* 15*s.* is one arising in the administration, and can therefore be properly determined on an originating summons, and that was the

(1) 57 Law J. Rep. Chanc. 759; Law Rep. 88 Ch. D. 210.

ground on which Kekewich, J., decided that the Court had jurisdiction. Further, the defendant has submitted to the jurisdiction; she has filed evidence. *In re Turcan* (2) shews that where a party has appeared on a summons, it is too late for him to object that the Court has no jurisdiction to determine the question on the summons.

[By arrangement the case was then heard on the merits, but on these a report is unnecessary.]

COTTON, L.J.—On the question of jurisdiction, Mr. Justice Kekewich considered that he had jurisdiction to deal with the question raised on this originating summons; but, in my opinion, that view is erroneous. Under Order LV. rule 3, questions between executors and legatees as legatees may be determined on an originating summons; but the claim made on this summons is not made against the widow as a legatee, but is made in respect of a sum to which she claims to be entitled as a gift from her husband. The question is between the executors and a person who says she is entitled to the sum. It is not a question which could be properly determined in an administration action, and therefore cannot be raised on an originating summons. In an administration action an enquiry might have been properly directed as to whether the money formed part of the testator's estate; but the finding on that enquiry would not have been a decision against the widow, who does not claim this money as part of the testator's estate. I think the contention of Mr. Levett on the question of jurisdiction is right.

BOWEN, L.J.—With regard to the jurisdiction of the Court on this originating summons, the question for determination is one which, adversely, and without consent, could not be decided on an originating summons because it does not come within Order LV. rule 3. It was urged on behalf of the plaintiff that the defendant had submitted to the jurisdiction, and *In re Turcan* (2) was referred to; but that can only decide that if a person who is served with an originating sum-

(2) 58 Law J. Rep. Chanc. 101.

In re Royle, App.

mons not within Order LV. rule 3, objected to the jurisdiction, and did not appear, the Court would not go on; but when he had appeared and taken the decision of the Court, it was too late for him to take objection to the jurisdiction on the case coming before the Court of Appeal. But that is not the present case, and here, I think, the Court has no jurisdiction to make an order on an originating summons.

FRY, L.J.—I am entirely of the same opinion. Order LV. rule 3 is not intended to give jurisdiction, except in matters which might have been tried in an administration action. The words of the Order itself are emphatic on the point. This is not such a matter. I entirely concur with the views expressed by Mr. Justice North in *In re Davies; Davies v. Davies* (1).

[On the facts their Lordships held that the gift was made out.]

Decision of KEKEWICH, J., reversed.

Solicitors—Bower, Cotton & Bower, agents for W. H. Vaughan, Cheadle, for defendants; Yielding, Barlow & Piper, agents for Cobbett, Wheeler & Cobbett, Manchester, for plaintiff.

CHITTY, J. }
1889. } THE NEATH PERMANENT BENE-
Oct. 29, 30. } FIT BUILDING SOCIETY v.
Nov. 7. } LUCE.

Building Society—Extent of Borrowing Power—“Amount secured by Mortgage”—Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 15, sub-s. 2—Society borrowing ultra vires—Extent of Lender's Right to have the Benefit of Securities obtained by means of the Loan.

In calculating the extent of a building society's borrowing power, which, by the Building Societies Act, 1874, s. 15, sub-s. 2, is not to exceed “two-thirds of the amount for the time being secured to the society by mortgages from its members,” the amount so secured is not to be limited to the principal sum secured by such mortgages, but covers all sums due thereon at the date

when the borrowing power is exercised, whether for principal, or interest, or fines, or otherwise, and all instalments not then accrued due, but secured by such mortgages and outstanding.

The right of a person who has lent money to a building society in excess of its borrowing power to have the benefit of securities obtained from members of the society by means of the loan extends to the whole amount covered by such securities, although a lesser amount was, in fact, received by the members from the society.

Blackburn and District Benefit Building Society v. Cunliffe, Brookes & Co. (54 Law J. Rep. Chanc. 1091; Law Rep. 29 Ch. D. 902) followed.

The plaintiff society was established under 6 & 7 Will. 4. c. 32, and in 1882 was incorporated under the Building Societies Act, 1874. Its rules were, in the main, similar to those of other building societies, that having reference to the borrowing powers of the society (rule 10) being expressed in the same terms as those used in section 15, sub-section 2, of the Building Societies Act, 1874—namely, “The total amount so received on deposit or loans, and not repaid by the society, shall not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members,” and empowering the society to raise such loans on the security of mortgage-deeds belonging to them. Rule 6 provided that “the society will make advances to its members for terms of from seven to sixteen years, repayable by monthly or quarterly contributions, covering principal and interest,” at certain specified rates; and, by rule 13, a member might redeem his mortgage to the society before the expiration of the term for which it was taken; “on payment of all advance repayments, and any fines due in respect thereof up to the time of the redemption of such mortgage, and of all other contributions required by the rules (if any), and of the present value of the future repayments calculated by the consulting actuary upon the principle of payments made at the end of each year to the end of the original term, and discounted after a rate of interest to be fixed by the consulting

Neath Building Society v. Luce.

actuary, not lower than 3l. 10s. per cent."

In 1885 an order was made to wind up the society, and a liquidator was appointed.

The society had in the years 1882 and 1883 borrowed from the defendants sums amounting to 12,500l. under indentures by which the society secured the repayment of the same by a charge on all their assets and property, and particularly on certain specified mortgages from members, which were deposited with the defendants.

These loans were alleged to be in excess of the borrowing powers of the society, and this action was brought, with the sanction of the Court in the winding-up, for a declaration that the indentures of charge were invalid and unauthorised as against the society, and for delivery up of the same to be cancelled; or, in the alternative, for an account of what was due to the defendants by way of lien or charge on the securities deposited with them.

The defendants, by counter-claim, asked a declaration that the indentures were valid to the extent of the amounts applied in payment of the debts and liabilities of the society properly payable, and that they were entitled to the benefit of all securities obtained by the society for advances made by means of the loans. On the 1st of August, 1887, an order was made by consent for certain preliminary accounts and enquiries, when questions arose as to the basis upon which the amount secured to the society by mortgages from its members was to be calculated, and, by an order of the 19th of July, 1889, the question of law was directed to be set down for argument before the Court—namely, upon what principle is it to be ascertained what was the amount secured to the plaintiff society by mortgages from its members, within the meaning of section 15 of the Building Societies Act, 1874, on the respective dates of the indentures of charge?

Sir H. Davey, Q.C., and J. G. Wood, for the society.—The term "amount secured by mortgage," as used in section 15, subsection 2, of the Building Societies Act, 1874, means only the principal money

due on a security, and does not include every sum capable of being recovered under the mortgage-deed, and which would have to be paid by a mortgagor seeking to redeem, such as interest, fines, &c. If it were so, a society might, by allowing interest to fall into arrear, extend its borrowing powers, whereas the object of the section in imposing the limit of two-thirds was to leave a fixed margin for the protection both of lenders to the society and its members.

The instalments payable by advanced members are made up of principal and interest, and vary according to the limit for repayment, and, when spread over sixteen years, two-thirds of their total will be found to exceed the amount advanced to the member. And as a member can always redeem his mortgage under rule 13 at a discount, at no time is the amount of the whole number of instalments really secured to the society.

The intention of section 15 was to compare a loan to the society with an advance from the society, in which the only fixed element is the principal, that being independent both of the form of the mortgage-deed and of arrangements with the mortgagor.

In section 40, which requires an annual statement of the society's funds, and where the object was to include everything due on the mortgage, the term used is, "the balance due or outstanding on the mortgage security, not including prospective interest"—that is, arrears of interest, already due, were to be included. No such words are used in section 15.

Romer, Q.C., and Levett, for the defendants.—The plain meaning of the words in section 15 is to include all that is already due on the security, which, on the face of it, has no principal sum secured as distinct from interest, but only instalments made up of both. Words similar to those in this section came before the Court in *Laing v. Reed* (1), where they are paraphrased by Lord Hatherley as "the amount that may be outstanding upon mortgages."

Byrne, Q.C., and Chadwyck Healey, for

(1) 39 Law J. Rep. Chanc. 1; Law Rep. 5 Chanc. 4.

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a party to the counter-claim, argued to the same effect.

Sir H. Davey, Q.C., replied.

CHITTY, J. [after referring to the terms of section 15, sub-section 2, continued:] In this sub-section two terms are compared—the first being the sum received on deposit or loan, and not repaid. On this no question is raised. Assuming the society to have received in the past 100*l.*, and to have repaid a portion, then the balance would be this first term. This term involves no computation of interest whatever on the amount received. Whether or not some interest were owing on the 100*l.*, the amount received would merely be the 100*l.* About that there is no question.

Then this term has to be compared with the other mentioned in the sub-section—the amount for the time being secured to the society by mortgages from its members—two-thirds of which is the limit of the borrowing power of the society. The question is as to the meaning of the words “amount secured by mortgage,” and but for the argument I should have felt no difficulty in stating that the expression must be taken according to its natural meaning, and even after the argument I cannot say that I entertain any doubt as to the meaning of the Legislature’s language.

The plaintiffs’ argument is that the term “amount secured” must be interpreted so as to exclude any interest owing on the security. In the simple case of the society having, at the time when it proposes to receive money on loan, a mortgage for 100*l.* payable in six months, with interest at five per cent. payable half-yearly, and that, the six months having just elapsed, 2*l.* 10*s.* is due for interest, the plaintiff says that this is not included in the amount secured. But why not? If the question be asked either in a popular or a legal form, the answer would be that the amount consists of principal and interest—that is, 102*l.* 10*s.* And supposing also a fine of, say, 10*s.* due for non-payment of the interest, then the amount secured would be 103*l.* As far as my mind goes, I am unable to give any other answer to the question. Indeed, the

plaintiffs’ argument, if pushed to its logical conclusion, would require that, in the case of a mortgage just given by a member, the 100*l.* should be discounted and reduced to its present money value—that is to say, that the “amount secured” means the present money value of that which is owing on the security. And that because, it is argued, there must be some relation between the two terms which have to be compared—the borrowed money and the amount owing on the security. But the Legislature has not expressly said that there must be any such relation. It may well be that as the principal due on the mortgage is not repayable for six months, the society would not necessarily have, during the currency of a loan, any money in hand on a given security, and this discounting of the principal cannot possibly have been intended by the Legislature. The plaintiff has made calculations by which it appears that, in the case of an advance the repayment of which was spread over sixteen years, although the society has only advanced 100*l.*, the total amount of the instalments would be about 160*l.*, so that in that case the society would be enabled to borrow a sum slightly in excess of the 100*l.* principal they had advanced on the security. But taking an advance of 100*l.*, repayable under these rules in a period of seven years, and adding these instalments to the former, the total amounts to about 286*l.* only, two thirds of which is within the limit of 200*l.*, which is the amount of the principal secured in the two cases. In reality, the Legislature had no intention of comparing in the section the amounts of principal alone, but was putting the principal of the loan against the amount secured, and leaving a margin of one third, which it supposed would be a sufficient protection to the lender.

Section 40, which provides for a balance-sheet, has also been relied on; but the account there mentioned is to include not merely the principal of the loans, but has to state the amounts due to depositors and creditors for loans, which would, of course, include the interest. The language of the Legislature here is precise. What is to be stated is, not the “amount secured,” but the “balance due or out-

Neath Building Society v. Lucas.

standing on their mortgage securities, not including prospective interest." And this language, whilst not affecting that of section 15, which is plain, is adverse rather than favourable to the plaintiff's argument, because it shews that the Legislature had present to it the fact that a building society's mortgages were generally payable by instalments, and necessarily involved prospective interest, and it provides that in ascertaining how the society stands with a view of declaring profits, prospective interest is to be excluded. Prior to 1874, when this Act was passed, the case of *Laing v. Reed* (1) had decided that, under a limited borrowing power, a building society was entitled to borrow; and, curiously enough, the rule of the society in that case was expressed in very much the same language as that of the section—namely, "the amount for the time being secured by the mortgages to the society." And Lord Hatherley, in the course of his judgment (at page 9), translates this term into "the amount that may be outstanding upon mortgages." I do not found my decision on this *dictum*, but, following it, I decide this case unfavourably to the plaintiffs. Take also the case of a mortgagor coming to redeem his mortgage—which in the case of this society he has power to do, though not at a fixed rate of discount, but as the actuary acting under the rules may decide, provided the rate be not less than three and a half per cent.—it would be impossible to suppose that for the purpose of this section 15, which was intended to lay down a working rule, such a right as this, which might never be exercised, was to be taken into account on every occasion when the society was borrowing money. And the mortgages contain a power of sale, and when this is exercised, the case of *Matterson v. Elderfield* (2) decided that a society is entitled to take at once the whole amount of the future instalments due, without allowing any discount whatever. It is not to be supposed that what was intended to be a simple rule in the society's business should be complicated by matters of this sort. It is said that by deciding against

the plaintiff I shall be enabling societies of this kind to increase their borrowing power by allowing their mortgagors to fall into arrear. If that be the result of the Act, the result must follow; but I think the suggested danger is theoretical, not practical. For building societies are exposed rather to the charge of being hard on their mortgagors. Besides, Acts of Parliament are not framed on the principle, nor should they be construed on the footing, that men will not perform their duty, for the suggestion would amount to misconduct on the directors' part. I must answer the first question by saying that the amount is not to be limited merely to the amount of principal secured, but covers all sums due on the members' securities at the time of the loans to the society, whether for principal, or interest, or fines, or otherwise, and all instalments not then accrued due, but secured by the mortgage and outstanding.

A question had also arisen in taking the accounts as to the extent to which the plaintiffs were entitled to have the benefit of securities obtained by members by means of the loans. Rule 6 provided that advances should be made to the party tendering the highest sum for the same, provided always that the amount of the premium should in no case exceed the sum of 10% per share of 100%, and "that the whole of the premium offered by the purchaser of any share, together with any fines, forfeitures, and expenses, shall be deducted from such share at the time of payment to such purchaser; but security and repayments for the whole amount of the share or shares advanced shall be taken notwithstanding." In calculating the advances made out of the loans, the defendants claimed to include the whole 100% for which the security was given, and not the 100% minus the premium; and the further question of law was therefore directed to be argued—namely, whether, in ascertaining the amounts of the advances made by the society out of the moneys lent by the defendants on the security of the indentures of charge, the premiums at the rate of ten per cent. retained by the society out of the amount secured by

(2) Law Rep. 4 Chanc. 207.

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the mortgages obtained by the society by means of such advances ought, or ought not, to be included and treated as part of the advances so made as aforesaid.

Sir H. Davey, Q.C., and *J. G. Wood*, for the society, contended that the right of the defendants to a lien on the securities to the extent of sums advanced by the society to members out of the loans should be limited to the amount actually advanced—i.e. 90*l.* on each share—such lien being on the security merely, and not on the property comprised therein.

Romer, Q.C., and *Levett*, for the defendants, referred to *Mainland v. Upjohn* (3), as shewing that a sum deducted from an advance under a mortgage contract might be included in the security.

Sir H. Davey, in reply, referred the Court to the judgment of the Vice-Chancellor of the Duchy of Lancaster in *The Blackburn and District Benefit Building Society v. Cunliffe, Brooks & Co.* (4), where it appeared that in a case similar to this the sums paid by the society to advanced members were made to include bonus, &c., and a copy of the judgment having been procured, this was found to be so.

CHITTY, J.—The second question arises in working out the equity of the person who has lent to the society sums in excess of their borrowing power. Such sums, it is clear, he cannot recover; but it is also established that he has an equity of subrogation, which is expressed by Lord Selborne in *The Blackburn Building Society v. Cunliffe, Brooks & Co.* (5) as the right to be repaid such portion of the amount lent as went to pay the legitimate debts of the society. To this extent the lender is entitled to stand in the shoes of the creditors. But this case contains a further illustration of this right of the lender (4). If the society has made advances to members out of the amount lent, and obtains securities in respect of these advances,

then the lender is entitled also to have the benefit of these securities.

The exact point now raised is this: Advances were made by this society to members, but as the applicants for advances were numerous, the society made a profit out of the transaction by putting the advance up to competition at a limit of ten per cent. discount, the result being that the advanced member paid 10*l.* for the right to the advance. It is argued that in working out this right of subrogation, the point to consider is how was the lender's money applied, and that here it was applied to the amount only of 90*l.* On the other hand, it is argued that there was a distinct contract between the society and its member for an advance of 100*l.*, the right to have the loan being purchased for 10*l.*, which, by the rules of the society, is deducted from the advance. In my opinion the right mode of working of the equity is to treat the advance as being 100*l.*, and to calculate the right of subrogation accordingly. But the case does not stop here, for, in fact, the member's security was given neither for 100*l.* nor for 90*l.*, but for a number of instalments. Now, in the last-mentioned case of *The Blackburn Society* (4), the Vice-Chancellor of the Duchy of Lancaster gave the bankers the benefit of all sums received by the society from advanced members by way of bonus, &c., subject, nevertheless, to the costs of the winding-up, and to mortgages and charges to the society in respect of advances out of its proper funds. This limitation was, however, struck out by the Court of Appeal. It is true the exact point as to the bonus does not appear to have been argued before them; but the ground on which they proceeded is stated to be that "We treat the mortgages given to secure sums lent out of money advanced by the bankers as property which they are entitled to claim, that is, as their property" (6). That is to say, the security given by the advanced member is to be treated as the property of the *quasi* lender. Though in this case the sum was only 90*l.*, it purchased the right to a security for 100*l.* On these

(3) 58 Law J. Rep. Chanc. 861; Law Rep. 41 Ch. D. 126.

(4) 54 Law J. Rep. Chanc. 1091; Law Rep. 29 Ch. D. 902.

(5) 52 Law J. Rep. Chanc. 92; Law Rep. 22 Ch. D. 61.

(6) 54 Law J. Rep. Chanc. 1096; Law Rep. 29 Ch. D. p. 912.

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grounds, therefore, I hold that the question must be answered so as to give the *quasi* lender the benefit of the 100%.—that is to say, that the advance is not to be treated as diminished by ten per cent.

Solicitors—Howell Thomas, agent for S. T. Evans, Neath, for plaintiffs; Prior, Church & Adams, agents for Meade-King & Bigg, Bristol, for defendants; R. White, agent for Hartland & Isaac, Swansea, for a defendant to the counter-claim.

KAY, J. }
1889. } WHITBY v. MITCHELL.
July 11, 15. }

Contingent Remainder—Perpetuity—Limitation to Use of unborn Person for Life, with Remainder to the Use of her Children—Restraint on Anticipation—Remoteness.

The rule that real estate cannot be limited to an unborn person for life, followed by any estate to any child of such unborn person, is independent of the rule against perpetuity, which restrains executory interests within a life or lives in being and twenty-one years afterwards.

Land was conveyed by marriage settlement to trustees to the use of husband and wife successively for life, with remainder to the use of such child or more remote issue of the marriage born before the date of such appointment, as the husband and wife should appoint. The husband and wife appointed to the use of a married daughter for life, for her separate use, without power of anticipation, and after her death to the use of such persons as the daughter should by will appoint, and, in default of appointment, to the use of the daughter's children living at the date of the appointment as tenants in common in fee:—Held, that the whole of the appointment was void, excepting the limitation to the daughter for her life, for her separate use.

By a marriage settlement made in 1840, in pursuance of articles made before the marriage, certain freehold lands were conveyed to trustees to the use of the husband for life, with remainder to the use of the

wife for life, with remainder, after the death of the survivor of the husband and wife, to the use of a child, grandchild, or more remote issue, or all and every or any one or more of the children, grandchildren, or more remote issue of the husband by the wife (such child, grandchild, or more remote issue being born before any such appointment as thereafter mentioned should be made to him, her, or them respectively), for such estate or estates, interest or interests, and in such parts, shares, and proportions (if more than one), and with such limitations over (such limitations over being for the benefit of some or one of the objects of the present power), and in such manner and form, as the husband and wife during their joint lives should by deed appoint, and in default of appointment to the use of the child, if only one, and, if more than one, then to the use of all the children of the husband by the wife, to be equally divided among them, share and share alike, their heirs and assigns.

The settlement contained a power of sale, with the usual provisions for re-investment of the proceeds of sale in land, and for interim investment in the meantime.

The husband and wife had two children, Emily Hyde Burlton and another daughter. Emily Hyde Burlton was married, and had five children, of whom three were born at the date of the appointment next stated.

By an indenture dated the 15th of March, 1865, the husband and wife appointed that one moiety of the lands comprised in the settlement, or the proceeds of sale thereof, should, after the death of the survivor of them, go and remain to the use of Emily Hyde Burlton for her life, for her separate use, without power of anticipation, and after her death to the use of such persons as she should by will or codicil appoint, and, in default of such appointment, to the use of her children living at the date of that indenture, and their heirs, as tenants in common, with a gift over if such children should die under twenty-one without leaving issue.

An appointment in similar terms had been made in favour of the other daughter and her children.

Part of the land comprised in the settle-

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ment was sold, and the purchase-money, amounting to 4,700*l.*, was advanced, in 1877, on mortgage, to the defendant Mitchell by the plaintiff and Turner, the two trustees of the settlement. Mitchell afterwards repaid various sums on account, amounting to 2,700*l.*, to Turner alone. Turner afterwards absconded, and the plaintiff now brought this action to realise the mortgage for the entire 4,700*l.* against Mitchell.

Mitchell put in a counter-claim in the action, to which the plaintiff, Turner, Mrs. Burlton, and her three children living at the date of the appointment were defendants, alleging that the moneys so paid to Turner were, by and at the request, and with the knowledge, authority, and sanction of, the defendants to the counter-claim, paid by Turner to the three children of Mrs. Burlton, or were duly applied by Turner in their maintenance, education, and advancement; and claiming, amongst other things, an enquiry whether the 2,700*l.*, or any part thereof, had at such request, or with such knowledge, authority, and sanction, been so paid or expended.

July 11.—The action came on for trial on this day, when it was admitted on behalf of Mitchell that the payments by him to Turner alone were not a sufficient discharge; but it appeared that the payments were made at the request of Mrs. Burlton; and to determine the form and effect of the enquiry claimed by the counter-claim it became necessary to ascertain the nature of the beneficial interests in the 4,700*l.* of Mrs. Burlton and her children, and to determine the validity and effect of the deed of appointment, and the trial was adjourned in order that Mrs. Burlton and her children might be separately represented.

On the 15th of July the action came on again.

It was admitted that the question must be decided as if the settlement had been made before the marriage and as if the limitations were contained in the settlement creating the power.

Robinson, Q.C., and *Alex. Young*, for the plaintiff.

Renshaw, Q.C., and *Swinfen Eady*, for Mitchell, contended that the power of

appointment by will given to Mrs. Burlton was void for remoteness, and that the limitation in default was equally void.

Farwell, for Mrs. Burlton, contended that the limitation to her for her life, for her separate use, was the only part of the appointment which was valid, and that the rule that real estate cannot be limited to an unborn person for life, with remainder to any child of such unborn person, is a rule of law independent of the ordinary rule against perpetuities; and that the restraint on anticipation annexed to Mrs. Burlton's life-estate was void for remoteness, and must be rejected.

Marten, Q.C., and *W. Baker*, for the children of Mrs. Burlton, contended that the limitation to the children was valid in this case, since it was kept within the limits of the rule against perpetuities, and that the alleged rule of law was only an instance of the rule against perpetuities, and not an independent rule; also that in any case the alleged rule only applied to common law limitations, and not to estates created under the Statute of Uses.

Renshaw, in reply.

The following authorities were referred to in the course of the arguments:—As to the remoteness of Mrs. Burlton's power of appointment—*Wollaston v. King* (1); as to the restraint on anticipation annexed to her life estate—*Fry v. Capper* (2); as to the rule against a limitation to an unborn person for life, with remainder to a child of such unborn person, and its connection with the rule against perpetuities—*Williams on Real Property* (9th ed.), p. 263; (16th ed.), pp. 314, 315; *Sugden on Powers* (8th ed.), p. 393; *Fearne on Contingent Remainders* (10th ed. 1844), vol. ii. p. 565; *Preston on Abstracts*, vol. ii. p. 114; *Lewis on Perpetuities* (1843), p. 408; *Davidson's Conveyancing* (3rd ed.), vol. iii. part 1 ("Settlements"), pp. 336–38; *Monypenny v. Dering* (3), *Cole v. Sewell* (4), *Haye v. The Earl of Coventry* (5), *Catlin v. Brown* (6), *Cadell v. Palmer*

(1) 38 Law J. Rep. Chanc. 392; Law Rep. 8 Eq. 165.

(2) Kay, 163.

(3) 7 Hare, 568; 2 De Gex, M. & G. 145, 170; 22 Law J. Rep. Chanc. 313.

(4) 4 Dr. & W. 1, 28.

(5) 3 Term Rep. 83, 86.

(6) 11 Hare, 372.

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(7), and *Hockley v. Mawbey* (8); and as to the doctrine of *cy-près*—*Brudenall v. Elwes* (9).

KAY, J. [stated the facts and continued:—] The question has been raised whether the limitations contained in the deed of appointment were good, or whether in point of fact that appointment was not entirely bad except as far as it gave an estate for life to Emily Hyde Burlton. If I had to give a decision on that point, I believe it would be a very strong one that the appointment was bad except with regard to the life estate of Emily Hyde Burlton. This is really land, and the law as to land has always been that one could not limit to an unborn person for life, with remainder to the issue of that unborn person. Stated broadly, no one would dispute that proposition for a single moment; but it is said, if you do so limit, with a proviso that the unborn child of the unborn child who is to take shall be a person who comes into existence within the limits of perpetuity, that is good. All I can say is, no decision to that effect has been cited to me. I do not know of any; and I do not know any authority whatever for that construction of the rule. The truth is really this. Under the old feudal law existing in England, which is only being broken down by legislation and decisions slowly, and which yet exists to a very great extent, there was a constant attempt on the part of owners of land to limit it in the most elaborate fashion so as to tie it up as long as possible; and that constant attempt has been constantly defeated by both legislation and the decisions of the Courts of law. One of the many attempts was to make successive limitations of life interests in this way to unborn persons, and then to the children of those unborn persons. That has always been treated as being an invalid limitation of real estate. You may limit for life to an unborn person, but you cannot limit for life to an unborn person so as to tie it up till the death of that unborn person—that is to say, any remainder limited

after that life estate must be to a person *in esse* at the time it is made. The only way to try the validity of the limitations in this deed of appointment is to read them into the original settlement. A marriage settlement made on the marriage of A. with B., limiting the estate to A. for life, remainder to B. for life, remainder to the first child of A. by B., remainder to the children of that first child, would *prima facie* be utterly bad as far as that limitation is concerned. Can you make that good by saying, "Provided that such children shall be born within a life now in being, or twenty-one years after"? I have asked in vain for any authority for that. If you could, it is obvious that this which I am going to state would be perfectly good—a limitation to A. for life, remainder to the unborn child of A. for life, remainder to the unborn children of that unborn child for life, and so on through a dozen, or twenty, or a hundred and twenty if you like, successively to the unborn children of the unborn child. If you can make the limitation which is here attempted good, then you might make a series of successive limitations of that kind good by merely inserting a proviso that the persons shall come into existence within a life or lives in being, or twenty-one years after a life or lives in being. That is at present a mode of dealing with real estate which is not sanctioned by the law of real property in this country, and I do not at all agree with the attempt that has been made to make out it is only an application of the law against perpetuities. I do not agree with that. It is not only an application of the law against perpetuities, it is something more. It is the law of real property in this country which prevents elaborate limitations over of that kind, and whether they offend against the law of perpetuity or not, or whether they are so ingeniously guarded as not to offend against the law of perpetuity, still I hold it to be the law of this country that you cannot limit real estate to an unborn person for life, with remainder to the children of that unborn person. Such a limitation is bad. I do not need any higher authority than the authority of the late Mr. Williams, who certainly was one of

(7) 2 Cl. & F. 372; Tud. R. P. Cas. (3rd ed.), 424, 470.

(8) 1 Ves. jun. 143, 150.

(9) 7 Ves. 382, 390.

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the best real property lawyers that has existed in my lifetime, and he, in his most valuable book on Real Property, discusses the whole subject. He refers (9th ed. pp. 263, 264) to the foundation of the rule being the objection which the law had to a possibility upon a possibility, and criticises that. Then he sums up the law after that criticism thus: "But although the doctrine of Lord Coke, that there can be no possibility on a possibility, has ceased to govern the creation of contingent remainders, there is yet a rule by which these remainders are restrained within due bounds, and prevented from keeping the lands which are subject to them for too long a period beyond the reach of alienation. This rule is the second rule to which we have referred, and is as follows: that an estate cannot be given to an unborn person for life, followed by any estate to any child of such unborn person; for in such a case the estate given to the child of such unborn person is void. This rule is apparently derived from the old doctrine which prohibits double possibilities." I had better continue the quotation—the words are very apt and well worth consideration. "It may not be sufficient to restrain every kind of settlement which ingenuity might suggest; but it is directly opposed to the great motive which usually induces attempts at a perpetuity—namely, a desire of keeping the estate in the same family; and it has accordingly been hitherto found sufficient. An attempt has been recently made, with much ability, to explain away this rule as merely an instance of the rule by which, as we shall hereafter see, executory interests are restrained." Then he refers to *Lewis on Perpetuities* (p. 408 *et seq.*), from which passages have been read in argument before me. Mr. Williams goes on: "But this rule is more stringent than that which confines executory interests; and if there were no other restraint on the creation of contingent remainders than the rule by which executory interests are confined, landed property might in many cases be tied up for at least a generation further than is now possible." That is the late Mr. Williams's opinion, that if you might make successive limitations of this kind within the rule

against perpetuities, you might, of course, tie it up for a generation longer than is now possible. He says that that is not the foundation of the rule, but that it is an absolute rule independent of the rule against perpetuities. With that I entirely agree. I have always understood that to be the case, and I do not believe that any authority to the contrary could be found anywhere. Therefore, if I have to decide this point, I hold that this attempt to limit to the unborn children of Emily Hyde Burlton is void, and so is the attempt to restrain Emily Hyde Burlton from anticipating her share. That was decided in *Fry v. Capper* (2) by Lord Hatherley, who declined to tie up the life interest of an unborn person in that way by an attempt to restrain that unborn person, if a married woman, from anticipation. Accordingly it seems to me that the only part of this appointment that is good is the appointment to Emily Hyde Burlton for her life for her separate use.

[His Lordship then directed an enquiry as to the application of the moneys paid to Turner, and whether such payments were made with the consent of Emily Hyde Burlton, or to her, or by her direction, and under what circumstances such payments were made, with liberty to apply. His Lordship added an express declaration that the appointment was invalid so far as it affected to give a power of appointment by will to Emily Hyde Burlton, and so far as it affected to appoint the property in default to the children of Emily Hyde Burlton then living, and also so far as it restrained anticipation.]

Solicitors—Sanderson, Holland & Adkin, for plaintiff; W. Montgomery White, and Cowdell & Son, for defendants.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
 FRY, L.J.
 LOPES, L.J. } PROCTOR v. BAYLEY.
 1889.
 August 1, 2.)

Patent — Infringement — Experimental Use abandoned — Injunction in Aid of Legal Right — Damages — Jurisdiction of Palatine Court.

The plaintiff, the owner of a patent the validity of which had been established in a previous action, brought an action against the defendant claiming an injunction and damages for the use of certain machines which infringed the plaintiff's patent. The defendant alleged that the machines complained of had been put up on trial, and, being found unsuccessful, had been taken down five years before the plaintiff brought his action, and had been removed from the defendant's premises three years before; and he denied any threat or intention to use machines which infringed the plaintiff's patent:—Held, that the facts did not shew an intention on the part of the defendant to renew or continue the infringement of the plaintiff's patent, and therefore an injunction ought not to be granted; and that, as the case for an injunction failed, the Palatine Court had no jurisdiction to give damages.

Decision of the Vice-Chancellor of the County Palatine reversed.

Millington v. Fox (3 Myl. & Cr. 338) and Geary v. Norton (1 De Gex & S. 9) considered.

This was an appeal from a decision of the Vice-Chancellor of the County Palatine.

The plaintiff was the owner of a patent for an improved self-acting apparatus for supplying fuel to boiler and other furnaces. The validity of this patent was established in the action of *Proctor v. Bennis* (1), and in which it was also held that Bennis had infringed the plaintiff's patent by making, using, and selling certain machines.

In 1882 Bennis put up and fixed four of his machines on the defendant Bayley's furnaces, on condition that they were to be paid for only if successful. These

(1) 57 Law J. Rep. Chanc. 11; Law Rep. 36 Ch. D. 740.

machines did not give satisfaction to Bayley, and their use was discontinued after a few months, and they were taken down and put in the yard, and Bennis was frequently requested to remove them from the yard, but he did not do so until the beginning of 1885.

Shortly after the decision in *Proctor v. Bennis* (1) the plaintiff's solicitor sent to the defendants the following circular:—
 "I am instructed by Mr. James Proctor, of Burnley, to apply to you with reference to your infringement of his letters patent by the use of stokers which, I am informed, have been ordered by you from Mr. Bennis and his agent. My information rests upon a circular of Mr. Bennis which has come to my hands; and I must apprise you that if you have not already received these machines, you must please refrain from accepting them; or, if you have used them, I must inform you that you have been guilty of an infringement. My client desires me to write to you on this matter, and to intimate that, if you have used the machines, upon payment of a moderate royalty he will be satisfied, and will forego further proceedings; but in the event of your declining to do so, my client will have no alternative but to commence proceedings against you as soon as he has acquired the necessary proof of user."

The defendants replied as follows:—
 "Your circular to hand. You can satisfy yourselves at any time, by calling at the above address, that we are neither using Proctor's nor Bennis' stokers, and have no intention of doing so."

On the 11th of August, 1887, after the hearing of the appeal in *Proctor v. Bennis* (1), the plaintiff in this action again applied to the defendants demanding payment of a royalty, and some further correspondence took place between the parties, the effect of which is sufficiently set out in the judgments. The defendants refused to pay a royalty, and the plaintiff then commenced this action. He alleged infringement by the purchase and use of infringing machines, and claimed an injunction and an account of profits or damages. By the particulars he relied on the user by the defendants of the four machines above-mentioned.

Proctor v. Bayley, App.

The defendants, by their defence, admitted the plaintiff's patent, but denied that they had purchased or used any infringing machines, and stated that if they had done so they had done it in ignorance, and that they had discontinued the user of the machines complained of before the plaintiff commenced his action, and that they had not threatened or intended, and did not threaten or intend, to use any infringing machine.

On the trial of the action the Vice-Chancellor of the County Palatine held the plaintiff was entitled to an injunction.

From this decision the defendants appealed. The arguments used on appeal appear sufficiently from the judgments.

Romer, Q.C., Rotch, and Staffurth, for the appellants, cited and referred to *Ferguson v. Wilson* (2), *Baily v. Taylor* (3), *Millington v. Fox* (4), *Stannard v. The Vestry of St. Giles* (5), *Geary v. Norton* (6), and *Caldwell v. Van Vliessen* (7).

Moulton, Q.C., and Maberley, for the respondent, referred to *Proctor v. Bennis* (1), *Loak v. Hagne* (8), *Millington v. Fox* (4), and *Geary v. Norton* (6).

Romer, Q.C., replied, on the question of costs only.

COTTON, L.J.—This is an appeal from a judgment given by the Vice-Chancellor of the Duchy of Lancaster granting an injunction against the defendants and an enquiry as to damages. The action was brought by a patentee against the defendants on the ground that the defendants had infringed his patent. There is no doubt that it was a good patent, and we must also take it that the defendants have infringed; but the question we have to determine is this: Is there any ground here which would justify the Court in exercising the extraordinary jurisdiction of the Court of Chancery in granting an

injunction? That, I think, has been a good deal lost sight of in the argument. It is not because a man has done a wrong that an injunction will be granted against him. If a man has done a wrong which will not be continued, damages at common law may be obtained for the wrong done, which the common law says is sufficient indemnity for that wrong; but then the Court of Chancery, in the exercise of its extraordinary jurisdiction, says this: "We will not be satisfied with that; we will grant an injunction because a wrongful act has been done, in order to prevent that wrongful act"; and they grant an injunction where a wrongful act has been done and the Court is satisfied of the probability of the continuance of the wrongful act. Its practice is preventive, and not like that of the common law Courts, which merely give damages against the wrongdoer for the wrongful act which he has done; and now that all the superior Courts exercise all jurisdictions, a great deal is lost sight of as to what was the jurisdiction of the Court of Chancery and what was the jurisdiction of a Court of common law. In this particular case it becomes necessary for us to look at the matter carefully to see whether the order for this injunction can be sustained or not, and this is the first point which I shall deal with. Undoubtedly, wherever a person has done a wrongful act in infringing a patent, *prima facie* that is ground for granting an injunction, because when a man has done a wrongful act the probability (unless there is anything which prevents that probability from arising) is that he will continue it, and the patentee who is injured by that act is entitled, in a Court of equity, to prevent a repetition of that wrongful act. The patentee would be entitled to the protection of the Court of Chancery from what was done by the defendants, although there had been no infringement, if there was what the Court would consider an intention to commit that infringement; but here, although the defendants did infringe the plaintiff's patent, we must consider all the circumstances of the case in order to guide us in the consideration of the question: Ought the Court to draw the inference that there will be a continuance of the wrongful act

(2) 36 Law J. Rep. Chanc. 67; Law Rep. 2 Chanc. 77.

(3) 1 Russ. & M. 73; 8 Law J. Rep. (O.S.) Chanc. 49.

(4) 3 Myl. & Cr. 338.

(5) 51 Law J. Rep. Chanc. 629; Law Rep. 20 Ch. D. 190.

(6) 1 De Gex & S. 9.

(7) 9 Hare, 415; 21 Law J. Rep. Chanc. 97.

(8) 1 Webs. 201.

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so as to justify the Court in granting the extraordinary interference and the protection which is exercised by a Court of equity.

Let us look at this case. First of all, who are the defendants? The defendants are not manufacturers of patent stokers, but they are persons who were users of patent stokers; and the action is brought against them simply on the ground that they have used a patent stoker, which is an infringement of the plaintiff's patent. But when was that done? Although there were four of these patent stokers used by the defendants, yet that was one continuous act which was put an end to by the defendants in 1883. That was long before the decision of the Court of Appeal in favour of the plaintiff's patent; but undoubtedly what was done then, as far as I can see, was a wrongful act against the plaintiff, and an infringement of the plaintiff's patent. Then when was it discontinued? In 1883, as I say; and it was discontinued on this account, that according to the defendants' experience these stokers they were using were really useless—that is to say, they did not save expense and did not stoke the fires as effectually as could be done by hand. If we consider those circumstances, is there any probability that there will be a repetition by the defendants of an act injurious to the plaintiff? I should have said no.

Then we go further, and a strong point against the defendants is the course which they took both before and after the action, when an application was made to them on behalf of the plaintiff. First, a circular was sent, as I understand, by the plaintiff and signed by his solicitors [his Lordship read it and continued:] Now I think the plaintiff ought to have enquired before he wrote such a letter what the user was; when it began; how long it had been continued; and under what circumstances it had taken place; but he assumes he has a case as against the defendants of present user, and calls on them in that way. Then the answer is one which I cannot commend, because it refrains from giving that information which would have prevented any action like the present one. [His Lordship read it, and continued:] I think the solicitor for the plaintiff on

receiving that—although it is not such a letter as I wish the defendants had written—should have made some enquiry, and should have gone and satisfied himself whether there was in fact anything of the kind being used by the defendants which would be considered an infringement of the plaintiff's patent; and having enquired as to the circumstances under which the user had taken place he would have found that it was four years before 1887, when that letter was written. Then there is other correspondence. The next letter is in answer to a letter of the plaintiff's: "In reply to your circular, we beg to say that we have no 'stokers.' Mr. Bennis put four on our boilers on trial, but after a short time we had to take them off, as they were not satisfactory. We wrote your solicitors a short time ago to the same effect." Now, that is not a letter which I think ought to have been written, because "on trial" is rather doubtful—but then it does state what had in fact been done—namely, that Bennis's stokers had been used, and then only for a short time, and that they were taken off because they were not satisfactory. If there had been a little more desire to avoid litigation, I think a reply might have been made in answer to that letter which would have prevented this unfortunate litigation. I need not read any further letters.

Then we come to the defence which was put in when the action was brought in order to get the injunction and to get damages. Again, the defendants do not take what I think would have been the proper course on their part, because they deny the right of the plaintiff in a way which was very much relied upon by the plaintiff's counsel. In my opinion that is not—as would have been the case if the defendants had been manufacturers of the machines or the user had been recent—any indication of an intention to continue the wrongful act, but that is simply the way in which they defend themselves against the claim now made by the plaintiff; and though the letters I have referred to, and the form of defence which has been so much commented on by Mr. Moulton, probably would have led to the inference that there was a probability and

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intention, as he said, to continue the user of the infringing machines; yet, in my opinion, it would be wrong for us to draw, from the letters which were written and from the defence of the defendants, the inference of fact that there was an intention to continue the wrongful act. Upon that we have the judgment of the Vice-Chancellor, because he does decide, after hearing the witnesses and after he had read all the letters and the defence, that there was no intention to continue the wrongful act. I certainly agree with him, although I think that the course pursued by the defendants, both in their letters and in their defence, was not one which they ought to have taken if they were trying to avoid, if possible, any litigation with regard to this matter. To my mind, the circumstances of this case do not in any way lead to the inference that there was any intention to continue the wrongful act done by the defendants as long ago as the year 1883, or that there was anything from which we could infer, as a fact, that the interference of a Court of equity was required in order to protect the plaintiff from the repetition of the injury which was done in 1883, and for which damages would have been an ample satisfaction. That is my opinion, and although I never would do anything to encourage persons to do wrongful acts, and then say "we only did it once," and to protect themselves in that way, yet I think parties ought not to rush without consideration into litigation of this kind. We know what patent actions are. We know what a patent action generally leads to in the way of lengthened litigation and expensive litigation; but if there was any expensive litigation in that action caused by the conduct of the defendants, in my opinion the defendants would have had to pay for it. But that is no ground for coming into a Court of equity to claim the protective exercise of the jurisdiction of a Court of equity when the Court is satisfied on the facts before it that there is no necessity for that exercise of jurisdiction, because there is nothing to protect the plaintiff against.

Then the Vice-Chancellor seems to have considered (and we were much pressed with it) that, as a matter of fact, the cases

lead to that conclusion, and two cases have been very much relied on. One of those was *Millington v. Fox* (4). That was a strong case, because there very probably the defendants had not, at the time they did the act complained of, done it intending to use the trade mark of the plaintiffs; but what we find was done before the bill was filed was this. The attorney-at-law for the plaintiffs, Mr. Milner, stated in his evidence "that on the 28th of July, 1834, he made an application to the defendant, Samuel Fox, to know whether his firm had stamped or marked the names 'Crowley Millington,' or either of them, upon any kinds of steel manufactured by them; and that Samuel Fox would make no direct admission that his firm had used the plaintiffs' mark, but said that he would not interfere, and that the plaintiffs might file a bill against them if they pleased." That being so, and it being shewn that in fact the defendant's firm had stamped the mark of the plaintiffs upon steel, and there being no admission of that fact, and the statement that they might file the bill if they pleased, and that the member of the firm referred to would not interfere, the Court would probably rightly draw from those circumstances the inference that the defendants (who, although they were not manufacturers at the time, were selling bars of steel and iron on which it was proved that these marks had been stamped) were intending to continue this act, which was wrongful as against the plaintiffs. Although it is very true that the Lord Chancellor in dealing with that case is considering it with regard to the costs after a certain date, yet he says that if the plaintiffs had received a letter on the 2nd of August before they filed the bill they would have been wrong; that is to say, the bill would have been dismissed, and probably with costs. Although it was right to file the bill under the circumstances known to the plaintiff at the time when the bill was filed, and there were facts then brought to the knowledge of the plaintiff which would raise this natural inference, that the defendants, who were shewn to have acted wrongfully, were intending to continue the wrongful action, and therefore the action was right; but

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the action would have been wrong if they had received a letter on the 2nd of August, that is to say, had known from the facts that there was no probability of the continuance of that wrongful act. If there had been anything here which would properly have led the plaintiff to the conclusion that the defendants were intending to continue the wrongful act, it seems to me that the injunction ought to have been granted; but, in my opinion, there was not, because when the facts are known, what was done by the defendants would not raise properly the inference that there was an intention to continue their wrongful act, and therefore that the plaintiff ought to be protected against it.

Then the case of *Geary v. Norton* (6) was cited—and rightly cited; but what do we find there? Before the bill was filed one of the defendant's partners, Norton, knowing that the shawl was registered and entitled to protection, went and got an order for 100 of these shawls, offering to sell them at two-thirds less than the Norwich price, the Norwich price being the price of the Norwich manufacturer entitled to protection; and although there was afterwards a statement by the defendants that they would not do it again, yet where there was that act intentionally done when it was known that the plaintiffs were entitled to protection, and done just before the action was commenced—that is, a very recent act of misfeasance on the part of the defendants—the proper inference from that was that there was a probability of their doing it again. Although the defendant's partner had said they would not do it again, yet when the defendants had shewn immediately before the action was brought that they would do it then for the purpose of profit, though they knew the plaintiffs were in a position to allege a title to protection, the very proper inference there was that the plaintiffs would not be safe unless there was an injunction of the Court of Chancery in order to defend them by that injunction from a repetition of the act. In my opinion here, on the facts of the case, notwithstanding the course taken by the defendants, we ought not to draw the inference that there was any prospective injury against which the plaintiff required the

protection of the Court; and, in my opinion, therefore, the judgment, so far as it granted an injunction, was wrong.

Now, what has been the consequence? Unfortunately, the Palatine Court has not got any jurisdiction, except such jurisdiction as it might have under Lord Cairns's Act to grant damages. What is the rule laid down as to that? It is, that if the case is one where an injunction ought not under the circumstances to be granted, and would not be granted if there was nothing like Lord Cairns's Act, there the jurisdiction given by Lord Cairns's Act ought not to be exercised. Here, if this action was in the Chancery Division, we could exercise both the common law jurisdiction and the old Chancery jurisdiction; and, in such a case as this, it might be very right to grant damages as against the defendants for the act which they had done, but we cannot do that if the plaintiff has brought an action for equitable relief when he is not entitled to that equitable relief; and, in my opinion, the injunction failing, the whole action fails, and must be dismissed. In my opinion the defendants have so acted in conducting their defence that we ought not to give them any costs of the action in the Court below; but the plaintiff has persuaded the Vice-Chancellor to make a judgment which we think erroneous, and so the defendants appealing must have the costs of the appeal. The appeal will succeed, the defendants having the costs of the appeal, but the action will be dismissed without costs up to and including the hearing before the Vice-Chancellor.

Fry, L.J.—The Lord Justice has gone so fully into this case that I should not have added anything had we not been differing from the opinion of the learned Judge of the Palatine Court. In this case he has ordered an injunction to restrain the defendants from violating the letters patent, and, further than that, he has directed an enquiry as to damages. Now, he has no jurisdiction in damages, except by way of substitution for, or addition to, an injunction. Therefore, the validity of the whole decree rests upon the question whether it was a proper case for an injunction.

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The circumstances have been already stated, but they are, shortly, these. The defendants are not manufacturers, they are not vendors, they are merely persons who use the instruments in question. The case in which they have used them is a single and isolated instance. I know they used more than one instrument, but they only used them on one occasion. It was nearly, if not quite, five years ago. From that time down to the present they have never attempted to use them again. They abandoned the use of them on that one occasion because they were found not to answer, and because they were found to consume a great deal more coal than the ordinary way of feeding the furnaces, and under circumstances which convince me that the repetition of the act was improbable.

That being so, the question is, whether an injunction ought to have been granted. An injunction, be it borne in mind, is granted under a preventive jurisdiction of this Court, is addressed to the prevention of an injury which is about to be done, or which the Court sees the probability of being done, and is not rightly described as protective. To prevent a wrong protects a right, but in no other sense than that can it be properly described as a protective jurisdiction. I think that there was no ground to apprehend a repetition of the acts of the defendants. What has been pressed upon us, and what is really the only ground, on the part of the plaintiff is that the defendants have, whilst admitting they did what they did, said—"We had a right to do it"—as I think, a very foolish and idle statement on the part of the defendants, but, regarded in the light of the existing circumstances, a statement which seems to me not to raise the probability of a repetition of the wrongful acts of the defendants. I think, therefore, that there is no case for the injunction, and that with that falls, of course, the case for damages. I cannot help expressing my regret that this action should have been brought in this form. The plaintiff has, or may have, a claim which he himself has assessed at the sum of 40*l*. Instead of bringing an action in any of the common law Courts for his 40*l*., he has thought fit to institute a regular

patent action in the Palatine Court, a class of case which, unfortunately, is stricken with the curse of prolixity. He has gone through the whole machinery of such an action, and obtained an injunction, when, according to his own assessment of his rights, all he wanted was 40*l*. I therefore think that the judgment suggested by the Lord Justice is the right one.

LOPES, L.J.—The wrongful act complained of had been discontinued at the time this action was brought for a period of five years, and there had been no threat of any repetition of that wrongful act. If there was nothing more in the case than this, it would be abundantly clear that no case was made out for an injunction. But the defendants have challenged the plaintiff's right before the trial, at the trial, and, so far as I know, challenged it up to the present time, and they have never admitted any infringement. Now, in those circumstances, taking the defendants' conduct, their consistent denial of the infringement, the absence of any promise on their part not to repeat the wrongful act, I have had doubts whether those matters do not raise an inference that it is not improbable that they might repeat what they have done. If that inference did exist, and were properly drawn, the plaintiff would then be, I presume, entitled to the protection of the injunction in respect of his legal rights; but the rest of the Court, who are much more familiar with injunctions than myself, think otherwise, and whilst I do not differ from the conclusion at which they have arrived, I arrive at that conclusion with very great hesitation.

Appeal allowed.

Solicitors—Dangerfield & Blyth, agents for Hall, Son & Lowe, Manchester, for appellant; Shaw, Tremellen & Kirkman, agents for A. Macdonald Blair, Manchester, for respondents.

[IN THE CHANCERY DIVISION AND IN
THE COURT OF APPEAL.]

COTTON, L.J.
BOWEN, L.J.
FREY, L.J.
1889.
Oct. 29.

In re BRACKEN.
DOUGHTY *v.* TOWNSON.

Executor—Advertisements for Creditors and Claimants—Lord St. Leonards' Act (22 & 23 Vict. c. 35), s. 29—Sufficiency of Local or London Newspapers—Advertisements abroad—Notice of Claim by Persons out of the Jurisdiction.

The executors of C., a farmer, who at his death, and for the forty years previous, was residing in the parish of Tatham, in the county of Lancaster, issued the statutory advertisement for creditors and other claimants against his estate, in the usual form, dated the 16th of September, 1875, and inserted one in the London Gazette of the 21st of September, and one in each of the following papers:—the Lancaster Guardian of the 18th of September, and the Lancaster Observer of the 17th of September (weekly papers), and the Lancaster Gazette of the 18th of September (a bi-weekly paper), all circulating in Tatham:—Held (affirming the decision of NORTH, J.), that such advertisements were sufficient, and that there was no rule of practice that required the advertisement to be inserted in any London newspaper in addition to the London Gazette; that the time of one month as limited from the date of the advertisement was also sufficient, notwithstanding that, having regard to the dates of issue of the several papers, a full month's notice was not given; and that, consequently, a claim brought against the surviving executor of C. by a person alleging that C.'s estate was liable was rightly dismissed.

The question what notice is sufficient to require advertisements in foreign countries considered.

Whether, having regard to the terms of section 29 of the 22 & 23 Vict. c. 35, an appeal lay from the decision of NORTH, J., quære.

This was an appeal from a decision of North, J., holding that certain advertisements issued under Lord St. Leonards' Act were sufficient.

John Bracken, by his will dated the

21st of December, 1819, devised his undivided fourth part or share of an estate called Meargill unto John Chapman and Robert Mount, their heirs and assigns, upon trust for his (the testator's) wife during her life, and after her death upon trust to sell the same, and, after payment of his debts, funeral and testamentary expenses, to pay the overplus money equally between his two daughters Alice Cock and Mary Solloway, with a substitutionary gift to the issue of either of his two daughters who should die before the same should become payable leaving lawful issue.

The testator died on the 23rd of November, 1825. His daughter, Alice Cock, died in 1842, in New York, having had issue; and his widow died in 1843.

John Chapman, who had become sole surviving trustee, sold the Meargill estate in 1847. The plaintiff Alice Doughty, who was a grandchild of Alice Cock, and at the time of the sale an infant living in New York, alleged that John Chapman had not accounted for the share of Alice Cock to any person entitled to the same, and accordingly brought this action against James Henry C. Townson, the surviving executor of John Chapman, who had died on the 21st of July, 1875, for an account of the proceeds of sale, and for payment of one half of the net proceeds or other the share of the plaintiff therein. She had taken out administration to the estate of her grandmother, and sued as such administratrix, and in the alternative in her own right.

The defendant, by paragraph 9 of his defence, admitted that he had received assets of John Chapman's estate sufficient to answer all claims against the same, but pleaded that he or his co-executors had long since fully administered the same in a due course of administration, and advertised for and paid all claims against the said estate as by law required, and that he had not in his possession any such assets.

The point of law raised by this paragraph as to the sufficiency of the advertisements for claims against J. Chapman's estate was ordered to be set down for hearing pursuant to Order XXV. rule 2, and disposed of before trial of the action.

The statutory advertisement, which was dated the 16th of September, 1875, was in

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the ordinary form, and described John Chapman as late of Ridleys, in the parish of Tatham, in the county of Lancaster, yeoman, deceased (who died on the 21st of July, 1875, at Ridleys aforesaid, and whose will was proved at Lancaster, in the said county of Lancaster, on the 16th of August, 1875), and required particulars of claims to be sent in to the executors or their attorney before the expiration of one calendar month from the date of the advertisement.

It appeared from an agreed statement of facts that John Chapman had been a farmer, who at his death resided, and for forty years previous thereto had resided, at Ridleys, in the parish of Tatham, which is an agricultural parish, the residents in which use Lancaster as their market town.

The above advertisement was inserted in the *London Gazette* of the 21st of September, 1875, the *Lancaster Observer* of the 17th of September, 1875, the *Lancaster Gazette* of the 18th of September, 1875, and the *Lancaster Guardian* of the 18th of September, 1875.

The three last-named papers have a local circulation in Tatham. The *Lancaster Observer* and *Lancaster Guardian* are weekly papers, and the *Lancaster Gazette* a bi-weekly paper.

On the hearing of the point of law before North, J., it was urged on the part of the plaintiff that the advertisements should have been inserted in the *Times* or some other London paper in addition to the *London Gazette*.

F. H. Colt, for the plaintiff.

Gatey, for the defendant.

NORTH, J., after stating the facts above set forth as to the advertisements, and holding that the period named therein (a month) was not too short a time, and that enough time was given even though the advertisement was published in some of the papers a few days after its date, and after reading the 29th section of the 22 & 23 Vict. c. 35, proceeded as follows:

I have made enquiries in chambers, and I find that the practice accords with my view, and I hold that the notices here given were sufficient, and such as would have been given by the Court of Chancery. In my opinion it was not necessary to

insert the advertisement more than once. The man was a farmer, and advertisements were inserted in every local newspaper in his neighbourhood. The claimant was in America, and it is not suggested that the advertisement would under any circumstances have been of any benefit to her. The ordinary practice, as appears from Order LV. rule 45, is to insert the advertisement only once, unless there is any special reason to insert second or further advertisements. I hold that the advertisements were amply sufficient in this case.

[His Lordship then, by consent of the parties, considered an allegation of the plaintiff that the defendant had notice of the plaintiff's claim before distributing J. Chapman's estate, on the ground that a certain bundle of papers had come into his possession an inspection of which would have given him notice of the existence of a claim on the part of the person claiming under Alice Cock, and held that he had not had any such notice.]

As to this bundle of papers, the 8th paragraph of the agreed statement of facts stated that upon receiving an application from the plaintiff's solicitor the defendant looked into the bundle and got from its contents certain information which he communicated to the plaintiff's solicitor in a letter dated the 27th of September, 1886, of which the following is a copy:—

"Re Bracken. Doughty v. Chapman.

*"Sirs,—I am in receipt of your letter of the 24th inst. The estate of John Bracken was sold by auction Sept. 30th, 1847, for 437*l*.*

"The deeds were sent to America to be signed, and the money for the estate was paid to Mr. Winstanley, solicitor, of Preston, at the 'Royal Oak,' Lancaster, March 27th, 1848, in the presence of Mr. Willan (solicitor, Lancaster and Bentham), William Tolloway, and Thomas Tolloway (heirs to Mrs. Ellen Bracken), and full accounts were sent to John Humber.

"I may mention that Mr. A. Hanford, 11 Wall Street, New York, was appointed to find out the addresses of the Cock and Humber family in 1846. Mrs. A. Doughty would then be about 17 years old, and consequently a minor. The estate was mortgaged to $\frac{3}{4}$ of the value, and as her

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eldest brother was entitled to $\frac{1}{8}$ of the estate, her share could only be between 30*l.* and 40*l.*—Yours truly,

“J. H. C. Townson.

“P.S.—Messrs. Thomas and Lawrence Chapman died soon after Mr. John Chapman.”

The Humber family referred to in such letter were some of the issue of Alice Cock, who had formerly been Mrs. Humber.

The plaintiff appealed.

Seward Brice, Q.C., and *F. H. Colt*, for the appellant.

[FRY, L.J.—I doubt whether you can appeal; under section 29 it is to the Court before whom the executor is sought to be charged that the discretion is given.]

We submit that these advertisements are insufficient. Section 29 of 22 & 23 Vict. c. 35, puts an executor in the same position as if the Court were administering a fund. He is advertising not only to the creditors who would probably be in the neighbourhood, but to possible claimants all the world over—*Newton v. Sherry* (1); and a London newspaper of a large circulation would be more likely to be found abroad than a purely local newspaper. Lord Romilly in *Wood v. Weightman* (2) states that the general practice of the Court is to require an advertisement to be inserted in the *Times*. Moreover, the time fixed was too short; and further, the facts of which the executor had notice, constructive or actual, as to possible claims in America were such as, had they been brought to the knowledge of the Court in an administration suit, would have induced the Court to require advertisements to be issued in America. The defendant's letter of the 27th of September, 1886, is a sufficient admission of these facts.

Gatey, for the defendant, was not called upon.

COTTON, L.J.—This is an appeal against a decision on a statement of facts presented to Mr. Justice North, and the contention is that the defendant, an executor, is not relieved from liability in consequence of the insufficiency on various grounds of the advertisements that were issued under Lord St. Leonards' Act.

(1) Law Rep. 3 O.P. D. 246.

(2) Law Rep. 13 Eq. 434.

The first objection was that the advertisements were only inserted in the *London Gazette* and in local papers in Lancashire. It is said that that was wrong, and that the advertisements ought to have been inserted in some London paper, the *Times* or some other well-known London paper. But I think for several reasons that we cannot come to the conclusion that that is what the Court of Chancery, according to its ordinary practice, would have required. Here the Judge who has tried the case, and who has experience in chambers, and whose chief clerks are experienced, says he has enquired and he does not find that that is necessary. In the case of *Wood v. Weightman* (2) which was referred to, Lord Romilly did not say it was necessary to insert the advertisement in the *Times*; but in that case there had been no advertisement in any London paper, and he said that an advertisement ought to have been inserted in the *Gazette*, and that it was usual to insert one in the *Times*. But that case does not lay down that that was the rule. The book of practice to which I have referred—*Daniell's Chancery Practice* (4th ed.), p. 1110—says that the advertisement should be inserted in the *Gazette* and in such other papers as the Judge may direct; and apparently the practice in the chambers of Mr. Justice North, which I think were the chambers formerly occupied by Lord Justice Fry, is not to require this as an absolute rule, but to require an advertisement in the *Gazette*, and to decide whether there should be other advertisements in other London papers according to the circumstances of each case. Speaking for myself (and I am speaking as a Judge who has not had to deal with practice in chambers), I cannot say that it was necessary in circumstances like these, where a man had been living for many years in Lancashire, apparently not living or carrying on business in London, to insert the advertisement in any other London paper except the *Gazette*, and I do think that a reasonable course was taken in saving expense by not issuing the advertisements in London papers, but issuing them in local papers where his creditors probably would be found. Then it was said that the time given was

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not sufficient, and although the time fixed in the advertisement is admittedly sufficient—a month—yet here the month runs from the date of the advertisement, which was the 16th of September, and the earliest of these advertisements was not issued till some days after that, and the latest appeared in the *London Gazette* on the 21st of September. I cannot agree that that is insufficient. The advertisement is made and dated once for all, and then it is inserted in various papers according to the times they are published, and it must of course leave some period of time between the publication and the date in the advertisement. I think that that objection is one which cannot prevail.

But then it was said that the executor at the time he issued these advertisements had in his possession a bundle of papers, and that that bundle of papers would have led to further advertisements in America being issued if certain facts therein referred to, the case being before the Court of Chancery, had been brought before the chief clerk, because there was constructive notice there of a claim made by parties in America. Now, in my opinion, it was not necessary for the executor to look at all these papers and hunt up all the papers he might have, because the chief clerk who decided the matter had to consider, having regard to the business carried on, and to the position of the testator, and where he lived, what would be the reasonable place in which to issue the advertisements. But those papers do not to my mind give any constructive notice, or any notice whatever, of any probability of a claim by persons who were in America, or of this particular claim. Because what is this claim? The estate of the original testator was sold in 1847. Some of the parties interested were in America, and a deed had to be sent out to America to be executed. Then the proceeds of the sale were paid to a solicitor in England. Of course, they had no authority to pay it to a solicitor instead of to the parties interested, but for thirty years after the money is handed over to that solicitor, evidently for the purpose of being distributed by him among the persons interested, no claim whatever is raised by those persons, who, on the circumstances stated, would have notice that

the property was being sold in which they were interested. In my opinion the strong presumption is that there was no claim by them—that is to say, that any claim which they originally had was satisfied; and therefore these papers would not in any way raise a presumption that any claim by them existed, and would not, in my opinion, lead any Judge or any chief clerk to direct the issue of advertisements in America. I think it might have been said that the issuing of advertisements in consequence of that was a very unnecessary expense—and it would have caused delay in dividing the estate.

In my opinion the decision appealed from was right, and the appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. The question for us is whether in this case the executor gave such notices as in the opinion of the Court in which the executor is sought to be charged would have been given by the Court of Chancery in an administration action to creditors and others.

Now, although we entertain the appeal, still it remains an open question, as to which we have not been asked to decide, whether this is a case in which an appeal would lie. Lord Justice Fry threw out a doubt on the subject, and I do not think that we can be said to have decided that point one way or the other. Assuming, for the sake of argument, that the appeal lies, still it seems to me to be an appeal in a case in which we ought to be extremely chary in interfering with the view of the Court below. The Court below, the High Court of Justice, is the Court which is clothed by this statute with the duty of forming the opinion—and, at all events, whether an appeal lies or not, unless that opinion is clearly wrong we ought not to interfere.

Now, is the opinion which has been expressed by Mr. Justice North clearly wrong? The opinion he has expressed is, that this is a case in which the executor was not obliged to issue, and in which the Court of Chancery, if an administration action had been pending before it, would not have required to be issued, advertisements in other papers than in the *London Gazette*

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and in the local newspapers in Lancashire. As to the practice of the Court of Chancery, I leave my learned brothers to express with real authority their view upon the decision of Mr. Justice North; but, sitting here as a member of the Court which has to decide the question, I can only decide on the materials that are brought before me, and I find with regard to the sufficiency of these advertisements the following facts. Mr. Justice North has, after consultation with his chief clerk, who is a gentleman of the greatest experience, come to the conclusion that the practice in the chambers of the Chancery Division does not require such advertisements as are here said to be necessary. My learned brothers, whose knowledge of the practice of the Chancery Division is of course obvious, see no reason to differ from him. I think, for the reasons which have been given by Lord Justice Cotton, that the case of *Wood v. Weightman* (1) is not an authority in the appellant's favour, and no authority has been produced to shew that there is a practice of the Court of Chancery which is contrary to the decision in this case.

Lastly, the learned counsel who addressed us, who both had the opportunity and skill and learning to inform us if the contrary practice existed, really could not shew us that within their knowledge as counsel or within the knowledge of those who instruct them, who are officers of the Court, any practice to the contrary existed. How can we on these materials overrule the decision of the Judge who is *prima facie* clothed by the statute with the duty of forming his own opinion? It is impossible.

Then comes the question of the dates of the advertisements, as to which I say nothing beyond what my learned brother has said.

Then with regard to the point that the executor's knowledge was such as ought to have caused him to issue further advertisements, and would have put the Court on enquiry and further advertising if this had been an administration suit and those facts had come to the knowledge of the Court, it is sufficient to say, as the Lord Justice has pointed out, that, if there was any presumption at all, there was a strong

presumption that this claim was satisfied, although it might not have been satisfied, and there was nothing on the face of the papers if they had been read which would have made an executor hold his hand, or led the Court to direct other advertisements than those which were issued.

Fry, L.J.—I am of the same opinion.

Solicitors—Warriner & Kinch, agents for F. Stone, Derby, for appellant; T. R. Hargreaves, agent for Johnson & Tilly, Lancaster, for respondents.

KEKEWICH, J. } *In re HARRISON, MCGREGOR*
1889. } AND COMPANY'S TRADE
August 3. } MARK.

Trade Mark—Registration—Old Trade Mark—Special and Distinctive Word—Pattern—Descriptive Word—Rectification of Register—Costs—Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), s. 10—Patents &c. Act, 1883 (46 & 47 Vict. c. 57), ss. 64 and 90.

A word which has been used as indicating a pattern or type of manufacture, and not the manufacture of a particular individual or firm, is not, although used prior to the 13th of August, 1875, a special and distinctive word used as a trade mark before the passing of the Trade Marks Registration Act, 1875, and the registration of such a mark will, under section 90 of the Patents &c. Act, 1883, be expunged at the instance of a person aggrieved.

H. & Co., in 1884, registered the word "Albion" as an old mark used by them prior to 1875 in connection with the manufacture of agricultural machines. It was proved that the word had been used to designate machines of a particular pattern:—Held, that the word had not been used as a trade mark, and the registration must be expunged, and H. & Co. must pay the costs of the application to rectify.

Messrs. Woodroffe & Co., carrying on business at Albion Iron Works, Rugeley, Staffordshire, as manufacturers of agri-

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cultural implements, applied, under section 90 of the Patents &c. Act, 1883, for an order to rectify the register of trade marks by expunging the registration of the word "Albion," No. 35,160, as a trade mark for goods in class 6 and class 7; or otherwise, that the registration might be limited to certain goods in class 7—namely, "mowers, reapers, chaff-cutters, turnip-cutters, and pulpers." The registration was effected on the 24th of January, 1884, by Messrs. Harrison, McGregor & Co., who carried on a similar business to the applicants at Albion Iron Works, Leigh, near Lancaster.

Messrs. Harrison, McGregor & Co. had registered the word as an old mark, having been used for more than a year prior to August, 1875, and they had in fact used the word in connection with the agricultural machines and implements made and sold by them for the period mentioned.

As will be seen from the judgment, the Court found upon the evidence that the word "Albion" had been used by Messrs. Harrison, McGregor & Co. as denoting, not their own particular manufacture, but certain goods in class 7 of a special pattern or construction.

Warmington, Q.C., and *Ralph Griffin*, for the applicants.—The registration must be expunged. The word "Albion" has not been used as a trade mark, but simply as descriptive of machines of a certain type (1). In any case, the registration must be limited to the goods in respect of which there has been a user—*In re Jelley, Son & Jones* (2).

Moulton, Q.C., and *J. Hopkinson*, for Messrs. Harrison, McGregor & Co.—The registration has stood for more than five years—Patents &c. Act, 1883, ss. 75 and 76. The applicants have not discharged the burden of shewing that "Albion" has not been used as a trade mark. The word has been used as a trade mark indicating manufacture as well as a certain

type of machine. The suggested limitation is assented to.

Warmington, Q.C., replied.

KEKEWICH, J.—This is a novel question. I am not aware of any case in which it has been attempted to remove from the register a mark placed upon it, especially when it has been there for five years, and was in use prior to 1875, on the ground that it has been used as a design and not as a trade mark. It is quite clear that the two things are entirely distinct. There is statutory provision for the registration of designs, and statutory provision for the registration of trade marks; and before any Trade Marks Act, there was protection afforded by the Court to trade marks on the ground of fraud. Designs, of course, stood on an entirely different footing; but it is quite possible for a man to say, "Such and such is my design," and then to register that design. It is also possible for him to say, "Such and such is my trade mark," and, if it comes within the proper definition of a trade mark, to register that. And it is quite possible for him to find some word which is equally capable of indicating a design, or being a trade mark. I think Messrs. Harrison, McGregor & Co. have been successful in this instance in finding such a word—that is to say, this word "Albion" is capable of indicating an "Albion" design, or of being a trade mark indicating a manufacture. It is a fancy word adopted by them, not to indicate a particular class of machine, or character, or description, or construction, but a machine manufactured by themselves. That is just the difference between a trade mark and a design. Now, they obtained registration for a trade mark used before 1875. I have no doubt, on the evidence, that the word was used before 1875, and it was used in connection with some—though I am not prepared to say how many, or what—agricultural machines; but whether it was used as a trade mark or as a design is a more difficult question. I think, however, I must take it, on the evidence, that the word "Albion" was stamped upon some machines, probably not on many, but still upon some machines, before 1875, and that so far there is evi-

(1) See *In re Leonard & Ellis's Trade Mark* (53 Law J. Rep. Chanc. 233, 603; Law Rep. 26 Ch. D. 288), which appears to cover this point, but was not referred to in the arguments or judgment.

(2) 51 Law J. Rep. Chanc. 639n.

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dence of the user of the word "Albion" as having been marked to that extent. But I have had put in evidence several catalogues of Harrison, McGregor & Co. for the years before 1875, and one of 1875. I think the fairest way to them is to take the catalogue of 1875, because that was, as near as I can get it, immediately before the date to which they have limited the user—that is, one year and six months before the 13th of August, 1875, during which time they had used this mark. It was immediately before the expiration of that period, as near as I can get at it. Now, in that catalogue the word "Albion" is used largely for everything that Messrs. Harrison, McGregor & Co. manufactured. I find it used for mowing and reaping machines, and chaff-cutters, prize oil-cake breakers, turnip-cutters, and pulpers. As regards all these, more or less, if the term "Albion" was not used directly by calling them "Albion," I think it must be understood that the firm meant it to be used in that way. I do not see "Albion" used as regards some of them, but it is certainly used as regards the greater part—certainly as regards chaff-cutters; and on one page it is used expressly with reference to pulpers. Now, taking that as the best evidence of the use by them on their machines, we see how they used it themselves, and it seems to me to be as clear as anything can be that what Messrs. Harrison, McGregor & Co. said to the probable purchaser was not, "Look for the word 'Albion,' and you will get our manufacture," but "Look for the word 'Albion' for the particular kind of machine." That is what they said. "We have got the New Albion Pattern Double Action Turnip-Cutter; that is the machine for you to cut turnips with; one of that particular construction, that particular size," and so forth, "but not one that is necessarily of our manufacture, in the sense of depending on the care we take in the putting together of the parts, and the selection of the materials," and so on, which is generally what a manufacturer relies on as a trade mark. The affidavits refer to the advertisements, and I have read some of them which are appended to the catalogue. There are a good many of them, and I do not profess to have read them

all. Some of them are opinions of the press, and others are testimonials—letters received from customers; but I have not hit upon one yet which, in the slightest degree, indicates that "Albion" was a trade mark. On the other hand, I have met with many which say that it means a particular class of goods of a particular character. Now, I just take haphazard one from the *Western Morning News* of the 31st of May, 1875: "Messrs. Harrison, McGregor & Co., Leigh, Lancashire, have the largest display they have ever contributed" (that is, at the Bath and West of England Agricultural Show). "There is a very large array of their notable 'Albion' mowers and reapers, not only effective, but easy of handling by ordinary farm labourers. The firm also shew a large assortment of chaff- and turnip cutters, pulpers, &c. The chaff-cutters are especially adapted for both the English and Continental markets, cutting three different lengths, having a stop and reverse motion, and having all the gearing under a neat cover, so that there is absolutely no danger of accident." What has that to do with trade mark? That is the particular construction, which was, I dare say, of the very best. Taking, again, a testimonial quite haphazard, though I have seen a great many of the same kind: Mr. Robert Shuttleworth, Prestwich Old Hall, near Manchester, says, "I have used your 'Albion' mower and reaper the last season. It is decidedly the best machine I ever had, and so easy and simple in its construction, and no trouble to keep in order—in fact, my man has mown over sixty acres last year without one breakdown. I can with confidence recommend it to any party wanting one." It is not, "I recommend all my friends to see that 'Albion' is stamped, so that they may know that they got those excellent materials which come from your care in construction and manufacture," but "that they may get the machine which you make of a particular construction, so easy and so simple that it is no trouble to keep it in order." That is description, and not trade mark. I find, if you look at the others, it runs the whole way through. Now, it seems to me that what Messrs. Harrison, McGregor & Co.

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used before 1875 was what they relied upon as their design; and I think I must take it that, although they did—I do not doubt Mr. McGregor's affidavit—stamp "Albion" on some of these machines—I do not know which, except the chaff-cutters—they must have stamped it as indicating the design or the particular construction, and not as being their trade mark. That is borne out by reference to the few cases in which I have the word "Albion" stamped in the engravings in the catalogue, where there is nothing to shew that it is disconnected with the particular construction. I see in one particular place of the same catalogue, "Albion" combined mower and reaper, which is the particular article which the advertisers were constructing and recommending to their customers. If I did not come to that conclusion, I should be forced to the conclusion that the respondents were, on their own evidence, only properly registered for certain articles. They could not possibly, because they used "Albion" for mowers, reapers, chaff-cutters, and other things, register it for all agricultural and horticultural implements, and all other machinery, which is what they have done. It was never intended that a man having a trade mark for one class of machinery should register it as a trade mark for all. But I need not go further into that, because I think that, if they had only used the word "Albion" as designating a particular construction or class of machine, they did not use it as a trade mark before 1875. Therefore they ought not to have been placed on the register as the owners of a trade mark, and therefore the register, being in that sense improper, must be rectified, with costs.

Solicitors—C. G. & F. Woodroffe, for applicants;
Shaw, Tremellen & Kirkman, agents for
A. M. Blair, Manchester, for respondents.

KAY, J. }
1889. } *In re ROBERTS; ex parte*
August 5. } EVANS.

Solicitor and Client—Solicitor-Mortgages—Profit-Costs.

A solicitor who advances money to a client on mortgage is not entitled to charge the mortgagor profit-costs for the preparation of the mortgage.

Adjourned summons.

In 1880, John Miles Evans, being about to purchase property at Great Malvern, applied to his solicitor, Thomas Roberts, to obtain for him an advance of 2,100*l.* on mortgage. Mr. Roberts found himself unable to procure the whole amount, but ultimately found a lender for 1,200*l.* at 4½ per cent. on first mortgage, and agreed himself to advance 900*l.* on second mortgage at five per cent. The purchase was then completed, and both mortgage-deeds were prepared by Roberts. The second mortgage contained a clause enabling any person interested in the mortgage-money as a solicitor to charge for professional services in connection with the mortgage-money or mortgaged premises.

On the 26th of March, 1889, Mr. Evans obtained an order for the delivery and taxation of Roberts's bill. Roberts then made out a bill in accordance with the system which prevailed before the General Order made under the Solicitors' Remuneration Act, 1881. The bill comprised all the work done in respect of both mortgages. The Taxing Master, however, though he allowed the costs for preparing the first mortgage, disallowed, together with other items, the whole costs of preparing the second mortgage to Roberts himself. But he allowed certain items for work done after the execution of the mortgage, on the ground that they came within the clause permitting professional charges. Roberts carried in objections to the disallowance of the costs of preparing the mortgage to himself, on the ground that the work charged for had been undertaken upon Evans's own instructions; that the work was for Evans's benefit, and that he was responsible to Evans for the proper negotiation of the entire loan of 2,100*l.*, and for the preparation and com-

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In re Roberts.

pletion of the second mortgage to himself. But the Taxing Master overruled these objections, on the ground that a solicitor could not make a profit of his position as mortgagee.

Roberts then took out the present summons to obtain a reference back to the Taxing Master to vary the certificate by the allowance of these objections.

Marten, Q.C., and *Maidlow*, for the summons.—There is no authority directly in point; but in principle it is reasonable that a solicitor should be entitled to payment for his time and trouble in preparing the mortgage for his client.

[KAY, J.—Kindersley, V.C., disallowed all but out-of-pocket costs to a solicitor-mortgagee as against a second mortgagee in *Slater v. Cottam* (1).]

But that case was overruled in *The London Scottish Benefit Society v. Chorley* (2), where a solicitor, defending an action in person, was allowed profit-costs. So in *In re Donaldson* (3) profit-costs were allowed to a solicitor-mortgagee enforcing a security.

Leveti, for Evans.—A mortgagee stands in a quasi-fiduciary position to the mortgagor, and cannot make a charge for work which he does himself for his own benefit.

Marten, Q.C., in reply.—Profit-costs were allowed to a solicitor-mortgagee in *Price v. Macbeth* (4).

KAY, J.—In this case the solicitor prepared not only the mortgage to the third person, the costs of which, being mortgagee's costs, the mortgagor has admitted his liability to pay, and therefore allowed them to be included in the bill; but he has charged profit-costs for preparing the mortgage to himself. The reason why these costs should not be allowed is, not that there exists any fiduciary relation between the solicitor and the mortgagor, but the reason is that they are not mortgagor's costs at all. They are mortgagee's costs, and the only way in which they

could be allowed is if there is a mortgagee against whom they could be charged, and who would have to pay them to his own solicitor, and could then charge them to the mortgagor. But there never was a mortgagee here who would have to pay these costs to any solicitor. The mortgagee had no solicitor to prepare the mortgage, because he prepared it himself, and therefore he cannot charge any costs, because they never existed at all. I therefore disallow these costs.

Solicitors—Ellis, Munday & Bartrum, agents for Lambert, Worcester, for applicant; Taylor, Stileman & Underwood, for respondent.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
BOWEN, L.J.
FREY, L.J.
1889.
Oct. 28. } *In re THE COMBINED WEIGH-
ING AND ADVERTISING MA-
CHINE COMPANY (LIMITED).*

Attachment of Debt—Garnishee Order absolute—Company—Winding-up—Right of Garnishor to petition—Companies Act, 1862, section 82.

A garnishee order absolute obtained against a company does not constitute the garnishor a creditor of the company so as to entitle him to present a winding-up petition.

Decision of NORTH, J., affirmed.

This was an appeal from the refusal of North, J., to make an order for the winding-up of the above-named company. The petition was presented by J. B. Ball, who claimed as a creditor.

On the 19th of November, 1888, Ball obtained a garnishee order absolute directing the company forthwith to pay him a sum of 38*l.* 6*s.* 10*d.*, due from the company to J. W. Wright, against whom Ball had recovered judgment for 57*l.* 5*s.* 6*d.*, and that in default of payment execution might issue for the same.

On the 27th of November, 1888, the company made default, and Ball levied execution under the garnishee order, but the sheriff made a return of *nulla bona*.

(1) 3 Jur. N.S. 630.

(2) 53 Law J. Rep. Q.B. 551; Law Rep. 12 Q.B. D. 452; *ibid.* 13 Q.B. D. 872.

(3) 54 Law J. Rep. Chanc. 151; Law Rep. 27 Ch. D. 544.

(4) 38 Law J. Rep. Chanc. 460.

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These facts were alleged in the petition, and it was further alleged that the sum of 38*l.* 6*s.* 10*d.* remained unpaid, and that the company was unable to pay its debts.

North, J., held, upon the authority of *Chatterton v. Watney* (1), that the petitioner was not a creditor of the company, and dismissed the petition.

Ball appealed from this decision.

Eve, for the appellant.—I submit that the petitioner is a creditor within section 82 of the Companies Act, 1862. It is not necessary to contend that the garnishee order operates as an absolute transfer of the debt, as was held by Bacon, V.C., in *Chatterton v. Watney* (1). The judgment creditor is clothed with all the rights against the garnishee which the judgment debtor would have had but for the garnishee order; he is made debt collector for the judgment debtor. And where money is owing by a company, one well-known method of getting in the debt is to present a winding-up petition. Why, then, should the petitioner be deprived of this right? The garnishee order gives the garnishor a charge upon the debt and constitutes him a creditor in equity.

Firminger, for the company, and *George White*, for the shareholders, contended that the petitioner had no *locus standi*.—They based their contention on three grounds—first, that the garnishor could only become a creditor by assignment, and the garnishee order did not operate as a transfer of the debt; secondly, that the limited right conferred upon the garnishor by Order XLV. rule 3—namely, the right of levying execution by leave of the Court—excluded the ordinary rights of a creditor against his debtor; thirdly, that section 82, which introduced a procedure analogous to bankruptcy, ought to be strictly construed.

They cited, in addition to *Chatterton v. Watney* (1), *In re Keeling*; *ex parte Blanchett* (2), *Ex parte Chinery*; *in re Chinery* (3), *Butter v. Wearing* (4), *Wood*

v. Dunn (5), *In re Curtoys*; *ex parte Pillers* (6), *In re Connan*; *ex parte Hyde* (7), and *In re The European Bank*; *ex parte Baylis* (8).

Eve replied.

COTTON, L.J.—When this case was opened, from the way in which it was presented to us we thought it turned on the question whether the petitioner had a case under section 80, sub-section 2; but really we do not come to that case at all, because the question in the first instance is not whether the petitioner has made out a case for winding up the company—which I very much doubt—but whether he is a person entitled to present a petition. That turns upon section 82. He says: "I am entitled to present a petition. I am not a contributory; I am a creditor." Well, is he? He is no creditor of the company unless and except so far as the garnishee order which he obtained made him a creditor. Mr. Wright owed him money; he got a judgment against Wright. Having done that, he attached a debt due from the company to Wright, and the order is made absolute. What does the garnishee order do? It is no assignment to any extent of the debt due by the garnishee to the debtor of the garnishor; it merely gives the garnishor an attachment upon that debt. That was laid down by the late Master of the Rolls, confirming the view taken by myself in a case of *Chatterton v. Watney* (1), where he says, "I quite agree with the view of the Lord Justice Cotton, that a garnishee order does not operate as a transfer of the debt." Transfer does not necessarily mean absolute transfer, but a transfer of the debt by way of assignment, security, or otherwise. Even if there was a transfer or assignment of the debt so as to constitute the petitioner an assignee either in law or equity of this debt, although he might say, "I am a creditor under section 82, and entitled to present

(5) 36 Law J. Rep. Q.B. 27; Law Rep. 2 Q.B. 73.

(6) 50 Law J. Rep. Chanc. 691; Law Rep. 17 Ch. D. 653.

(7) 57 Law J. Rep. Q.B. 472; Law Rep. 20 Q.B. D. 690.

(8) 35 Law J. Rep. Chanc. 690; Law Rep. 2 Eq. 521.

(1) 50 Law J. Rep. Chanc. 535; *ibid.* 227; Law Rep. 17 Ch. D. 259; *ibid.* 16 Ch. D. 378.

(2) 55 Law J. Rep. Q.B. 327; Law Rep. 17 Q.B. D. 203.

(3) 53 Law J. Rep. Chanc. 662; Law Rep. 12 Q.B. D. 342.

(4) Law Rep. 17 Q.B. D. 182.

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a petition," we should still have to consider the question whether he had made out a case for winding up this company. But on the ground that he is not entitled to present the petition, I think it unnecessary to go into the case on the merits. I would say here that this gentleman is not in any way a creditor of the company, and not in any way one of those persons entitled to present a petition. I ought to mention the question as to whether this is an equitable assignment of the debt. Of course, if there had been an order by the person to whom the debt was owing to pay to the petitioner, that would have been a good equitable assignment. But, in my opinion, a mere order in the nature of a garnishee order made by a competent authority putting a hold upon the fund, and enabling the person who has obtained the garnishee order to give a good discharge, would not come within the principle of equitable assignment, and therefore the petitioner cannot, under the doctrine of equitable assignment, claim to be a creditor in this case.

BOWEN, L.J.—I am of the same opinion. The real point is whether the appellant is a creditor or not within section 82 of the Act. I think, in all probability, having regard to the language of the preceding sections, that a creditor under section 82 includes a creditor in equity as well as in law. It is not necessary to decide it—and I believe the point has been expressly left undecided in a previous case—and I desire to keep it open, but I should think it would include a creditor in equity. In any case I cannot see here that this statutory position, which was created originally by the Common Law Procedure Act, 1854, and has been perpetuated by the rules under the Judicature Act—this relation which exists between the judgment creditor and the garnishee—is a position which involves the creation of a creditor. There cannot be said to be any equitable debt. There is no assignment in equity, and I cannot see that there is any legal debt. There is an order of a Court of common law that a sum equal to the original debt shall be paid by the garnishee to the judgment creditor—or, as an alternative, that execution may issue; but

I think that the relation which is created by Order XLV. does not create a debt at all; it creates an attachment of the whole or a portion of the debt, and in case of non-payment confers the right of issuing execution, and nothing more. I think that was a fair argument that was pressed upon us, and one must remember that these winding-up sections cannot be extended lightly or loosely, because they relate to procedure in the nature of execution against the company, and involve considerable results against property.

FREY, L.J.—I am of the same opinion. The 2nd rule of Order XLV. provides that the service of the garnishee order on the garnishee shall bind the debt in his hands. The question, I take it, is, what is the meaning of the words "bind the debt in his hands." Now it has been argued that it amounts to a transfer of the debt. It is remarkable, if that was the meaning of the words, that those words were not used, and that the Order does not say transfer the debt; but, further than that, the whole scheme of the Order is inconsistent with its being a transfer—and, in fact, the question has been settled by the Court. It is plain to my mind that there is no transfer of the debt; it is equally plain to my mind that the garnishee order does not make the garnishor a creditor of the garnishee. What the order does is this, it gives the garnishor certain statutory rights. It enables the garnishor to say to the garnishee, "You shall not pay the money which you owe to your creditor." It enables him to give a valid receipt and discharge for the money. It enables him, in the event of the money not being paid, to obtain execution. He has all these rights, but there is no transfer of the debt, and he is not created a creditor.

White.—Will your Lordships give the shareholders any costs? We were not served, but we appeared in the Court below.

COTTON, L.J.—No, we cannot give you any costs.

Solicitors—Norris, Allens & Chapman, for appellant; Perkins & Sawyer, for respondents.

STIRLING, J. }
 1889. }
 Oct. 30, 31. } **FISHER v. SHIRLEY.**

Marriage Settlement—Covenant to settle after-acquired Property—Whether extending to Property acquired by the Husband after the Death of the Wife.

A covenant in a marriage settlement by the husband to settle future property acquired by him in right of his wife includes property coming to him through his wife after her death.

In re Edwards (43 Law J. Rep. Chanc. 265; Law Rep. 9 Chanc. 97) explained and distinguished.

By a deed-poll dated the 6th of June, 1833, a sum of 3,866*l.* 7*s.* 3*d.* Three per Cent. Reduced Bank Annuities was settled upon trust for Caroline Hannah Neave, Caroline Mary Cookson, and William Cookson, successively for life, and upon the death of the survivor upon trust for the children of the said William Cookson and Caroline his wife, equally, share and share alike; the several shares to be payable in the case of sons upon attaining twenty-one, and in the case of daughters upon attaining that age or marriage; and in case such ages, days, or times should happen in the lifetime of any of the tenants for life it was provided that the shares of such children should thereupon become vested and transmissible interests, the actual payment being postponed.

Mr. and Mrs. Cookson had several children, one of whom, Georgina Emily, married Arthur George Sewallis Shirley.

At the date of the marriage Mrs. Shirley was an infant.

By a settlement made on the 20th of August, 1841, in contemplation of the marriage of Mr. and Mrs. Shirley, after reciting that the intended wife was entitled to various sums of money therein mentioned (no mention being made of the sums secured by the deed-poll of the 6th of June, 1833), and that she might become entitled to a further sum under the marriage settlement of her parents, and reciting an agreement to settle all such moneys and all property that she or her intended husband in her right should thereafter become entitled to under any deed, will,

intestacy, or otherwise howsoever, the several sums above referred to were settled upon certain trusts for the benefit of the marriage, and the settlement proceeded as follows: "And it is hereby agreed and declared, and particularly the said A. G. S. Shirley, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree with and to (the trustees of the settlement) that if the said G. E. Cookson, or the said A. G. S. Shirley in her right, shall become entitled to any part share or shares of the trust moneys, stocks, funds, and securities, her shares whereof are hereby settled as aforesaid, or shall by deed, gift, intestacy, or by any other means whatsoever become entitled to any other moneys, stocks, funds, or other property whatsoever, the same shall, at the costs and charges of the said fund, by all such acts, deeds, and assurances as shall be necessary for the purpose, be vested in the trustees or the trustee for the time being under these presents, and shall be held by the said trustees or trustee on the same trusts, and subject to the same powers, provisos, and declarations as are hereby expressed, declared, and contained of and concerning the moneys and premises hereby settled by and on the part of the said Georgina Emily Cookson."

Mrs. Shirley died on the 8th of July, 1852, leaving her husband her surviving.

In 1884, Mr. Shirley filed a petition for liquidation, and by a deed of assignment, dated the 10th of April, 1884, all his property, whether in possession, reversion, or remainder, was assigned by the trustee under the liquidation to one Henry Dyne.

Mrs. Cookson, the last surviving tenant for life under the deed-poll of the 6th of June, 1833, died on the 16th of August, 1888, and the fund thereby settled became divisible.

This was a summons taken out by the trustees of the deed-poll to determine (*inter alia*) the question whether Mrs. Shirley's share in the fund was bound by the covenant to settle after-acquired property contained in her marriage settlement.

Aubrey Spencer, for the summons.

J. B. Dyne, for Mr. Shirley and his assignee.—A covenant in a marriage settle-

Fisher v. Shirley.

ment to settle after-acquired property is confined to property acquired during the coverture—*In re Edwards* (1), *Dickinson v. Dillwyn* (2), and *Carter v. Carter* (3). A contingent reversionary interest becoming vested, but not falling into possession during the coverture, is not an interest acquired during coverture—*In re Jones's Will* (4), in which *In re Viant's Settlement* (5) was dissented from, and *In re Michell's Trusts* (6). *Williams v. Mercier* (7) may perhaps be relied upon as supporting the proposition that the fund in question is included in the covenant as property to which at the moment of the marriage the husband became entitled in right of the wife; but the explanation of that case in *In re Garnett*; *Robinson v. Gandy* (8) shows that the decision must have turned upon the peculiar language of the settlement then under consideration. Mr. Shirley, or his assignee, is therefore entitled.

Hadley, for the trustees of the settlement.—This fund is bound by the covenant. It has been assumed that, in a covenant by the husband to settle the wife's after-acquired property, the Court will read into the covenant the words "during the coverture." But the decisions only go to this, that property acquired by the wife after the death of the husband is not bound by a covenant to settle future property. And the reason for this restriction is that the primary object of covenants of this kind is to exclude the marital right—*In re Edwards* (1).

There are other cases besides those cited against me in which the covenant

has been confined to property acquired during coverture, but in all the cases where this restriction has been applied the wife has been the survivor—*Howell v. Howell* (9), *Godsal v. Webb* (10), *Reid v. Kenrick* (11), and *In re Campbell's Policies* (12). There being here no ground for any modification of the covenant, it ought to be construed according to its literal meaning.

Dyne, in reply.—The authorities lay down the rule in general terms that a covenant to settle after-acquired property in a marriage settlement is limited to property acquired during the coverture, and do not warrant the suggested distinction.

STIRLING, J.—I have had an opportunity of looking at the cases since the adjournment of the Court, and I have come to the conclusion that Mr. Hadley's contention is right. The question is whether certain property to which, at the date of the marriage settlement, the wife was contingently entitled, and which became a vested interest upon her marriage, but did not fall into possession until after her death, is bound by the covenant on the part of the husband to settle after-acquired property. That covenant is in general terms. [His Lordship read the covenant.] There are no words of limitation to confine the covenant to the coverture or to any particular period; and, so far as regards the husband, it is an absolute covenant that if he shall at any time become entitled to any fund or other property in right of the wife, then that is to be settled. I am asked to say that, in the events which have happened, the husband is not bound by that covenant. What happened was this: The wife died in the lifetime of the husband, and the fund did not become divisible until after the wife's death, and, but for the covenant, the husband would become entitled to it upon taking out letters of administration to his wife's estate. The ground on which the case is put by Mr. Dyne is this: It is said that

(1) 43 Law J. Rep. Chanc. 265; Law Rep. 9 Chanc. 97.

(2) 39 Law J. Rep. Chanc. 266; Law Rep. 8 Eq. 546.

(3) 39 Law J. Rep. Chanc. 268; Law Rep. 8 Eq. 551.

(4) 45 Law J. Rep. Chanc. 429; Law Rep. 2 Ch. D. 362.

(5) 43 Law J. Rep. Chanc. 832; Law Rep. 18 Eq. 436.

(6) 48 Law J. Rep. Chanc. 50; Law Rep. 9 Ch. D. 5.

(7) 54 Law J. Rep. Q.B. 148; Law Rep. 10 App. Cas. 1.

(8) 55 Law J. Rep. Chanc. 773; Law Rep. 33 Ch. D. 300.

(9) 4 Law J. Rep. Chanc. 242.

(10) 2 Keen, 99; 7 Law J. Rep. Chanc. 103.

(11) 24 Law J. Rep. Chanc. 503.

(12) 46 Law J. Rep. Chanc. 142; Law Rep. 6 Ch. D. 686.

Fisher v. Shirley.

by a series of cases it has been settled that a covenant of this nature is to be construed as if it were limited to the coverture; but all those cases are decisions which have been given in a different state of circumstances—namely, where the wife has been the survivor. The ground on which those decisions proceed is very clearly stated by Lord Justice James in *In re Edwards* (1). He says: "The primary object of a covenant to settle the future property of a wife is to prevent its falling under the sole control of the husband, and it therefore, *prima facie*, is to be supposed not to be intended to apply to property the wife's title to which does not accrue until after the husband's death. We have consulted the Lord Chancellor on the case, and he agrees with us in the opinion that in the absence of any expressions shewing that a covenant of this nature was intended to have a more extended operation, it is to be construed as if the usual words 'during the said intended coverture' had been inserted." No doubt the concluding sentence, in which the Lord Justice says that the covenant is to be construed as if the words "during the said intended coverture" had been inserted *prima facie*, lends support to the argument advanced on behalf of the husband; but before one departs from the literal meaning of the covenant we must look at the reasoning of the cases, and the reasoning in the case of property coming to the wife after the death of the husband is clear. The object of the covenant is to exclude the marital right, so that the property subject to the covenant may be kept for the benefit of the wife and children; and the decisions only amount to this, that the covenant is not to be extended when it is not required for that object. Here, instead of excluding the marital right, I am asked to give effect to it. It seems to me that the decisions do not extend to property coming to the husband in right of the wife after her death. The reasoning of these cases not applying, I must give effect to the covenant. Accordingly, there will be a declaration that the wife's share in the fund is bound by the covenant, and a direction to pay the same to

the trustees of the settlement. There will be no order as to the costs of the husband and his assignee.

Solicitors—Janson, Cobb, Pearson & Co., agents for Tozer, Geare & Mathew, Exeter, for summons; Prior, Church & Adams, agents for Dyne & Müller, Shepton Mallet, for Mr. Shirley and his assignee; Cole & Jackson, agents for Francis & Francis, Cambridge, for trustees of marriage settlement.

NORTH, J. }
1889. }
Oct. 28. }

In re JONES.
DUTTON v. BROOKFIELD.

Will—Trusts—Power for Trustees "to make any Sales and Arrangements they shall judge expedient"—Power to mortgage Testator's Real Estate.

*A testator appointed Hignett and Jones executors and trustees of his will, and directed that the trustees or trustee for the time being of his will should have full power to settle his accounts and wind up his affairs as they or he should think fit, and, in so doing, "to make any sales and arrangements they or he shall judge expedient." And the testator devised all his real estate unto and to the use of his trustees upon the trusts therein declared. After the testator's death, Jones (Hignett having renounced probate and disclaimed the trusts of the will), in order to meet some pressing claims against the estate, borrowed a sum of 500*l.* upon the security of a mortgage of a portion of the real estate:—Held, that, under the terms of the will, Jones, being both executor and trustee, had power to mortgage the testator's real estate.*

Adjourned summons.

John Jones (hereinafter called the testator), by his will dated the 5th of April, 1884, appointed his son-in-law, John Hignett, and his son, W. R. Jones, executors and trustees of his will. And the testator directed that the trustees or trustee for the time being of his will should have full power to settle his accounts and wind up his affairs as they or he should think best, and, in so doing, "to make any sales or arrangements they

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or he shall judge expedient." And the testator devised and bequeathed all his real and residuary personal estate unto and to the use of his trustees upon the trusts therein declared.

The testator died on the 7th of April, 1884, and his will was proved by W. R. Jones alone, John Hignett, the other executor, having renounced probate and disclaimed the trusts thereof.

The testator had during his lifetime deposited a policy of assurance on his life with one Brookfield, as a security for the sum of 500*l.* advanced by Brookfield to the testator, with interest. After the testator's death, Brookfield, at the request of W. R. Jones, handed to him the policy to enable him to obtain payment of the policy-moneys from the insurance society, Jones undertaking to pay to Brookfield out of the policy-moneys, when received, the amount owing to him. After receiving the policy-moneys Jones requested Brookfield to permit the moneys to remain in his hands for a further period of five years on the security of a mortgage of a portion of the testator's real estate. Brookfield acceded to this request, and, by an agreement dated the 6th of September, 1884, made between Brookfield of the one part and Jones (described as executor and trustee of John Jones) of the other part, Brookfield agreed that if interest on the said sum of 500*l.* should be paid half-yearly at the rate of five per cent. per annum for the term of five years from the 29th of July, 1884, then last, he would not call in the same sum during that period. And Jones agreed that the sum of 500*l.*, with interest thereon at the rate aforesaid, should be charged upon the eleven houses in St. Anne Street, Chester, then in mortgage to the Provincial Insurance Company for 1,800*l.* The houses referred to in the agreement formed part of the testator's real estate. Interest on the sum of 500*l.* was duly paid until the 29th of July, 1886. No interest was paid after that date.

In January, 1887, Jones died. In October, 1888, William Dutton and Henry Small were appointed trustees of the will; and in the same year letters of administration *de bonis non* to the testator's estate were granted to William Dutton, who claimed to be a creditor of the testator.

The testator's estate proving to be insolvent, the trustees refused to recognise the claim of Brookfield to be a secured creditor upon the property comprised in the agreement of the 6th of September, 1884, on the ground, as they alleged, that under the terms of the will W. R. Jones had no power to mortgage the testator's real estate. They accordingly took out this originating summons against Brookfield as defendant asking to have it determined whether, by the agreement of the 6th of September, 1884, a valid charge was created in favour of the defendant over the property comprised in the agreement.

Cozens-Hardy, Q.C., and *Russell Roberts*, for the plaintiffs.

Napier-Higgins, Q.C., and *P. S. Stokes*, for the defendant.—This question cannot be decided on an originating summons. Creditors would not be bound. The plaintiff Dutton, no doubt, is a creditor, but he does not sue on behalf of creditors. We are willing to have the question determined if your Lordship thinks you can do it.

[NORTH, J.—The summons must be amended by making another creditor of the testator plaintiff on behalf of himself and all other creditors other than the defendant, and making Dutton and Small defendants instead of plaintiffs. The summons must be further amended by asking for administration of the estate. If this course is adopted I think the difficulty suggested by the defendant's counsel will be got over.]

Cozens-Hardy, Q.C., and *Russell Roberts*, for the summons.—The trustee had no power to mortgage the testator's real estate—*Stronghill v. Anstey* (1). The clause in the will authorising the trustees "to make any sales and arrangements" does not authorise a mortgage. It is clear if Jones had not been executor as well as trustee, he could not have made the mortgage, and we submit that the fact of his being both executor and trustee makes no difference. The will contains no charge of debts.

Napier-Higgins, Q.C., and *P. S. Stokes* for the defendant Brookfield.—We rely

(1) 1 De Gex, M. & G. 635; 22 Law J. Reg Chanc. 130.

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upon the words "make any sales and arrangements." Those words clearly authorise a mortgage. *Stronghill v. Anstey* (1) does not apply, as in that case the trusts of the will implied a conversion out and out. *Ball v. Harris* (2) is an authority in our favour.

They also referred to *Devaynes v. Robinson* (3).

Cozens-Hardy, Q.C., in reply.—In *Ball v. Harris* (2) there was a charge of debts.

NORTH, J.—Having regard to the language of this particular will, I must hold that the agreement of the 6th of September, 1884, created a valid charge upon the testator's real estate comprised therein. It is not suggested that the conduct of Mr. Brookfield has not throughout been in perfectly good faith; and if he fails to have a good security it is by reason of misfortune, and not through any fault of his own. His conduct has been *bona fide* throughout.

[His Lordship stated the facts and continued:]

The question now raised is whether this security as created in September, 1884, upon the property in St. Anne Street, is a good security or not. If it is, Mr. Brookfield will be paid in full; if it is not, he will only receive a dividend for the amount of his claim.

In my opinion the arrangement which was made by Mr. Jones with Mr. Brookfield was one which it was within the power of Mr. Jones, as executor and trustee, to make. The point has been put that if he had not been executor he could not have made the arrangement. Of course, the trustee could not have made the arrangement without the executor, and the executor could not have made it without the trustee. Mr. Jones filled both characters. He had the legal estate devised to him, and the terms upon which it was devised to him are stated in the will. The will begins by appointing Mr. Jones executor with another person who did not act; then it proceeds: "And I direct that the trustees or trustee for the time being of my will shall have full power to settle my accounts

and wind up my affairs as they or he shall think best, and, in doing so, to make any sales and arrangements they or he shall judge expedient." Mr. Jones was sole executor and trustee, and, according to the evidence, it appears that he required the money in question for pressing claims against the testator's estate. Under these circumstances, the defendant's right to receive the 500*l.* was clear, if he insisted upon it; but the right of Mr. Jones to sell the real estate to raise the 500*l.* which he required for pressing purposes was equally clear, and is not disputed. Further than that, I think it is quite clear that he could, if he liked, have raised money by mortgage, and that is, in point of fact, what he did do. In my opinion he was justified by the terms of the will in making an arrangement by which the money required for the pressing claims was retained in his hands instead of being paid to the defendant, upon the terms of his giving the defendant the mortgage of the 6th of September, 1884. So far as authorities go, *Ball v. Harris* (2) seems to me to be nearer than any other to the present case.

It is quite true that there is not here any charge of debts as there was in that case, and it was admitted that if there had been a charge of debts *Ball v. Harris* (2) would not have been distinguishable. But here there are words which, in my opinion, justified the trustee in dealing with and settling the accounts, and which justified his dealing with the estate in the manner he did. In my opinion, those words give him exactly the same power as he would have had if the power had been given him, not by these words, but by a direct charge of debts upon the estate.

Under these circumstances, I am of opinion that the defendant is entitled to retain the mortgage security, and is not compelled to give it up for the benefit of the other creditors of the testator.

Solicitors—Kennedy, Hughes & Kennedy, agents for Roberts & Dickson, Chester, for summons; Chester & Co., agents for Moss & Sharp, Chester, for defendant.

(2) 4 Myl. & Cr. 264; 8 Law J. Rep. Chanc. 114.

(3) 24 Beav. 86; 27 Law J. Rep. Chanc. 157.
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STIRLING, J.	} THE SHEFFIELD AND SOUTH YORKSHIRE BUILDING SOCIETY v. AIZLEWOOD.
1889.	
July 16, 17, 18, 23,	
24, 25, 30, 31.	
August 1, 6.	
Nov. 6.	

Building Society—Directors—Misfeasance—Imprudent Investment—Ultra vires—Negligence—Building Societies Act, 1874 (37 & 38 Vict. c. 42), ss. 13, 16, and 25.

The rules of a building society registered under the Building Societies Act, 1874, provided that advances might be made on leasehold security, and that none of the directors should be answerable for the insufficiency or deficiency in the title or otherwise of any security, unless the loss arising therefrom should happen through their own neglect or default; and that when the directors were of opinion that the premises were a sufficient security, and the solicitor was satisfied as to the title, the amount advanced should be paid to the borrower, upon his executing a mortgage in the form required by the solicitor:—Held, that the directors were not liable for the loss of a sum advanced upon a second mortgage of a leasehold colliery and certain collateral security, although the valuer on whose opinion they acted was selected by the chairman from a list of four names supplied by the mortgagor.

*The directors subsequently advanced 41,000*l.*, which they borrowed, for the purpose of paying off the first mortgagees, who were threatening to foreclose, and they entered into possession and expended large sums in payment of rents and royalties and in working and maintaining the colliery:—Held, that the directors had an implied power to pay off the first mortgage and to enter into possession and pay the rents and royalties and proper expenses of working, and were not liable for loss resulting thereby.*

Such directors are in a different position from trustees, and are at liberty to accept securities which trustees could not accept.

Small v. Smith (Law Rep. 10 App. Cas. 119) explained and distinguished.

This was an action by the Sheffield and South Yorkshire Permanent Building Society, in liquidation, against certain of

the former directors of the society and the legal personal representatives of two deceased directors, seeking a declaration that the directors who were defendants, and the estates of the deceased directors, were liable to make good to the society certain sums advanced out of the assets of the society to one Thomas Joseph, upon the security of certain leasehold collieries in Wales, and also certain sums expended out of the assets of the society for the preservation of those securities and the maintenance and working of the collieries.

The plaintiff society was originally formed under the provisions of the Act 6 & 7 Will. 4. c. 32, under rules which were originally certified on the 24th of August, 1868, and were subsequently altered and certified on the 19th of May, 1874. After the passing, on the 30th of July, 1874, of the Building Societies Act of 1874 (1), the rules were again altered

(1) The material provisions of the Building Societies Act, 1874, are as follows:—

Section 13: "Any number of persons may establish a society under this Act, either terminating or permanent, for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate by way of mortgage; and any society under this Act shall, so far as is necessary for the said purpose, have power to hold land, with the right of foreclosure. . . . Provided always that any land to which any society may become absolutely entitled by foreclosure or by surrender or other extinguishment of the right of redemption, shall, as soon afterwards as may be conveniently practicable, be sold or converted into money."

Section 16: "The rules of every society hereafter established under this Act shall set forth:—(3) The purposes to which the funds of the society are to be applied and the manner in which they are to be invested."

Section 25: "Any society under this Act may from time to time as the rules permit invest any portion of the funds of the society not immediately required for its purposes upon real or leasehold securities, or in the public funds, or in or upon any Parliamentary stock or securities, or in or upon any stock or securities payment of the interest on which is guaranteed by authority of Parliament. . . . And for the purpose of investments in the public funds or upon security of copyhold or customary estate, the society or the board of directors or committee of management thereof may from time to time appoint and remove trustees."

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by the society, and the rules so altered were on the 1st of July, 1876, certified as being registered under that Act. Those rules continued in force down to the commencement of the winding-up of the society.

So far as material the rules provided as follows :—

1. This society shall be called "The Sheffield and South Yorkshire Permanent Building Society." Its objects are to raise by the subscriptions of the members a stock or fund for making advances to members on security of freehold, copyhold, and leasehold estate by way of mortgage.

10. The management of the society's business shall be under the control of a board of directors.

11. The board of directors shall be composed of not less than six or more than twelve members of the society, and there shall be a surveyor, solicitor, two auditors, and a secretary.

12. The directors and auditors shall be elected at the annual meetings of the society by vote of the members.

13. The solicitor, surveyor, and secretary shall be considered as permanent officers, and shall not be removed from office except by a majority of two thirds of the directors present at a meeting specially called for the purpose.

14. The directors and all other officers of the society shall be, and are, hereby indemnified and saved harmless out of its funds and property from and against all losses, costs, charges, damages, and expenses which they may incur or be put unto, in or about the execution of their respective offices, trusts, and services ; and none of them shall be answerable for any act or default of any other of them, or for the insufficiency or deficiency in the title or otherwise of any security whatsoever which shall be taken for the repayment of any advance, unless the loss arising by such means shall happen through their own neglect or default."

17. The directors shall meet at least once a month for the transaction of business.

19. The board shall have full power and discretion to conduct the affairs of the society according to the rules, to make

by-laws not inconsistent with the rules for the guidance of the officers and members in carrying the rules into execution, to appoint agents and committees of directors, and also to appoint, and from time to time remove, trustees for the purposes mentioned in the 25th section of the Building Societies Act, 1874 ; they shall also have power (a) to invest any portion of the funds of the society not immediately required for its purpose according to section 25, Building Societies Act, 1874 ; (c) to receive deposits on loans at interest from the members or other persons, or from corporate bodies or joint-stock companies, not exceeding two thirds of the amount for the time being secured to the society by mortgages from the members ; (g) to do such other acts and deeds as are authorised by these rules or by the Building Societies Act, 1874.

24. The secretary shall conduct the general business of the society under the control of the directors.

25. The surveyor of the society shall be allowed for every valuation and survey of property such amount as the directors may decide, having regard to the extent and value of the property.

26. The solicitor shall transact the legal business of the society and investigate the title to all property offered as security, and, where such title is not deemed by him good and sufficient, shall render a report thereof in writing to the directors. He shall prepare all mortgages and deliver to each mortgagor a schedule of all deeds and documents deposited by him with the society, and shall furnish to the auditors a copy of all such schedules relating to properties mortgaged. He shall be responsible for the safe custody of all deeds and documents deposited by mortgagors with him, and shall attend the auditors in their inspection of the schedules. He shall be at liberty to attend any meeting of the directors, and may take part in any discussion, but shall not have power to vote.

47. The funds of the society shall be applied by and at the discretion of the board in making advances to members in respect of the shares held by them on legal or equitable mortgage of freehold,

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copyhold, or leasehold property, for such periods and at such rate of interest as the board may from time to time approve. Such commission in respect of each share advanced to any member as may from time to time be determined by the board shall be deducted from the amount to be advanced, or shall be paid in such other way as may be agreed upon between the board and the member offering the security.

48. Any person desirous of receiving an advance or of ascertaining what amount will be advanced upon any property shall give to the secretary, on a form supplied for that purpose, a description of the premises intended to be offered as security. The surveyor's fee for examining the property must be paid at the same time.

49. When the directors are of opinion that the premises are a sufficient security, and the solicitor is satisfied that the title to the property is satisfactory, the amount granted shall be paid to the borrower on his executing a mortgage of the premises in such form and with such conditions as the solicitor shall require, and depositing the same, with all other title-deeds, with the society.

50. When a member shall require an advance for the purpose of building, such members shall be entitled, on the mortgage being executed, to receive the amount by instalments as the building progresses. When the buildings are finished to the satisfaction of the directors, the balance of the advance shall be paid after deducting all interest and other charges due at the time.

51. Should any member after receiving a portion of his advance leave the buildings unfinished, the directors may either sell such premises or complete the same at the cost of the member, and the money paid, with the attendant expenses, shall be a charge upon the premises, with interest at six per cent. per annum.

53. Whenever any property mortgaged to this society shall be subject to a chief or ground rent, the owner shall produce to the secretary a receipt for such rent within twenty-one days after it becomes due. And in case the rent shall not be

duly paid, the directors may order the amount to be advanced out of the society's funds and charged to the member, with a fine of one shilling per pound per month till the same be repaid.

54. No alteration shall be made to property mortgaged to the society without first obtaining the consent of the directors, and any member making alterations without such consent shall be fined in such an amount as they may determine, and they may require the advance to be repaid.

60. The monthly repayments in respect of a loan of 100*l.*, including interest, shall for the following terms be—five years' term, 1*l.* 19*s.* 1*d.*; seven years' term, 1*l.* 9*s.* 4*d.*; ten years' term, 1*l.* 2*s.* 2*d.*; twelve years' term, 19*s.* 4*d.*; fourteen years' term, 17*s.* 6*d.*

69. The surplus profits, if any, after providing for interest on deposits and investing shares, for all losses by bad and doubtful debts or securities, and for all expenses properly chargeable, shall be apportioned as a bonus among the holders of investing shares.

The transactions complained of in this action commenced in 1878. Down to that time the society had carried on a considerable business with very considerable success, the average annual dividend being nine per cent.

In 1878 there were twelve directors: John Aislewood, Alfred Bennett, Henry Bloor, Thomas Charlesworth, Robert Thomas Eadon, John Taylor, John Wilson, Simeon Hayes, Joseph Brailsford, Alfred Allott, who were defendants to this action; and Robert Leader and Henry Loxley, since deceased, whose estates the plaintiffs sought to make liable. Of these, the first seven continued directors until the winding-up of the society in July, 1886. Hayes continued a director till April, 1886; Brailsford till February, 1884; Allott till December, 1881; Leader till March, 1881; Loxley till April, 1882.

Allott, who was the chairman, was a member of a firm of accountants in Sheffield. He was also interested in colliery properties, and had had a large experience in colliery matters. He became chairman in 1874, having previously been secretary.

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The other directors had no special acquaintance with colliery business.

The solicitor of the society was George Edward Webster, of the firm of Webster & Styring. The secretary was John Kidner, Allott's partner. The surveyor was a Mr. Innocent, an architect practising in Sheffield. He had no knowledge of collieries.

Early in 1878, Mr. Thomas Joseph made enquiry of Mr. Allott as to whether he could arrange an advance of 20,000*l.* on mortgage. The matter was entertained by Mr. Allott, and some information as to the nature of the proposed security, which consisted of Mr. Joseph's interest in certain collieries in South Wales, was furnished to him in three letters, dated the 21st and 22nd of February and the 1st of March in that year. On the 3rd of April the subject was brought before the directors of the society, but they declined to come to any definite conclusion without further information.

On the 5th of April Mr. Joseph wrote to Mr. Allott a letter, the material part of which was as follows:—

"Assuming that you can obtain the loan for me, will you let me know at Tydraw Treherbert, if possible, in the meantime, what would be your proposed rate of interest, time of repayment, and the commission per cent. upon the amount. Lawyer's costs and all other expenses to be added. The property is so well known to the following leading mining engineers in the district, that by reference to any of them a valuation could be obtained in a few days' time—Mr. William Thomas Lewis, Aberdare; Mr. Wm. Adams, Cardiff; Mr. Evan Daniel, Swansea; Mr. Richard Bedlington, Aberdare; Mr. Herbert Kirkhouse, Pendyren's Colliery, Pontypridd. My solicitor, Mr. G. F. Hill, of Cardiff, will satisfy you as to the title, and give all assistance required in the matter. Enclosed herewith I send a statement of particulars of securities offered, drawn up by Mr. Hill. You will observe that I have put the sum required at 25,000*l.*; but, if your clients cannot arrange for that amount, I shall be content with 20,000*l.* You will see from the particulars that I have (or Mr. Hill for

me) named at the end a source from which the loan can be repaid, if required, and the trustees referred to therein will, if the loan be 25,000*l.*, give an undertaking as security to the proposed mortgagee to that effect."

The particulars were headed, "Particulars of security upon which a loan of 25,000*l.* is required," and were as follows:—

"1. A first mortgage upon a residence called Tydraw, and 8 cottages, situated in the Rhondda Valley, Glamorganshire, held under a lease from the Earl of Dunraven, of which 39 years are unexpired; also the agricultural surface of 900 acres, with tipping and other rights (worth 3*l.* per acre per annum when exercised) over 600 acres of land in the same valley, held under the same lease. The rent payable in respect of the whole of the above is 90*l.* per annum. The estimated value of the above is 10,000*l.*

"2. A first mortgage upon all the minerals beneath 620 acres of land close to the property comprised in head No. 1, held for a term of 60 years from the Earl of Jersey, from December, 1869, at 500*l.* per annum certain rent, but with the usual average clause. The royalty is 6*d.* per ton of 2,520 lbs. The estimated value of this lease is 20,000*l.* and upwards. There is no obligation to sink pits on this property, and it comprises the best South Wales steam coal.

"3. A second mortgage upon Dunraven colliery, comprising all the minerals beneath 995 acres of land in the Rhondda Valley, held under leases granted in 1857, for terms of which 39 years are unexpired, at certain rents in the aggregate of 1,200*l.* per annum, with the usual average clauses, and at royalties averaging in respect of a portion of the taking 8½*d.* for thick seams and 6*d.* for thin seams of coal per ton of 2,520 lbs., averaging in respect of the remainder of the taking 6½*d.* for thick seams and 5*d.* for thin seams of coal per ton of 2,520 lbs.; also all the plant, workshops, engines, and appliances connected with the colliery, and including 24 houses held in connection with the colliery. There are a pair of large pits sunk on the colliery, both fitted up with machinery capable of raising nearly 1,000 tons per

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day from each pit. The colliery is in regular work, as all the coal raised from it has been sold to a substantial firm for four years to come at the trade prices of the time and on cash payments. The colliery and property enumerated under head No. 3 fetched 155,000*l.* when sold in 1872. There is a power in one of the leases under which 395 acres of the minerals are held to renew for a further term of 40 years at same rents, royalties, and terms, upon payment of a sum of 100*l.* This colliery comprises the best South Wales steam coal.

"4. A second mortgage upon 100 houses, 4 houses, and 2 schoolrooms, adjoining the above colliery, held under leases lately granted for original terms of 99 years at low ground-rents. The sum of 85,000*l.* has been spent since 1872 in the erection of these houses, and the above-mentioned workshops, engines, and appliances, and in developing the underground workings connected with the colliery, making with the above 155,000*l.* the sum of 240,000*l.*"

"NOTE.—The present owner purchased in 1876 all the property enumerated under heads 3 and 4 (and which had cost 240,000*l.*) for 80,000*l.*, of which last-named sum he has paid 20,000*l.*, and the remainder (60,000*l.*) is secured by a mortgage of the colliery and property comprised in heads 3 and 4. This 60,000*l.* is payable as follows: 20,000*l.* now due, and 40,000*l.* in October, 1881. The present owner intends to apply 20,000*l.*, part of the 25,000*l.* he seeks now to raise, in payment off of the instalment of 20,000*l.* now due to the existing mortgagees. The first charge on the colliery and property comprised in heads 3 and 4 would then stand at 40,000*l.* only. It should be also stated that the present owner has, since he purchased in 1876, laid out 5,000*l.* in completing underground works at the colliery.

"NOTE.—The trustees under the present owner's family settlements will be receiving about 22,500*l.* from the trust property, which sum (when received) they are willing to lend upon the security of a second charge of the colliery and property comprised in heads 3 and 4, and with which money any person now lending the

25,000*l.* can (if so desired) be paid off to the extent of the amount received by the trustees, the balance being made up at the time by the present owner of the colliery and property."

Mr. William Thomas Lewis (now Sir Wm. Lewis) was a mining engineer of great eminence. He was the agent of the Marquis of Bute and other large colliery proprietors in South Wales.

On the 10th of April Mr. Allott wrote to Mr. Lewis, whose name stood first on the list of mining engineers mentioned in the letter of the 5th of April, 1878, a letter in which he said, "Mr. Thomas Joseph has authorised me to ask your opinion of his colliery at Treherbert as a security for a loan of 25,000*l.* as a second mortgage after the balance of 40,000*l.* secured by first mortgage. Mr. Joseph offers as further security his house at Tydraw, and an unopened coal-field of which he holds a lease." On the 11th of April Mr. Lewis replied, "I am favoured with yours of yesterday's date with reference to the value of Mr. Thomas Joseph's coal and house property at Treherbert as a security for a loan 25,000*l.* I am, and have been, intimately acquainted with the whole of the property set forth by Mr. Joseph as the proposed security for the amount he requires, and I have no hesitation in stating that it is more than abundant for such an advance as he requires, in addition to the 40,000*l.* first mortgage. A very large sum of money has been expended on the property during the last four or five years, in cottages, workshops, and other permanent erections, and also in works necessary for the development of the minerals, and I believe, if you had time to inspect the property yourself, you would feel satisfied that the security offered is amply sufficient for the protection of you and your friends who purpose making the advance. Perhaps I should add that I am also well acquainted with the trust property which Mr. Joseph offers as collateral security, and which embraces an interest in some of the best steam coal properties in the district. If you purpose making an inspection of the property, and if you think it would be any advantage my meeting you on the ground,

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it would afford me pleasure to do so upon having two or three days' notice."

On the 15th of April the matter was again brought before the board, and the letter of the 5th of April was communicated to the meeting. Mr. Allott, according to the defendant Brailsford, stated that he had selected Mr. Lewis as being the first on the list, and the directors approved the choice, relying on the fact that he was the Marquis of Bute's agent. The minute stated as follows: "Mr. Allott reported that since the last meeting he had seen Mr. Joseph in London, and had made further enquiries as to his position and character. One of Mr. Joseph's references was Mr. William Thomas Lewis, the agent of the Marquis of Bute. A letter from him was read to the board, stating amongst other things that, from his knowledge of the property, he had no hesitation in stating that there was ample security. Mr. Allott proposed to visit the property next week, and requested one of the directors to accompany him. The application is for 25,000*l.*, on security of second mortgage of Mr. Joseph's colliery property, cottages, schools, &c.; first mortgage of his house and grounds, which he estimates to be worth 10,000*l.*; with a charge on certain trust property with the consent of the trustees, which has been valued at over 20,000*l.* The proposal was very favourably entertained, and it was resolved that, should the facts stated be substantiated on further enquiry, the loan would be granted." It was arranged by Mr. Allott and Mr. Lewis that they should meet at the colliery on the 23rd of April, and they met accordingly, and made certain investigations with reference to it, and on the 27th of April Mr. Lewis wrote to Mr. Allott as follows: "I enclose, as promised, brief remarks upon my inspection of this property, which I hope will be satisfactory to you. I don't know whether I am supposed to be acting for you or for Mr. Joseph in the matter; but as a rule the parties making the advance include my fees in the costs of the transaction." This letter enclosed a report, which was in the form of a letter to Allott. It commenced: "In compliance with your request, I visited the Dunraven colliery on Tuesday

last, with the view of advising you as to the condition of the workings and the general prospect of the property, having regard to its successful competition with similar properties in the steam coal trade." Then followed some remarks on the nature of the security, and the report concluded as follows: "As I mentioned to you in my letter of the 11th inst., I am intimately acquainted with the Ferndale collieries and other properties included in the trust estate which is intended as a collateral security. I have not inspected those collieries very recently, but from my general knowledge of them, and particulars obtained soon after the death of the late Mr. Frederick Davis, in my opinion the value of Mr. Joseph's interests may be safely assumed at 23,000*l.* Taking all matters into consideration as set forth in the particulars of security which you were good enough to lend me, it appears to me, as far as I am able to judge of the value of such properties from a considerable experience in this and other districts, that there is an ample margin of value beyond the amount sought by Mr. Joseph; and, therefore, that you and your friends will be sufficiently protected for the advance of 25,000*l.* as proposed."

In the meantime the solicitors of Mr. Joseph and the society were put into communication as to the title. Mr. Hill, Mr. Joseph's solicitor, on the 18th of April forwarded to Mr. Webster, the society's solicitor, the abstracts of title and particulars of the security, and on the 25th of April Mr. Webster made certain requisitions thereon, one being to the effect that receipts for the last rents and royalties due were to be produced on completion, to which on the 30th of April Mr. Hill replied that those receipts would be produced. This was never done, and in fact at the date of the advance the rents and royalties were in arrear to the extent of 3,000*l.*

On the 1st of May a board meeting took place, as to which the minute stated as follows: "Mr. Allott reported that he went to South Wales on Monday week and looked over the property with Mr. W. T. Lewis, mining engineer, and made enquiries as to all the securities referred to in the last

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minutes, and inspected Mr. Joseph's books, and with Mr. Lewis examined the costs. He requested Mr. Lewis to write a short report, giving his opinion as to the securities. This report was read to the directors, and was of a very satisfactory character. From all that Mr. Allott could ascertain he had confidence in recommending that the loan be granted. Unanimously resolved accordingly." The report referred to was the letter of Mr. Lewis of the 27th of April.

Early in May difficulties were raised by the society's solicitor as to the power of the trustees of the settlement referred to in the particulars to lend their trust funds on the security of a second mortgage. With reference to this the opinion of counsel was taken, and it was adverse to the existence of such power, and the completion of the loan was therefore delayed.

On the 25th of May Mr. Lewis wrote to Mr. Allott as follows: "I was sorry to learn from Mr. Hill, whom I saw in passing through Cardiff yesterday, that further difficulties have been suggested by consultation with counsel. It appears to me that so much has been said of late respecting this collateral security, that the original security of the collieries &c. and Mr. Joseph's personal covenant have been almost lost sight of. Considering the value of the colliery security and Mr. Joseph's covenant, I can hardly conceive, with your knowledge of the properties and the parties, that, even assuming the trustees have no power, as suggested by counsel, you would feel justified in declining the business altogether. I will not trouble you by repeating the arguments I adduced at our meeting at St. Pancras; but I hope to hear that upon a review of the whole of the facts your friends have agreed to make the advance upon the terms then understood." In reply to this letter Mr. Allott wrote to Mr. Lewis on the 27th of May, requesting him to give his opinion as to the value of the colliery and the other properties, separating the items, and giving the value which at that time he attached to each, instead of summarising the items and stating his opinion that there was ample security, as had been done in the letter of the 27th of April; and he also

asked Mr. Lewis to state to him confidentially his opinion as to the ability of Mr. Joseph to make the repayments to the building society, which would amount to 277*l.* 1*s.* 8*d.* per month. After receiving this letter Mr. Lewis made an inspection of the cottages and other buildings included in the security, and on the 30th of May he wrote to Mr. Allott a letter, which was as follows: "In further reply to your favour of the 27th as to the separate value I attach to the several items proposed to be included in the security in connection with Dunraven colliery, I beg leave to give you the following particulars—that is (1) Tydraw House with eight cottages held under a lease from the Earl of Dunraven, together with the agricultural land and tipping rights in connection with the colliery, which I estimate to be worth 5,880*l.* (2) The mineral lease of 620 acres of the Earl of Jersey's property, and under 360 acres of the property of the Marquis of Bute and Mr. J. Homfray, both of which adjoin the present Dunraven taking, which I estimate to be worth 14,800*l.* (3) The Dunraven colliery, with the mineral leases of 995 acres, with pits, levels, railway sidings, engines, and machinery, together with all the appliances necessary for an output of 1,000 tons per day; also including twenty-four workmen's cottages held therewith—which I estimate to be worth 92,960*l.* (4) The leases of 104 houses and two school-rooms, situate at a convenient distance for the use of the Dunraven colliery, which I estimate to be worth 16,900*l.*—(total) 130,540*l.* In fixing the above values I have taken what would be considered a fair average over a term of years, making, of course, due allowance for the risk incidental to the several descriptions of property, as also a deduction to cover a continuation of depressed trade."

As regards the ability of Mr. Joseph to make the repayments, Mr. Lewis made a verbal statement to Mr. Allott on the 4th of June, the effect of which was given in a letter of Mr. Allott to Mr. Kidner of that date. The part referring to Mr. Lewis's statement was as follows: "He says that Joseph is not dependent upon the colliery for his monthly repayments,

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and that for two years he can see his way to pay them entirely independently of the colliery. He will include in the security the Bute lease, which was not at first included, but which Mr. Lewis includes in his valuation." The Bute lease was the lease referred to in Mr. Lewis's report under head No. 2 as "The mineral lease under 360 acres of the property of the Marquis of Bute and Mr. J. Homfray."

On the 4th of June the matter was again brought before the board, and the minute stated as follows: "Thomas Joseph. The secretary reported that the collateral security for this loan turned out to have been settled by Mr. Joseph upon trustees for the benefit of his wife and children; and that in consequence of this, as some of the children were under age it was impossible to give a legal charge upon this collateral security, so far as the shares of those children who are under age are concerned. Notwithstanding this, however, so satisfied are the trustees that they will be perfectly safe in doing so, they will advance the whole amount on second mortgage to the colliery as soon as they receive it at the end of about five years, and out of this the money due to the society will be paid off. The three children who are now of age will give their consent, thus making three shares, amounting together to 7,500*l.*, legally secured to the society. Mr. Joseph deposits promissory notes amounting to about 2,500*l.* for advances made by him to different persons as security that the consent of another son will be given when he comes of age in about twelve months, and after this the notes are to remain as security for the assent of the other children. The collateral security may therefore be considered assured to the extent of 12,500*l.*, and the balance of the loan at the end of five years will be about 15,000*l.* Mr. William Thomas Lewis, the Marquis of Bute's agent, has also been requested to give a valuation of the separate properties proposed to be secured to the society, exclusive of that to which reference has just been made. He values the mineral leases, the house and surface rights, at 20,680*l.*, and upon this a first charge is given to the society. He values the

colliery and cottages at 109,860*l.*, upon which the society will have a charge subject to a first mortgage of 40,000*l.* Mr. Lewis's report was read containing the above figures, and also his letter in which he states that Mr. Joseph has other means, and is not dependent upon the colliery to make the repayments which will be due to the society. These circumstances having been considered, it was felt that there was ample security for the loan, and it was accordingly resolved that it should proceed, notwithstanding the alteration in the collateral security." The letter there referred to was, according to the evidence of the defendant Mr. Brailsford, that of Allott to Kidner of the 4th of June. Under this resolution the transaction was completed, and the mortgage money paid over on the 15th of June.

The properties which formed the subject-matter of the security given by Mr. Joseph were known as Dunraven, Hendrewen, Blaengwynfi, and Blaenselsig, and were all held under different titles. The Dunraven and Hendrewen properties abutted on each other, and on Blaenselsig, by which last-mentioned property they were entirely separated from Blaengwynfi. The Dunraven property included a residence called "Tydraw," and the surface of 335 acres, and the minerals under those 335 acres and 265 acres besides, making in all 600 acres, and the colliery works connected therewith, all held under a lease dated the 13th of April, 1858, for a term of sixty years from the 1st of November, 1856, at a dead rent of 800*l.* This lease contained covenants for the payment of the rent and royalties, and also a covenant by the lessee to work the mines demised in a proper and workmanlike manner, and to get and obtain from every part of the mines and strata so much of the minerals as could reasonably be got thereout, and *bona fide* and effectually to carry on and prosecute the works to the best of the lessee's judgment, skill, and discretion. There was a special power of distress, and a power of re-entry for non-payment of rent, but not for breach of covenant. The Dunraven property also included 100 cottages, held under a separate lease dated the 14th of October, 1875, for a term of

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ninety-nine years from the 1st of May, 1875, at a rent of 160*l.* The 900 acres referred to in the particulars consisted of the 335 acres above mentioned, and of 565 of mountain land held by Mr. Joseph upon a yearly tenancy. The 600 acres over which the tipping rights extended also included the 335 acres.

The Hendrewen property consisted of 395 acres, held under a lease dated the 26th of August, 1857, for a term of sixty years from the 1st of January, 1857, at a dead rent after the 1st of January, 1862, of 400*l.* This lease contained a clause under which the lessee could on certain conditions obtain a lease for a further term of forty years. It also contained a covenant on the part of the lessee to work the minerals uninterruptedly, regularly, properly, and productively, and a proviso for re-entry for non-payment of rent or default in the observance or performance of the lessee's covenants.

The Blaengwynfi property consisted of the minerals under 620 acres held under a lease dated the 28th of January, 1875, for a term of sixty years, from Christmas, 1869, at a dead rent of 500*l.* This lease contained a covenant on the part of the lessee to win and get the minerals regularly and effectually so as to work the largest possible quantity of marketable coal, and other minerals, without causing any unnecessary damage or injury to the demised premises, and a power of re-entry for non-payment of rent or default in observance or performance of the lessee's covenants.

In 1878 the Dunraven property and Hendrewen property were both worked from two shafts sunk in the Dunraven property. There was no separate shaft in Blaengwynfi, and the minerals on that property could not be got at from Dunraven or Hendrewen, except by passing through Blaenselsig.

The Blaenselsig property was not mentioned in the particulars originally laid before the plaintiff society. It was referred to for the first time in the course of the negotiations in Mr. Lewis's letter of the 30th of May and in Mr. Allott's of the 4th of June, in both cases in terms calculated, in the opinion of the Court, to lead to the belief that it, like the other

properties, was held under a lease. In point of fact, no lease of Blaenselsig nor any binding agreement for a lease ever existed.

Part of the Dunraven property (namely, the colliery, and minerals, and cottages), and the Hendrewen property, were subject to a mortgage dated the 1st of November, 1876, to the London and South Wales Coal Company. The sum secured by this mortgage was originally 70,000*l.*, of which 10,000*l.* had been paid off prior to 1878, and 20,000*l.* was paid off by means of the advances made by the plaintiff society on the 15th of June, 1878, leaving 40,000*l.* remaining on the security, and payable according to the terms of it on the 31st of October, 1881.

Upon these properties the securities created in favour of the plaintiff society were two. First, a mortgage dated the 15th of June, 1878, made between Joseph of the one part, and Kidner as secretary of the plaintiff society of the other part, by which the Blaengwynfi property, and so much of the Dunraven property as was unencumbered, were mortgaged by demise in common form to Kidner to secure 15,000*l.* and interest. Secondly, a mortgage bearing the same date, and made between Joseph of the one part and the plaintiff society of the other part, in the ordinary form of a building society's mortgage, whereby Joseph, who was therein described as a holder of 250 shares in the society, covenanted to repay the 25,000*l.* advanced to him by monthly instalments of 277*l.* 1*s.* 8*d.* each, and demised all the properties (subject to the mortgages for 15,000*l.* and 40,000*l.*) to the plaintiff society by way of mortgage to secure 25,000*l.* and interest. This mortgage contained powers to enable the society to enter into possession or receipt of the rents and profits of the mortgaged premises, and also to appoint a receiver and to keep the collieries in work as a going concern, and to work the various properties in accordance with the leases under which they were held. Mr. Joseph was entered on the register of members as the holder of the 250 shares mentioned in the mortgage deed, although no formal allotment was made to him, it not being

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the practice of the society on such occasions to make formal allotments of shares. The terms of repayment mentioned in the second of the two mortgages were in accordance with rule 60.

In addition to these mortgages there was a collateral security embodied in three instruments, all dated the 15th of June, 1878. The first was made between Mrs. Joseph, the wife of Thomas Joseph, and David Davis Joseph, Mary Louisa Hutchison, and Thomas Morgan Joseph (three of the children of Mr. and Mrs. Joseph), of the first part; the trustees of an indenture of settlement of the 28th of September, 1876, of the second part; the trustees of an indenture of settlement of the 15th of January, 1877, of the third part; and the plaintiff society of the fourth part. It recited that Mrs. Joseph was entitled for life for her separate use, and that the three children (as regards Mrs. Hutchison also for her separate use) were respectively entitled in certain shares in remainder expectant on the death of their mother, to certain funds vested in the trustees respectively, subject to the trusts of the two settlements respectively, and it witnessed that parties of the first part thereby required and directed the trustees of the settlements to lay out and invest so much of the trust funds as might thereafter come to their respective hands in the redemption, and taking up of the securities given to the plaintiff society, or such part thereof as the trust funds respectively would be competent to redeem. The second was a mortgage signed by the trustees of the settlements, whereby they undertook to guarantee that they would invest and apply such portion of the funds which might come to their respective hands for the benefit of Mrs. Joseph and her children, under or by virtue of the said settlements respectively, in obtaining a transfer of the whole, or such part as the said trust funds would permit, of the securities held by the plaintiff society upon the property of the said Thomas Joseph. The third was an agreement between Joseph of the one part and the plaintiff society of the other part, whereby it was recited, amongst other things,

to the effect that Joseph was entitled to a lease or leases of Blaenselsig, to be granted by the trustees of the Marquis of Bute and John Richards Homfray, and was also the holder of thirteen promissory notes for sums amounting in the whole to 2,414*l.* 13*s.* 2*d.*; and it was agreed that when and so soon as the lease or leases of Blaenselsig should be granted, he, Joseph, would deposit the same with the society, to be held by them as collateral security for the repayment of the amount remaining owing in respect of the advance of 25,000*l.* and interest, and would execute to the society a valid mortgage of the premises to be comprised in the said lease or leases, securing the amount remaining due to the society; and that the society should hold the promissory notes as security or guarantee for the infant children of Mr. and Mrs. Joseph, giving to the settlement trustees authority to apply their shares of the settled moneys towards payment of the amount due to the society, and the trustees applying such shares accordingly, and that in the event of either of them declining to give such authority, or the trustees not applying such shares in payment as aforesaid, the society might thereupon recover the amount of the promissory notes from the makers thereof.

In pursuance of this last-mentioned agreement, the fourth child of Mr. and Mrs. Joseph, on the 22nd of October, 1879, executed a document similar in terms to that of the 15th of June, 1878, signed by Mrs. Joseph and three of the children.

Between June, 1878 (when the advance was made), and the 31st of October, 1881 (when the 40,000*l.* became payable under the first mortgage of the Dunraven property), considerable payments in respect of the instalments payable to the plaintiff society had been made by Mr. Joseph, but the monthly payments were repeatedly in arrear. According to the ledger account, in the books of the plaintiff society on the 1st of November, 1881, there was due on the securities given by Mr. Joseph to the society the sum of 19,448*l.* 7*s.* 2*d.* Mr. Joseph failed to pay the 40,000*l.* which became due on the original mort-

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gage on the 31st of October; and in November, 1881, the first mortgagees threatened to enter into hostile possession of the mortgaged premises. The matter was brought before a board meeting on the 11th of November. The minute stated as follows:—"The solicitor reported that Mr. Gray of London, the solicitor for Mr. Joseph, who telegraphed to us on the 21st ultimo as to 'expected early completion of arrangements to pay off our loan, called upon him yesterday, and stated that the negotiations had fallen through, that the first mortgagees of the colliery and cottages, who want 41,000*l.*, which became payable on the 31st of October, were about to enter into hostile possession of the mortgaged premises. Explanations were given as to the other properties on which the society has a first charge, and the most important matter for consideration at present is whether it is desirable that the society should find the 41,000*l.* and take up the first mortgage on the colliery, or should trust entirely to the other securities which are held, which should be ample if the valuations are reliable. Resolved, that the solicitor make personal enquiries in London as to the action taken by the first mortgagees and the general position of the negotiations, and that the chairman and secretary be requested to make an early visit to the colliery to investigate the state of Mr. Joseph's affairs generally and the working of the colliery, and report to the board at their next meeting."

As has been already stated, the value placed by Sir William Lewis on those portions of the Dunraven property on which the plaintiff society had a first charge, and the unencumbered Blaenselsig and Blaengwynfi properties, amounted to 20,680*l.*, which was just sufficient to cover the indebtedness of 19,448*l.* 7*s.* 2*d.* Mr. Brailsford (who had succeeded Mr. Allott as chairman), Mr. Kidner (the secretary), and Mr. Webster (the solicitor), accordingly made investigations and enquiries as proposed in the last minute, and wrote separate reports, which were discussed at the next board meeting, which took place on the 17th of November. Mr. Brailsford reported as follows:—"Joseph's foreclo-

sure of first mortgage of 40,000*l.* I desire to record for the information of my colleagues that when this matter was referred to myself, Mr. Kidner, and Mr. Webster, I entered upon its consideration with a strong determination not to embark in this undertaking any such large sum as 40,000*l.* if it could possibly and safely be avoided. To all appearance we were sufficiently protected. We had (1) a first charge on land embracing important mineral rights, and valued to us by the agent of the Marquis of Bute at 14,800*l.* (2) A first charge on Mr. Joseph's house and surface right of a large tract of land, as valued by Mr. Lewis at 5,800*l.* (3) An undertaking to pay over to us in 1883 in reduction of the mortgage of the Dunraven colliery certain moneys, being the interest held by the trustees of Mrs. Joseph and her children in the colliery of David Davis & Sons, and which interest was assumed to represent not less than 10,000*l.* as affecting those of the children of age, and upwards of 20,000*l.* as affecting the whole children, who it was represented would assign as they arrived at age; and meanwhile we held certain promissory notes as collateral security for their fulfilling this undertaking. These three securities represented an assumed value of about 30,000*l.* In addition to these, we had a second mortgage upon the Dunraven colliery, subject to the prior charge of 40,000*l.* to its former owners the South Wales Company." Then, later on, he said: "The result of communications made to me by Mr. Kidner, and gathered from Mr. Gray, of the firm of Bell, Brodric & Gray, whom we interviewed with Mr. Joseph in London, was as follows:—No. 1. As to this security, it was land on which no shaft had been sunk, and which at present we could have no access to except by incurring the cost of sinking. It is intended to work it from Dunraven Colliery, but at present Mr. Joseph has not acquired a lease of minerals lying between it and Dunraven. Except therefore held with Dunraven, it did not appear that there was any immediate realisable value in this security. No. 2. This security is available for immediate

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sale, and, allowing for contingencies, it could not safely be estimated to realise more than 3,000*l.* No. 3. This security has reference to a valuable colliery, which, even in the recent depressed state of the trade, has realised good profits. Mr. Joseph's interest last year amounted to upwards of 2,000*l.* It is the income from this source which has served for the personal requirements of Mr. Joseph's family during the period referred to in Mr. Kidner's report when the Dunraven colliery has not been remunerative. The value of the interest of Mr. Joseph's children in this property was said to be over 20,000*l.*, and as it appeared that, according to our security, this had to be paid out and invested in the Dunraven colliery in 1883, I was disposed to stand upon this security rather than raise 40,000*l.* to rescue the property from the first mortgagees. Mr. Gray, however, pointed out that if we allowed the first mortgagees to foreclose, this security was perfectly valueless to us. The undertaking of the children of Mr. Joseph and their trustees went only to invest the money in Dunraven, and if this fell into the hands of the first mortgagees, and became their absolute property, we had no further value in it. This view, which was confirmed by Mr. Webster, was a complete surprise to me. Mr. Webster read to me the case which at the time the loan was granted he submitted to counsel for advice and his opinion thereon. I note, however, that neither in the case or opinion is there any reference made to the contingency which has arisen—that is, the possibility of the mortgagees of Dunraven being able to foreclose before the period at which the undertaking of the children and trustees under Mr. Joseph's settlement comes into operation."

Mr. Kidner's report contained the following statements as to Joseph's financial position:—"The colliery has lost money every year. Probably 2,000*l.* or 3,000*l.*, besides interest on capital 3,000*l.*, say 5,000*l.* altogether. This accounts for Mr. Joseph's position. During 1881 it will about balance, but next year I confidently anticipate a large profit; Mr. Joseph expects 30,000*l.*, or an average of 4*s.* per ton, which would require the price of

coal to be 10*s.* I think it not at all improbable that this price will be generally obtained at Midsummer next; but, allowing for the first six months, and for contracts running afterwards, I think 15,000*l.* profit would be a reasonable estimate for 1882. With a smaller output, and less favourably circumstanced as to management, Mr. Joseph assures me that the colliery made 150,000*l.* profit in three years, when the limited company had it in 1873-5. Mr. Joseph's books are not complete or written up in a manner to enable me to ascertain his financial position. . . . Mr. Joseph and his solicitor say a large sum is due for arrears of royalties, altogether about 14,000*l.*, against which, however, there are short workings, which he hopes to work up to a good amount. He says the arrears will not be pressed, as his case is one among many others just now in South Wales owing to the bad times, and they will be liquidated gradually."

The proposals made by Mr. Joseph, as set out in Mr. Brailsford's report, were these: "(1) To grant an absolute transfer of the wife and children's interest in Davis' Colliery, or execute any security which should secure his property to us. (2) In addition to the present charge upon his house, to give an undertaking to execute a bill of sale upon his furniture, &c., which Mr. Kidner thinks would be worth more than 1,000*l.* (3) To give us mortgage over his lease and tenant-right of a farm, which he estimates at 2,000*l.*, and undertakes to give a bill of sale over stocks to the value 1,000*l.* (4) To appoint Mr. Kidner on our behalf as receiver, with authority to pay over to us all colliery income beyond current working expenses. (5) To give us authority at once to transfer to the School Board, and receive 1,980*l.* in payment, of a piece of land agreed to be sold for a public school. (6) The loan to be for twelve months, 5,000*l.* being given us as a commission or bonus, and the total sum to bear interest at ten per cent. Any sum received from Mr. Joseph to be credited in reduction of principal and interest." Mr. Brailsford's report continued: "(7) In the course of conversation, Mr. Joseph named that he

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had another small colliery (the Avon), which was charged with a mortgage of 8,000*l.* I omitted to name that this should be charged to and included in our security, but am sure Mr. Joseph will assent to it."

The minutes then stated the resolutions passed upon these reports, as follows: "After discussion it was unanimously resolved that the sub-committee be authorised to advance such sum (41,000*l.* or thereabouts) as may be necessary to take up the first mortgage of 40,000*l.* upon Mr. Joseph's property in South Wales. Resolved that Mr. Bennett be added to the sub-committee to meet Mr. Joseph and arrange with him as to the securities which he shall be required to give upon his furniture, leasehold farm, the Avon Colliery, and other property, and especially Mrs. Joseph's interest in D. Davis & Sons' partnership. Mr. Brailsford raised a question as to whether the directors were before aware of the uncertainty of our hold upon the interest in D. Davis & Sons, in the event of the colliery passing into other hands adversely. At the request of the chairman, the secretary reported that he had called upon Mr. Holdsworth to enquire as to the society having an overdraft of 35,000*l.* or 40,000*l.* for an advance which they contemplated making, which may be required within a few days. He said he would submit the matter to his directors on Wednesday next, or call a special meeting on Saturday or Monday if desired. But they would require the key of the deed-safe and a list of securities which should be given up when the advance was repaid. A resolution authorising this to be done was also necessary. Mr. Webster drew up the following, which was agreed to unanimously: 'Resolved, that in consideration of the Sheffield and Hallamshire Bank granting to this society a special advance of 40,000*l.*, the bank be and they are hereby authorised and empowered to retain the deeds of the society (which are now deposited with them for safe custody) as a security for any overdraft.'"

In pursuance of these resolutions, 41,000*l.* was on the 22nd of November, 1881, applied by the plaintiff society in

paying off the principal and arrears of the interest due on the first mortgage, of which some 40,000*l.* was borrowed from the bankers of the society.

By way of security for the repayment of the 41,000*l.*, Mr. Joseph signed an agreement, dated the 21st of November, 1881, by which it was agreed: (1) That in consideration of the sum of 41,000*l.* to be advanced by the society in payment of the moneys secured by the said indenture of the 1st day of November, 1876 (and which loan was to be repaid by the said Thomas Joseph on or before the 20th day of November, 1882), the said Thomas Joseph should pay to the society interest on the said sum of 41,000*l.* from the date of its payment up to the date when the same shall be repaid to the society, at the rate of ten per cent. per annum, and should pay to the society a bonus of 5,000*l.*, with interest at ten per cent. per annum from the date of the agreement, and should execute a mortgage to secure the advance, bonus, and interest. (2) That the purchase-money of the property which had been sold to the School Board of Ystradfydwg for the sum of 1,980*l.* should be paid to the society. (3) That the said Thomas Joseph should obtain, with all due diligence, a lease of the Blaenselsig minerals, and charge the lease, when obtained, in favour of the society as a collateral security. (4) That the said Thomas Joseph should, within one month from the date of the agreement, execute and deliver to the society a mortgage upon all his estate and interest in the Avon Colliery. (5) That the society should be at liberty to appoint as their agent or representative their present secretary, Mr. John Kidner, who might keep upon the Dunraven colliery a clerk, who should at all times be permitted to have access to all parts of the said colliery, and to the accounts, books, and vouchers of the concern. (6) That the said Thomas Joseph should charge in favour of the society the lease of a farm containing ninety-three acres or thereabouts, situate in the Vale of Glamorgan, and that in the event of the secretary certifying that the security was depreciating in value, or that the colliery was being worked at a loss, the said

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Thomas Joseph should execute to the society a bill of sale on the farming stock upon the said farm. (7) That until the moneys agreed to be advanced should be repaid, the said Thomas Joseph should not draw, by way of salary or otherwise, any moneys from the Dunraven colliery, except such moneys as might be required for the efficient working thereof.

In that agreement nothing was said as to Mr. Joseph taking any further shares in the society, nor was the advance of 41,000*l.* purported to be made to him as a member of the society, but he was entered in the register of members as having become, in December, 1881, an advanced member in respect of 410 additional shares. The completion of this portion of the transaction was reported to a board meeting on the 28th of November, 1881, and was approved. Subsequently, on the 21st of April, 1882, the first mortgagees—the London and South Wales Coal Company—executed a transfer to the plaintiff society of their mortgage-debt and security, and on the same date Mr. Joseph executed a mortgage, in favour of the society, of the Dunraven, Hendrewen, and Blaengwynfi properties. This security did not take the form of a building society mortgage, but that of a mortgage to secure the payment on the 21st of November, 1882, of 46,000*l.*; and, in addition to the usual powers, it contained clauses enabling the society to work the collieries, and to appoint Kidner as their agent and representative there, for the purpose of obtaining information as to the value of the security and the working and management of the mines.

From this time Mr. Joseph's affairs did not prosper. He made several attempts to dispose of the collieries, but without success. He was unable to work them at a profit, and ultimately, early in July, 1882, he became unable to pay the wages of the men employed at the colliery. He was largely in arrear with the payment of the royalties reserved by the Dunraven lease, and on the 23rd of August, 1882, Lord Dunraven, the landlord, distrained in respect of them on the loose plant of the collieries. On the 25th of August Mr. Joseph commenced proceedings for

the liquidation of his affairs, and a receiver was appointed. Under these circumstances, the directors, at a meeting held on the 31st of August, 1882, sanctioned an arrangement, under which the distress was not to be acted on for twenty-eight days from that date, on a payment being made by the society to Lord Dunraven's agent of 1,000*l.* a week, that Mr. Barber, the receiver in the liquidation, should take or retain possession on behalf of the mortgagees—that is to say, the plaintiff society—and should advance the money to pay arrears of wages, the mortgagees indemnifying him in the event of the assets not covering the wages. On the 28th of September another board meeting was held, at which it was reported that 2,000*l.* had been paid on account of royalties, and 1,000*l.* on account of wages, and that the colliery was being carried on by the receiver in liquidation, as agent for the mortgagees. On the 17th of October the board sanctioned the appointment of a manager of the collieries, and a payment of a further 1,000*l.* on account of royalties. Ultimately the society took complete possession of the colliery, and a Mr. Ralfe was appointed manager. Large sums were expended by the society in carrying on the colliery, and in payment of arrears of royalties and royalties accruing due to the landlords. The workings were not successful, and a very large net loss was thereby occasioned to the society, in addition to which there was an expenditure of upwards of 7,000*l.* for engines, boilers, machinery, &c. No lease was obtained of the Blaenselsig property, and all attempts to sell the other properties failed. The evidence shewed that the failure was due to the absence of a lease of Blaenselsig.

On the 22nd of July, 1886, an order was made, upon a petition presented by the society, that the society be wound up voluntarily under the supervision of the Court. Since the commencement of the liquidation the lessor of the Blaengwynfi property recovered possession on the ground of the breach of the covenant to work the mine.

The plaintiffs by their statement of claim alleged as follows:—

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Paragraph 7: "The Hendrewen minerals adjoin the Dunraven colliery. The Dunraven colliery and Hendrewen minerals are separated from the Blaengwynfi minerals by a tract of minerals (hereinafter called the Blaenselsig minerals) belonging to the Marquis of Bute and Messrs. Homfray. The Dunraven colliery had for some time past been worked by means of two pits. There was no separate pit for working the Hendrewen minerals, but it was possible to work them by instroke from the pit belonging to the Dunraven colliery. No pit had been sunk for working the Blaengwynfi minerals, and they had not been worked. The said Thomas Joseph, at the time of his application to the society, was in treaty with a Mr. Lewis, the agent for the Marquis of Bute, and Messrs. Homfray for a lease of the Blaenselsig minerals. It was of the greatest importance that such lease should be granted. The Dunraven colliery had been worked, and the main engines' planes laid out with a view to the working of the Dunraven and Blaenselsig minerals at a future date as a single undertaking. If a lease of the Blaenselsig minerals could not be obtained, a large outlay would be required in altering the roadways in the Dunraven colliery, and certain portions of the minerals could only be worked at an increased cost. It was, moreover, necessary to acquire the Blaenselsig minerals to enable the Blaengwynfi minerals to be worked by instroke from the Dunraven colliery through the Blaenselsig minerals."

Paragraph 18: "No proper valuation wasever made by the surveyor of the society, or any one else, on behalf of the society. The said Mr. Lewis never was instructed by the directors, or any one else, to act on behalf of the society and to protect its interests in the matter of the said loan, and he did not do so. He never made any proper valuation of the proposed securities. He was, moreover, the agent of the Marquis of Bute and Messrs. Homfray, owners of the Blaenselsig minerals. He was also a personal friend of the said Thomas Joseph. On both grounds he was desirous that the loan should be carried through, and throughout acted as an advocate of the loan."

Paragraph 19: "Even if the letters of the 11th and 27th of April, 1878, had been proper valuations, they would not have justified the advance, inasmuch as the said Mr. Lewis proceeded on the assumption that the said Thomas Joseph was entitled to the residence called Tydraw, with the 900 acres, and tipping right over 600 acres, as described by him, and also to a lease of the Blaenselsig minerals."

Paragraph 20: "The said Thomas Joseph had not entered into any binding agreement for a lease of the Blaenselsig minerals, as the directors well knew, and he was never able to procure the owners of the property to enter into any such agreement."

Paragraph 40: "Many efforts were made by the directors, before the winding-up, to find a purchaser for the Dunraven colliery and other properties comprised in the society's securities, but without success. The owners of the Blaenselsig minerals have not entered into any binding agreement to grant a lease, and they decline to accept the society as lessees; but they have expressed their willingness to grant a lease to a person approved by them as nominee of the society, upon the terms that 6,000*l.* shall forthwith be paid to them, representing dead rent from the date when the said Thomas Joseph first made an offer for a lease. The proposed lease also provides that the lessee shall, within two years, sink a winding pit, the cost of which has been estimated at 20,000*l.* The terms of the proposed lease are in other respects onerous. The society is unable to procure any person to accept the said lease as the nominee of the society. Without such lease, the properties comprised in the society's securities are unsaleable. In any case they could be sold only at an enormous loss to the society."

The defendant Allott and the legal personal representative of Henry Loxley did not appear or put in any defence, and the case came on as against them on motion for judgment in default of pleading. The other defendants appeared and defended the action. Some of them delivered separate defences, but they did not differ

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materially. Shortly stated, their defence was that they relied upon the reports of Mr. Lewis and the information obtained from Mr. Allott and honestly believed in the sufficiency of the security; that they instructed their solicitor to investigate the title as required by the rules, and that they were not aware that it was defective.

Several of the defendant directors were called, and deposed that at the date of the original security they were not aware either that there were any arrears of rent due from Mr. Joseph or that he had no lease of Blaenselsig; and further, that even at the date of the second security they believed that he had a valid agreement for a lease.

Sir William Lewis was also called as a witness. Referring to Blaenselsig he said: "Mr. Joseph had opened negotiations for the minerals under Blaenselsig, and his offer had been approved by Lord Bute and Mr. Homfray, the owners, and I regarded Mr. Joseph as having a claim to that property, although the lease was not granted. The exact position of matters was very fully explained to Mr. Allott. Mr. Joseph could have had a lease of the Blaenselsig minerals, if he had required it, on the terms proposed."

Rigby, Q.C., Buckley, Q.C. and Theobald, for the plaintiffs.—There are three heads of liability—the loan of 25,000*l.*, the loan of 41,000*l.*, and the expenditure incurred to maintain the collieries. With regard to the original loan, we submit, first, that it was *ultra vires* the society, as being altogether outside the Act of 1874; secondly, that it was *ultra vires* the rules; thirdly, that the directors were guilty of gross negligence. The only investment contemplated either by the Act of 1874 or by the rules was on security of freehold, copyhold, or leasehold estate. Here part of the security consisted of the personal undertaking of Mrs. Joseph's trustees, and of promissory notes held by Mr. Joseph, and we submit that that vitiates the whole; but, apart from the collateral security, the security was in reality a security on a business depending for its sufficiency upon the fluctuations of the market, and was not, in any proper sense

of the term, a security on leasehold property. The rules were framed entirely with a view to investment on building land; they provide for the appointment of a permanent surveyor, who has a definite duty to perform on every investment, and if the surveyor was incompetent to deal with the class of property proposed for investment it shews that such investment was not within the authority of the directors. See rules 13, 25, 50, 51, 53, and 54. This investment, therefore, was neither within the rules nor the Act. But assuming that the loan was not *ultra vires* the directors are liable for neglect of all ordinary precautions. It was the duty of the directors to obtain an independent valuer, and to furnish him with proper instructions, and the omission to do so shews a want of that reasonable and proper prudence which as directors they were bound to exercise in the service of the society. Until proper advice has been obtained the duty of a director is the same as that of a trustee; it is only when the time comes for exercising a discretion upon such advice that there is any difference in their duties. Here the valuer, Sir W. Lewis, was acting in the interests of the borrower, and he received no instructions from the directors. They cannot, therefore, claim the benefit of the Trustee Act, 1888, which assumes that the surveyor is independent and is properly instructed. To that extent *Fry v. Tapson* (2) is not affected by the statute. It was also a breach of duty to depute the whole matter to Allott, without making any enquiries whatever, and the directors are therefore liable for not discovering the defects of title.

With regard to the subsequent loan, it was not an investment at all, but simply a speculation, and it was not made to a member in respect of the shares held by him as required by rule 47, and we submit that the directors are liable for that both as being *ultra vires* and on the ground of negligence.

As regards the expenditure in rent and wages, we do not charge the directors

(2) 54 Law J. Rep. Chanc. 224; Law Rep. 28 Ch. D. 268.

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with negligence; but we say that it was *ultra vires*, as such expenditure was not expressly authorised by the rules, and was not necessarily incidental to the powers of the directors—*Small v. Smith* (3).

Upon the question of negligence they cited *The Charitable Corporation v. Sutton* (4), *Evans v. Coventry* (5), and *Overend & Gurney v. Gibb* (6).

Graham Hastings, Q.C., Sir H. Davey, Q.C., and Chadwyck Healey, for the first eight defendants.—The defendants are attacked on two grounds—first, *ultra vires*; secondly, recklessness and negligence. As to the first ground: The rules confer on the directors the largest possible powers; they may lend on any property of freehold, leasehold, or copyhold tenure, without any restriction as to the character of the property, and they may lend either on legal or equitable mortgage. It is said that the colliery is a business, but it is none the less leasehold property because it requires capital and labour to make it profitable. The same may be said of agricultural land. In the case of *The Blackburn District Benefit Building Society v. Ward* (7), directors were charged with breach of trust and negligence in lending money on the security of a colliery; but it was held by Bristowe, V.C., that the loan was not *ultra vires*. The rules contain nothing to limit the largeness and generality of section 13 of the Act of 1874, and rule 47. Even assuming that there is an ambiguity in the rules, and the directors have adopted a wrong construction, they ought not to be visited with the consequences of their honest mistake—*Ireland v. Livingstone* (8) and *The London Financial Association v. Kelk* (9). Then it is said that the collateral security vitiates the loan; but that is not so, pro-

vided the leasehold property was a substantial and sufficient security. In the case of *In re Pearson; Oxley v. Scaith* (10), it was sought to make trustees having power to invest on real estate liable for investing on a security consisting of freeholds and leaseholds, but the valuation shewed that the freeholds alone were a sufficient security, and it was held that the trustees were not liable.

[STIRLING, J., referred to *Leary v. Whiteley* (11).]

There the House of Lords and the Lords Justices held that the investment was within the power, although the power had been negligently exercised.

If the original loan was not *ultra vires*, the subsequent proceedings were the natural consequences of that loan. The decision in *Small v. Smith* (3) turns upon the peculiar nature of a Scotch mortgage, and is not in point; but Lord Selborne does not deny that a power to do a particular thing implies a right to do everything which is necessary to the proper exercise of the power. A power to lend money on mortgage in England carries with it the right to redeem all prior mortgages, and to enter into possession; and the right to enter into possession involves the right to save the property from going to ruin—*In re The Asiatic Banking Corporation; Royal Bank of India's Case* (12). Secondly, as to negligence. The only duty of the directors was to form a *bona fide* judgment upon proper materials as to the sufficiency of the loan, and that duty they discharged. It was the duty of the solicitor to investigate the title; and the directors ought not to be made responsible for his default—see rule 49. The question is not whether Sir W. Lewis did or did not put too high value on the property, but whether the valuation was one upon which the directors were entitled to rely. It is not suggested that anything was omitted from the valuation which ought not to have been omitted, and therefore it is immaterial that the directors did not prepare any formal instructions; nor is

(3) Law Rep. 10 App. Cas. 119.

(4) 2 Atk. 400.

(5) 2 Jur. N.S. 557; 8 De Gex, M. & G. 835; 25 Law J. Rep. Chanc. 489.

(6) 42 Law J. Rep. Chanc. 67; Law Rep. 5 E. & I. App. 480.

(7) Unreported (1882, B. 56).

(8) 41 Law J. Rep. Q.B. 201, 209; Law Rep. 5 E. & I. App. 395, 416.

(9) 53 Law J. Rep. Chanc. 1025, 1041; Law Rep. 26 Ch. D. 107, 144.

(10) 51 L. T. 692.

(11) 57 Law J. Rep. Chanc. 390; Law Rep. 12 App. Cas. 727.

(12) Law Rep. 4 Chanc. 252.

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there any ground for saying that the valuer was not employed by the directors. Then it is said that they left everything to Allott; but they exercised an honest judgment on the sufficiency of the loan, and it was not to be expected that they should all visit the collieries. The liability of directors is not that of trustees, and if they are acting within their powers they are not liable even for a grave error of judgment—*In re The Faure Electric Accumulator Company (Limited)* (13), where Kay, J., reviews the authorities. We rely upon that case as summing up the law on the subject. So in *The Leeds Estate Building &c. Company v. Shepherd* (14) it was sought to make the directors liable, *inter alia*, for improvident investments; but that part of the action was dismissed. That case is also an authority for the proposition that the Statute of Limitations is a good defence to the action so far as it is founded on negligence.

Upon the question of the statute the following cases were also cited on behalf of the defendants: *The Metropolitan Bank v. Heiron* (15), *Knox v. Gye* (16), *Smith v. Fox* (17), *Brown v. Howard* (18), *Whitehead v. Howard* (19), *Short v. McCarthy* (20), *Howell v. Young* (21), and *In re Hindmarsh* (22).

Bigham, Q.C., and *Upjohn*, for Brailsford.—Assuming the loan was *ultra vires*, the directors are not liable in the absence of fraud or negligence. Directors acting *ultra vires* were held not liable in the following cases:—

The Land Credit Company of Ireland v. Fernoy (23), *Pickering v. Stephenson* (24),

(13) 58 Law J. Rep. Chanc. 48; Law Rep. 40 Ch. D. 141.

(14) 57 Law J. Rep. Chanc. 46; Law Rep. 36 Ch. D. 787.

(15) Law Rep. 5 Ex. D. 319.

(16) 42 Law J. Rep. Chanc. 234; Law Rep. 5 E. & I. App. 656.

(17) 6 Hare, 386; 17 Law J. Rep. Chanc. 170.

(18) 2 B. & B. 73.

(19) 2 B. & B. 372.

(20) 3 B. & Ald. 626.

(21) 5 B. & C. 259; 4 Law J. Rep. (o.s.) K.B. 160.

(22) 1 Dr. & S. 129.

(23) Law Rep. 5 Chanc. 763, 771.

(24) 41 Law J. Rep. Chanc. 493, 500; Law Rep. 14 Eq. 322, 341.

In re Denham & Co. (25), *The London Financial Association v. Kelk* (9), and *Studdert v. Grosvenor* (26).

It is only on proof of fraud or negligence that they are held liable—*In re The County Marine Insurance Company; Rance's Case* (27), *In re The National Funds Assurance Company* (28), *Marzetti's Case* (29), *In re The Oxford Building Society; ex parte Smith* (30), and *The Leeds Estate Building Company v. Shepherd* (14).

Pearson, Q.C., and *Levett*, for the representatives of Leader.—Directors are agents to enter into contracts on behalf of their company, and their liability depends upon the law of principal and agent, and not upon the law of trustee and *cestui qui trust*. Where the principal charges his agent with exceeding his authority, he must prove that the mandate was so clear that the agent could have no doubt as to its meaning, and if the agent actually exceeds his authority he is not liable if he does so innocently—*Story on Agency*, section 74; and where the appointment of a substitute is expressly authorised or is necessary, the agent is not liable for the mistakes of the substitute—*Story on Agency*, section 201, *Stone v. Cartwright* (31), *Bromley v. Coxwell* (32), and *Rossiter v. The Trafalgar Life Assurance Association* (33).

Upon the question of the measure of damages they cited *Cassaboglon v. Gibb* (34).

Rigby, Q.C., in reply.—This is not the case of a principal suing his agent, because the liquidator represents creditors, and therefore the law of principal and agent does not apply. A building society differs from a trading company under the

(25) 53 Law J. Rep. Chanc. 1113; Law Rep. 25 Ch. D. 752.

(26) 55 Law J. Rep. Chanc. 689; Law Rep. 33 Ch. D. 528.

(27) 40 Law J. Rep. Chanc. 277; Law Rep. 6 Chanc. 104.

(28) 48 Law J. Rep. Chanc. 163; Law Rep. 10 Ch. D. 118.

(29) 28 W. R. 541.

(30) 56 Law J. Rep. Chanc. 98; Law Rep. 35 Ch. D. 502.

(31) 6 Term Rep. 411.

(32) 2 Bos. & P. 438.

(33) 27 Beav. 377.

(34) 52 Law J. Rep. Q.B. 538; Law Rep. 11 Q.B. D. 797.

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Companies Act, and the position of the directors of a building society is analogous to that of trustees, and not to that of managing partners of a trading concern.

Cur. adv. vult.

STIRLING, J. [stated the facts substantially in the terms above set forth, and continued:] The transactions impeached in the action divide themselves into three heads: first, the original advance of 25,000*l.* in 1878; secondly, the advance of 41,000*l.* in November, 1881; and, thirdly, the expenditure for the preservation, maintenance, and working of the colliery. Each of these matters involves somewhat different considerations, and I propose to deal with them separately.

The original advance of 25,000*l.* is attacked on the grounds that it was beyond the powers of the society, or at all events of the directors; and, further, that it was made so recklessly and improvidently as to render the directors liable in respect of it, even if it was within their powers. First, then, was the advance beyond the powers of the society? The object of the society is to make advances "upon security of freehold, copyhold, and leasehold estate." It is said that the advance of 25,000*l.* was not made on such security, but on the security of the colliery and mines carried on by Mr. Joseph. In fact, however, the Dunraven, Hendrewen, and Blaengwynfi properties were held under leases, and constituted leasehold estate. The leases included minerals, which were to be worked and got by the lessees. The property offered as security was, therefore, to some extent of a wasting nature, and its value was affected by its being used for the purposes of the colliery business carried on by Joseph. Those were matters fit and proper to be considered in determining what amount should be advanced on the security of the leasehold property; but, in my judgment, it cannot be said that the society was precluded by reason of the existence of those circumstances from making any advance, however small, on mortgage of it; and I am therefore of opinion that this part of the transaction was not beyond the powers of

the society. Whether the sum advanced was properly advanced is a matter which requires subsequent consideration.

It was next said that the advance was not made exclusively on the security of leasehold estate, but was made partially on the security of the interests of Mrs. Joseph and her children in the funds held on the trusts of the two settlements of the 28th of September, 1876, and the 15th of January, 1877; it was said that those interests constituted an essential and integral part of the securities taken by the plaintiff society, and that reliance was placed upon them by the directors; and it was contended that the inclusion of those interests in the securities vitiated the whole transaction—that, in fact, the inclusion of any personal element in the security would vitiate such a transaction. If this contention were pushed to its utmost extent, then it would seem to follow that the inclusion in the building society's mortgage of a personal covenant by the mortgagor for repayment of the advance and reliance placed by the officers of the society on the solvency of the mortgagor might equally vitiate any transaction of which those were elements. Yet it was not disputed in argument, and in my judgment properly, that a building society making an advance to a member on the security of freehold, copyhold, or leasehold estate, might take from him a personal covenant for payment of what might be due from him to the society; and I think that the officers of the society might, to a certain extent, and for certain purposes, rely on the solvency of the mortgagor. For example, an action on the covenant of a solvent borrower affords an effectual and comparatively speedy and inexpensive mode of recovering what is due, and may be the means of avoiding the delay, costs, and liability incident to remedies (such as foreclosure, sale, or entry into possession) available only against the subject-matter of the security. If the circumstances of the borrower are such that his personal covenant is without value, the building society may, in my opinion, secure a like advantage by means of the personal guarantee of a third party or a charge on some readily available pure personal estate. The benefit so obtained

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must, however, be purely collateral, and the validity or propriety of the transaction is to be tested as if no such ingredient entered into it. If there be no freehold, copyhold, or leasehold estate comprised in the security, or if the estate so comprised be merely nominal, or its value out of all proportion to the amount advanced, the transaction is beyond the powers of the society, and invalid; but where, as here, the borrower offers as security such estate to a substantial extent, an advance is within the powers conferred by the Act of 1874; and the question for the officers of the society to determine is what amount may properly be advanced, and that they must decide having regard solely to the nature and value of the freehold, copyhold, or leasehold estate offered to them, and without reference to the solvency of the borrower or the worth of any personal estate he may be willing to throw in.

Next, it is to be considered whether the transaction, though within the powers of the society, was within the powers of the directors, and here it will be convenient to commence with some general observations as to the position and duties of directors of such societies. It has been laid down—and I take it to be established law—that directors of trading companies are not trustees in the sense in which that term is used with reference to settlements or wills. The question is discussed and the authorities considered in the recent case of *In re The Faure Electric Accumulator Company* (13), and it is sufficient for me to refer to the judgment of Mr. Justice Kay at pages 51 and 52 of the *Law Journal* report. It is said, however, that the rules there laid down refer to trading companies incorporated under the Companies Acts, and that the directors of building societies incorporated under the Building Societies Act, 1874, are in a different position. Such societies, according to section 13 of that Act, are established “for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate.” It has been repeatedly pointed out that the objects of such societies are twofold—on the one

hand, to assist some of the members to obtain advances on the security of their property; on the other hand, to assist others to obtain a high rate of interest on their money. Thus, in the judgment in *Fleming v. Self* (35), in which Lord Cranworth elaborately explained the nature and objects of such societies as were established under the Act 6 & 7 Will. 4. c. 32, he says, “In truth, the whole scheme is but an elaborate contrivance for enabling persons having sums for which they have no immediate want to lend them to others at a very high rate of interest;” and in the case of *In re The Guardian Permanent Benefit Building Society* (36) Sir George Jessel, Master of the Rolls, says of the same Act, “It was the object to assist some of the members to obtain freehold or leasehold property, and some a high rate of interest.” Similar observations apply to societies incorporated under the Act of 1874. These societies, therefore, in one aspect of them have for their object the acquisition of gain in the shape of a high rate of interest by the investing members; and the directors ought not, in my opinion, any more than the directors of companies formed under the Act of 1862, to be held liable upon the rules—which Lord Justice James in *Marzetti's Case* (29) said were, in his opinion, too strict rules—laid down by the Court of Chancery with respect to the duties of trustees of wills and settlements where the preservation of the trust funds is the primary object.

Some of the observations of the other learned Judges who took part in the decision in that case also deserve consideration. The present Master of the Rolls says, “The question is whether Mr. Marzetti has been guilty of such negligence as would make him liable in an action. Mere imprudence is not such negligence, want of judgment is not. It must be such negligence as would make a man liable in point of law. Mr. Marzetti has been guilty of not making those enquiries which a person of ordinary care in his position would have made.” And Lord Justice

(35) 3 De Gex, M. & G. 997; 24 Law J. Rep. Chanc. 29.

(36) 52 Law J. Rep. Chanc. 857; Law Rep. 23 Ch. D. 440.

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Cotton says, "Trustees are liable, whatever trouble they take, if the fund in their care goes not according to the trust. Opinions of counsel, *bona fides*, or care do not protect them. Now, directors are confidential agents, with the liabilities of trustees, but they have a large discretion, and if they act *bona fide* they are relieved, and are not liable for want of judgment or error if they make a payment which is in fact not for the purposes of the company."

In the exercise of this large discretion, the directors may, as I conceive, properly make advances on classes of securities forbidden to ordinary trustees. One rule which is binding on ordinary trustees is thus stated by Lord Watson in *Learoyd v. Whiteley* (11): "Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character, but it is the duty of a trustee to confine himself to that class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard." In my judgment directors are not under an obligation to avoid investments attended with hazard, but might, in the absence of anything to the contrary in the rules or articles of association, act in the same manner as men of business of ordinary prudence, and, if any particular society or company should deem such powers too wide, it will be competent to the members to properly frame rules or articles to impose such restrictions as they may deem advisable.

Is there then to be found in the rules any limitation on the powers of the directors as regards the nature of the property on the security of which they may make advances? It is observed that the rules of the society, though they deal with various special kinds of property, contain no reference to collieries. It is pointed out that one of the permanent officers of the society is the surveyor, whose duty it is to survey and value property offered as security, and whom the directors were bound to consult; and it is said that inasmuch as the property offered by Mr. Joseph was of such a nature that Mr. Innocent, the duly appointed surveyor, was (as is

admitted on both sides) not qualified to give an opinion as to its value, the directors ought at once to have seen that it was not one which they were authorised to accept. Rule 54 (as to the alteration of mortgaged property) was also referred to as shewing that the directors had no power to take the security of a wasting property such as a colliery in active operation. Now the rules of the society appear to be framed on the supposition that the property likely to be most frequently or ordinarily offered as security, or at all events one class of such property, would be land on which buildings were, or were proposed to be, erected, and there are to be found rules dealing with that kind of property. Mr. Innocent was an architect, and qualified to survey and value such property, and was doubtless chosen to fill the office of surveyor in the like expectation, but I do not find anything in the rules which limits the operations of the society to that or any other species of property. The terms of rule 47 are of the widest possible description: "The funds of the society shall be applied in making advances to members in respect of the shares held by them on legal or equitable mortgage of freehold, copyhold, or leasehold property"; and it was therefore within the powers of the directors to accept any such property as security. It might be difficult, or even impossible, to find a person duly qualified to advise them as to the value of every species of such property; and the rules do not appear to me either explicitly or by implication to prohibit them from obtaining the advice of a duly qualified expert in a particular case where the permanent surveyor might not happen to be such. As to rule 54, it appears to be directed to a different matter, and to have for its object to secure that changes in the nature of the mortgaged property shall receive the sanction of the directors. I am therefore of opinion that the proposed transaction was within the powers of directors.

I have now to consider whether the defendants who appear have so acted with reference to the transaction which is within their powers as to be held liable for the advance of the 25,000*l.* Now, in the first

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place, it must be observed that no question is raised as to the good faith of the defendants. The pleadings do not charge them with dishonesty or want of *bona fides*, and any such case was expressly repudiated by the liquidator in the witness-box. He said, in answer to a question put to him in cross-examination, "I do not suggest that they (the defendants) acted otherwise than in good faith. I do not think they intended to do wrong. They may have been negligent and relied too much on others." And I may add that nothing occurred in the course of the evidence which would lead me to suppose the opinion so expressed was otherwise than correct.

Next, I think it right to point out that the defendants who appear occupied a totally different position from Mr. Allott. He was in direct communication with Mr. Joseph, and took an active part in enquiring into the nature and value of the security offered by him. The other directors—I leave Loxley out of consideration—simply exercised their judgment on the materials submitted to them, and their defence is, in substance, that they acted on the reports of Sir William Lewis, and, in particular, that of the 30th of May, 1878; that those, in fact, were documents on which they were entitled to act, and which justified the action taken by them; that they have been guilty of no neglect or default, or, at any rate, such as would deprive them of the protection conferred by rule 14. Now, Sir William Lewis was the agent for the Marquis of Bute and other large colliery proprietors in South Wales, with the mining properties in which he states that he has been acquainted for a period of thirty-five years. Of his professional qualities as an expert to advise the plaintiffs there can be no doubt. Mr. Brown and Mr. Higson, expert-witnesses called on behalf of the plaintiffs, admitted that he was an experienced valuer of mining property, and competent to give a trustworthy opinion on its value. One of them (Mr. Higson) said he was quite equal to either Mr. Brown or himself. Various objections were, however, taken to him and the reports he made. It was said that he was a personal friend of Mr.

Joseph, and an advocate of the loan, and that, under those circumstances, he was not a reliable adviser. Now his name appears to have been brought before the directors for the first time on the 15th of April. It occurs in Mr. Joseph's letter of the 5th of April, along with the names of four other gentlemen, none of whom are shewn to be incompetent, and two at least of them being admitted by Messrs. Brown and Higson to have been experienced and competent valuers of mining property. At the board meeting it is stated by the defendant Brailsford that Mr. Allott reported that he had selected Sir William Lewis as first on the list, and had been in communication with him, and on this report, and on the strength of Sir William Lewis being the Marquis of Bute's agent, the directors appear to have sanctioned the employment of Sir William Lewis to advise them. I am unable to see that in this respect they have failed to exercise ordinary care.

As regards his advocacy of the loan, it certainly appears from the letter of his dated the 25th of May, 1878, that he urged the loan on Mr. Allott. It is possible that very cautious persons might have considered that in this he was stepping beyond his province as an adviser of the society, and might have been led to distrust the advice he gave. But, however this may be, there is no evidence that this letter was brought before the other directors, or that any of them knew that he was in any way pressing the making of the advance, and I have been unable to come to the conclusion that any of the directors other than Mr. Allott were aware of any circumstances as regards Sir William Lewis which ought to have led them to look with suspicion on his reports or statements.

It is further said that Sir William Lewis received no instructions on behalf of the plaintiff society, that he valued the property not as on behalf of the intending mortgagees, but on behalf of the mortgagor; and great stress was laid on the letter of the 27th of April, 1878, by him to Allott, in which he said: "I do not know whether I am supposed to be acting for you or for Mr. Joseph in the matter." Now it is true that no formal instructions appear to

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have been given to Sir William Lewis; but on the 15th of April there was before the board his letter dated the 11th of April, 1878, in which he proposed to meet Mr. Allott at the colliery. Mr. Allott's visit was sanctioned at that meeting. Mr. Allott was an accountant and a person of experience in colliery matters, and it seems to me that the directors were justified in entrusting to him the duty of communicating with Sir William Lewis, and it is not made out, in my opinion, that anything which it was essential and proper that he (Sir W. Lewis) should know for the purposes of his valuation was withheld from him. His report of the 27th of April, 1878, was addressed to Mr. Allott, and begins thus: "In compliance with your request, I visited the Dunraven colliery on Tuesday last with the view of advising you as to the conditions," &c. And this document was submitted to the board. If, in point of fact, Sir W. Lewis did value on behalf of the mortgagor (which is not, in my opinion, made out), he nevertheless appears to me to have framed his report in such a way as naturally to lead the directors (again excepting Mr. Allott) to believe that he was acting for them and valuing on their behalf. The letter of the 27th of April, 1878, means, I think, no more than this, that Sir William Lewis did not know to whom he was to look for his fees; but, whether this be so or not, there is no evidence that that letter was ever laid before the directors, nor do I think that they could suppose that Sir William Lewis was acting otherwise than on their behalf. I think, therefore, that, as men of business, they might reasonably accept the reports of Sir W. Lewis as documents obtained on their behalf and with a view to their making the proposed advance.

Were, then, those reports such as on the face of them to justify what they did? Now, the loan was in the first place sanctioned at the meeting of the 1st of May, 1878. At that time no detailed valuation of the properties had been laid before the directors, and it was said that there would have been a want of care on the part of the directors if that advance had been made simply on the materials which up to

that time had been brought to their notice. I do not think I am called upon to decide that question. In point of fact the advance was not so made. The matter was again brought before them and reconsidered on the 4th of June, and it is by what they did on that day that their liability must be determined.

Further, in dealing with the case the value of the personal security of Mr. Joseph, and of the collateral security (such as it was) given by Mrs. Joseph and her children, must, as I have already pointed out, be laid out of consideration, and the question is whether the detailed report of the 30th of May, taken in conjunction with the previous reports of Sir W. Lewis as to the value of the leasehold property, was such as to justify them in making the advance of 25,000*l.* Now, that report of the 30th of May gives a separate valuation of the several items, shewing that the property on which the plaintiffs were to have the first charge was of the value of upwards of 20,000*l.*, and that on which they were to have a second charge was of the value of upwards of 109,000*l.*, leaving a margin of upwards of 69,000*l.* after deducting the first charge of 40,000*l.* It also contains statements from which it would be reasonably inferred—if indeed that was not apparent on the face of the matter—that the property was of a speculative description and dependent for its value on the course of trade. Such property would not, according to the decision in *Leuroyd v. Whiteley* (11), have formed a proper subject for an advance by trustees of an ordinary will or settlement; but, for the reasons already given, I think that the rules which bind trustees do not apply to directors of building societies, and that the latter are not precluded from making advances on securities of a speculative nature.

Again, part of the security consisted of a second mortgage, on which rules of the Court prohibit ordinary trustees from making advances. That prohibition, I apprehend, rests on the ground that such security is of the class which is attended with hazard. The risk is twofold. First, there is the danger attendant on the absence of the legal estate, which would

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usually, at all events, be in the first mortgagees. As to this, it may be pointed out that rule 47 expressly authorises advances on equitable mortgages, so that the directors were not limited to securities under which a legal estate would become vested in them. Secondly, there is the danger arising from the probable want of means on the part of the mortgagor to pay off the first mortgage in the event of his attempting to enforce his right by foreclosure, to the disadvantage of the second mortgagees. This risk is one which, as it seems to me, a man of business and ordinary prudence might be willing to incur. Under these circumstances I am unable to come to the conclusion that the directors shewed a want of ordinary care, or were guilty of negligence, in acting on the reports of Sir W. Lewis.

It is, however, to be observed that in the property on which the plaintiff society was to have a first charge is included Blaenselsig, to which Mr. Joseph, the mortgagor, had no title, legal or equitable. Of this Sir W. Lewis was well aware, and I have already mentioned the explanation he gave in the witness-box. Sir W. Lewis further said in his evidence that the fact was known to Mr. Allott. As against him I am not at liberty to avail myself of this evidence; but the statement of claim contains an allegation that Joseph had not entered into any binding agreement for a lease of the Blaenselsig minerals, "as the directors well knew"—an allegation which must be taken to be true as regards Mr. Allott. It was the duty of Mr. Allott if he knew it to call the attention of his co-directors to it. But, so far from that, we find him speaking in his letter of the 4th of June, 1878, of the Bute lease as if a lease of Blaenselsig had been actually granted; and Mr. Kidner, the secretary of the society, in referring the matter to the solicitor, says, in a letter of the 5th of June: "There is to be a first charge on Tydraw House and surface, with tipping rights also upon the Earl of Jersey mineral leases, and a lease just obtained from the Marquis of Bute and Mr. Homfray." That it became known to the solicitor in the course of the preparation of the secu-

rities that such a lease did not exist is obvious from the form of the security ultimately taken. Yet, notwithstanding the provision of rule 26, directing him, "where such title is not deemed by him good and sufficient," to render a report thereof in writing to the directors, he made no report of any kind on the subject, nor did he avail himself of the right of attending meetings of the directors (conferred by the same rule) to bring the matter before the board. The solicitor, though still living, was not called as a witness, and I know not what explanation he may have to offer of that which, *prima facie*, would seem to be an omission on his part. In the result, the absence of title to Blaenselsig was not brought to the knowledge of the directors other than Allott.

Neither, again, do I know how it happens that the same solicitor did not report to the board that the requisition as to the production of receipts was not complied with, because it appears by the evidence that at the time when the mortgage was completed the rents and royalties were in arrear. This fact, however, was not known to the directors, whose case I am now considering, and on the whole I come to the conclusion that they have not been guilty of any neglect or default such as would deprive them of the benefit of rule 14.

The advance of 41,000*l.* in November, 1881, is next to be considered. It is of a totally different nature from that of the 25,000*l.* It does not fall within the category of ordinary advances to members, for it was made on terms other than those prescribed by rule 60. It was not an investment of any portion of the funds of the society, for there were no funds to invest, and the money actually used was borrowed. There is no rule which, in express terms, sanctions such an advance, but it was sought to be justified in argument on the ground that the directors having power to make advances on second mortgage, had by implication power to redeem a prior charge, and that this was the best, and indeed the only, course open to them under the circumstances.

To this it was answered on behalf of the

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plaintiffs that the directors had no such implied power, and in support of this proposition the case of *Small v. Smith* (3) was relied upon. That case came before the House of Lords on appeal from the Court of Session in Scotland. It appeared that a building society in Scotland incorporated under the Act of 1874 had made an advance to a Mr. McDonald, a member of the society, on the security of certain property subject to a prior charge in favour of Small and others, the appellants to the House of Lords, for 3,000*l.* This security contained a proviso enabling the society to pay off this prior charge, and binding McDonald, the mortgagor, to repay to the society the expenses of discharging the prior security. The prior incumbrancers, the appellants, gave, as by the law of Scotland they were entitled to do, notice that they proposed to exercise the power of sale incidental to their security, and thereupon negotiations took place between them and the directors of the building society, which resulted in the grant by the directors of a bond whereby the society, in consideration of the appellants forbearing for six months to exercise the power of sale, became bound at the expiration of that period to pay to the appellants what was due on their prior incumbrance. The consideration for this bond did not appear on the face of it, but was, in fact, the appellants' forbearance to exercise the power of sale. The question was whether that was binding on the society. The rules expressly empowered the directors, on the failure of an advanced member, to pay what was due from him, to enter into possession and receive the rents and profits, and to sell, and it was provided that when such default was made the society should have full power to act in every respect as absolute proprietor and owner of the property. There was also a rule that the directors should have power to act for the society in accordance with the rules in any matter which might arise. It was held that neither under the special powers which were conferred on the board of directors by the rules of the society, nor under the general powers vested in them by implication, could the giving of the bond in question be justified, and it

was held not to be valid. The case, therefore, is a different one from the one which I have to consider, and it is important to see the grounds upon which this conclusion was based. Lord Selborne, who first advised the House, says this at page 129: "I entirely adhere to what was said in this House in the case of *The Attorney-General v. The Great Eastern Railway Company* (37), that when you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done, and against which no express prohibition is found, may and ought *prima facie* to follow from the authority for effectuating the main purpose by proper and general means. I think it is quite right to invite your Lordships to apply that principle to the present case. In order to see how it applies, we must ascertain, first of all, what the main purpose here is, then what are the general powers of the directors, then what are their special powers; and then, supposing that this is not within the natural meaning either of their general powers or of their special powers, whether it can be brought in as incidental to the main purpose, and a thing reasonably to be done for effectuating it." Then his Lordship discussed first of all the purposes of the society, and then the general powers of the directors, and then their special powers, and he found nothing in them which would justify the transaction which was the subject-matter of the litigation in that case. Then he goes on at page 133 to say this: "The argument really is that because the rules permit this kind of security to be taken—that is to say, give very large and general powers as to securities, which do not exclude the taking of a security on which there is a prior mortgage—therefore there is a potential necessity for entering into a transaction of this kind to protect that security, and therefore there is a reasonable implication that there is power to do it. But I wholly deny that there is any potential necessity at all. If this were a proper

(37) 49 Law J. Rep. Chanc. 545; Law Rep. 5 App. Cas. 472.

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consequence of the relation constituted between mortgagor and mortgagee, or of the relation constituted between a first mortgagee and a second mortgagee—if it were one of those things which, by working out the legal rights or remedies already existing on the one side or the other, would or might result, the argument would be perfectly sound; but there is no more potential necessity for doing this in order to meet a temporary inconvenience, than there is for doing anything else in the world which, in the opinion of the directors, might tend to obviate that inconvenience. For example, supposing that they had no credit by which they could borrow money, and that they were entitled to borrow money to redeem this prior mortgage, could they or could they not make reckless sales, unauthorised by the trust deed, of any part of the assets or property of the society? That would be a very improper thing to do, at all events, and no one can possibly say that any such thing is to be implied. The grounds of such an implication must be found in the nature of the situation and the reasonable consequences of that situation, and not in what a man who may do what he pleases with his own may or may not consider proper to do under such circumstances. To say that because a man is a second mortgagee for 1,000*l.*, it is a natural consequence of that situation, or a potential necessity, that when a notice of sale is given by the prior mortgagee he shall make himself liable to him for 2,500*l.*, which was not his own debt before—to represent that as growing out of, or consequential upon, the situation in which the company was placed by what had been done under the rules, is going beyond all bounds of reason." Then he refers by way of illustration to a case in which express provision was made in the rules then in question. By those rules the society was enabled, in case any member after receiving an advance should leave buildings on land which he had mortgaged unfinished, to enter upon and take actual possession of such buildings and premises, and to sell the same either by public auction or private contract, or to employ persons to provide the requisite materials and labour, and to

furnish and complete the same at the cost of such member, and to advance the sums requisite for this purpose out of the funds of the society. Then he says, "Let me suppose that there had been no such rule; could it seriously have been argued that because the company took a security upon land, the value of which they expected to be improved by building, the directors could lay out the whole or any amount they pleased of the funds of the society in an expensive building speculation—in building upon the property those houses which the debtor had been expected to build? It was thought desirable that that power should be expressly given; but could any reasonable man have implied it if it had not been given? I am speaking, of course, not of a case of some little work to be done after taking possession in order to complete a building already partially erected upon the land. I am supposing a total failure to build at all, and that the land which constituted the security had no buildings erected upon it, and was not in the state of land covered with houses, though it ought to have been so if the member had fulfilled his contract." Then Lord Blackburn says: "As at present advised, I do not think that the directors have any power at all to do it. It is not a case of persons acting for themselves, and being *sui juris*, who may make any bargain, wise or foolish, which they please; but it is the case of persons acting by an authority. We must see what the authority is. The authority which is given to the directors is to manage all the affairs of the society according to the nature of its business according to these rules. I think that, according to that, they might do very much the same things which by common law a partner in a business limited in the same way would be entitled to do; it is not one of the powers which a partner has to give a guarantee. He may do it, of course, so as to bind himself, but he cannot do it so as to bind the firm." Then Lord Watson says: "It appears to me that the true test to apply in such a case is not to consider whether the act might have been competently performed by an individual or by directors who were not fettered by regulations or articles or a

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memorandum of association. The real test is to consider whether the act is authorised by the statutory rules of the society, which perform a twofold function—in the first place they define the power of the directors, and in the second place they ensure that all who deal with the directors shall have notice of the precise limits of their authority. We cannot assume that the directors have power to do everything which may be usually done by unfettered directors or by individuals. We must consider whether the rules confer, either expressly or by any fair implication, authority upon the directors to grant a bond of corroboration binding upon the society." I pass for a moment the next paragraph, with which I shall have to deal more particularly presently. Then he goes on: "It is said, however, that they have that power by implication in the special case of realisation whenever it becomes expedient and desirable on the part of the society that they should purchase time from the prior bondholder. Now I quite admit that circumstances might render that a very proper and a very expedient step in the case of an individual *sui juris*, or in the case of directors who have unlimited powers to conduct business according to the rules which guide individuals; but that is not the question here. Is it in any fair sense of the word incidental, in the sense of being necessarily incidental to the realisation of the security?"

It thus appears that Lord Selborne lays down that the directors of a building society have power by implication to do those things which are proper consequences of the relation constituted between mortgagor and mortgagee, or the relation constituted between a first mortgagee and a second mortgagee, or which, by working out the legal rights or remedies already existing on the one side or the other, would or might result. Each of the noble Lords agree that the question in a case like this is one of the authority of the directors, to be ascertained from the rules of the society; and they distinguish the position of the directors from that of a person who is *sui juris*, or of directors who, in the words of Lord Watson, are unfettered or who have unlimited powers to conduct the business

according to the rules which guide individuals. Those last expressions appear to have reference to a case which was cited and relied on in the argument before the House of Lords and also before me—namely, *The Royal Bank of India's Case* (12). To that I shall refer very shortly. The articles of association in that case contained a provision (article 71) that "The board of directors shall have full power, and it shall be their exclusive province, to prescribe the mode of receiving, collecting, and expending the moneys and funds of or owing to the company, and of drawing cheques and otherwise disposing of the funds and moneys which from time to time shall be in the hands of the bankers or treasurer, or otherwise at the disposal of the company; and the board of directors shall have full power in all respects as they shall think advisable to direct, control, and provide for the receipt, custody, and issue, management, remittance, and expenditure of the moneys and funds of the company." Lord Justice Selwyn says: "The 71st of the articles of association gives to the directors powers of very extensive and general character—in fact, to do everything which in their judgment should be necessary for the purpose of carrying on this business of banking."

The rules of the plaintiff society contain no such clause as occurred in *The Royal Bank of India's Case* (12). On the other hand, they deal less minutely with the powers and duties of directors than those which were the subject of discussion in *Small v. Smith* (3), and there is none which specifically authorised the directors to redeem a prior incumbrance on property which is the subject of the security which they have taken.

The question whether or not such a power is to be implied depends, as did the question which fell to be decided in *Small v. Smith* (3), on whether there is, in the language of Lord Selborne, a potential necessity "for entering into a transaction of the kind to protect the security;" and that question, according to his Lordship, is to be answered in the affirmative if the transaction be a proper consequence of the relation constituted between a first mortgagee and a second mortgagee. It appears

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to me that the redemption of a first incumbrancer threatening to foreclose is such a consequence, for it is the only means of preventing the subject-matter of the second incumbrance being entirely swept away.

But I have to consider a paragraph which I have passed by in the speech of Lord Watson. He says this: "The directors in the present case had by the rules power to hold bonds, whether first or postponed bonds, and dispositions in security; and they had undoubtedly not only the power, but the duty laid upon them of realising those bonds and dispositions in security. It is said to be within the power of the directors under these rules to acquire prior bonds for the purpose of protecting the interests of the society as postponed bondholders. I am quite prepared to concede that proposition, but upon this condition only, that the funds of the society are, at the time, in the state described in rule 84. In that case, the act of acquiring these preferable bonds might be justified under rule 84, because it might be an investment, sanctioned by that rule, of funds which at the time were idle—that is to say, not required for the purpose of being advanced to members of the society. But I demur to the proposition that they would be entitled to swell those funds which are not required for the main purposes of the society by exercising their borrowing powers in terms of rule 86." I do not think that what is there said is intended as an expression of opinion to the contrary of what is laid down by Lord Selborne, for his Lordship is there dealing with the case of a Scotch heritable bond, the holder of which has no right of foreclosure such as by the law of England is vested in a first mortgagee.

In my judgment, therefore, the directors had power to pay off the first incumbrance. If it was within their power to redeem, it was also within their power to borrow the necessary funds for the purpose, and the discretion which they exercised has not really been impeached. I think, therefore, that this portion of the case fails as against the defendants other than Allott and the representative of Loxley.

I have next to consider the case so far

as it relates to the sums expended by the directors out of the assets of the company for the preservation, maintenance, and working of the colliery. It was contended, again on the authority of *Small v. Smith* (3), that it was altogether beyond the powers of the directors. On the other hand, it was contended, on the authority of *The Royal Bank of India's Case* (12), that the whole of this expenditure took place as a consequence of acts proper and prudent to be done with a view to obtaining the benefit of the security. The test, according to *Small v. Smith* (3), is not to consider whether the directors had power to do everything which might have been done by individuals or unfettered directors, but it is to be considered whether the rules confer expressly or by fair implication any such power on the directors. Now there is no rule which expressly sanctions such expenditure. Neither is there any rule conferring on the directors of the society any such unlimited authority as was vested in the directors in *The Royal Bank of India's Case* (12). The rules, again, do not (as was the case in *Small v. Smith* (3)) prescribe the duties of the directors as to the enforcing and realising of securities, but, by rule 19, they are empowered to do such acts as are authorised by the Building Societies Act of 1874. Section 13 of that Act confers on building societies power to hold land (with the right of foreclosure subject to the obligation to convert into money as soon as conveniently may be practicable) to which an absolute title has been acquired. Under the powers so conferred the plaintiff society might enter into possession of any land, whether freehold, copyhold, or leasehold, comprised in a mortgage made by a member to secure an advance, and might retain possession till a sale was conveniently practicable. By the rules the directors are, as it appears to me, authorised to do the same thing. Apart from this, I conceive that, under the general powers of management vested in the directors, they have by implication power to make use of any of the ordinary remedies of mortgagees, amongst which is to be reckoned the power of entering into possession of the land com-

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prised in these securities. Such entry is, in the language of Lord Selborne, one of those things which would or might result from the working out of the legal rights and remedies already existing. This being so, it appears to me to follow that, if the land be leasehold, the directors must, upon entering into possession, have power to make all ordinary payments necessary to prevent the forfeiture of that property, and particularly to expend out of the assets of the society all sums necessary for the payment of rent, when such payment is secured by a power of re-entry contained in the lease. I do not think that any inference to the contrary can fairly be drawn from the special provisions contained in rules 51 and 53, both of which appear to me to confer powers of expenditure of an ampler nature than that which has been just expressed. Rule 51, which is to be read in connection with rule 50, deals with advances to be made to members for the purpose of building, and would apply to a case where the land is not held subject to any condition or stipulation for the erection of such buildings. It, therefore, confers a power much wider than that which would accrue from the simple right of possession, and sanctions acts which, according to the test expressed by Lord Selborne, would not be held within the powers of the directors of a society such as the plaintiff society. Rule 53, again, authorises the payment out of the funds of the society of any chief or ground rent not duly paid, and would, as I think, apply although the society had not entered into possession of the property which is the subject of the rent. It follows from what I have said that the directors had power to enter into possession of the leasehold property mortgaged to them, and to pay the rents reserved by the leases under which Mr. Joseph held, so as to prevent the forfeiture of the demised property under the power of re-entry, and to expend out of the assets of the society all sums necessary for that purpose. Consequently they cannot be liable for such expenditure.

On the other hand, there is at least one considerable item for which it appears to be difficult to find legal justification.

At the time when they entered into possession the wages of the miners were in arrear, and the directors paid those arrears, and expended in so doing sums amounting to 2,692*l.* 19*s.* 10*d.* This expenditure does not appear to me, as at present advised, to be, in the language of Lord Selborne, "a proper consequence of the relation existing between mortgagor and mortgagee, or one of the things which, by working out the legal rights or remedies already existing on the one side or the other, would or might result," but to be rather a thing done to meet a temporary inconvenience, and one which there was no potential necessity to do. That is my present opinion upon the evidence before me; but I do not think these items were gone into very carefully, or discussed from the point of view from which I look at them, and therefore I mean to leave it open to the defendants to adduce further evidence as to the circumstances under which the wages were paid. As regards the other items, it is not so easy to lay down any precise rule defining which are proper and which are improper. The difficulty may be illustrated by a passage in Lord Selborne's speech which I have already read, where he appears to lay down that directors might complete a building partially erected upon land, although they could not proceed to build where there had been a total failure to perform a contract to erect houses on the land.

Under these circumstances I think it would be best that, before the case is finally disposed of, there should be an enquiry as to what assets of the company have been expended by the directors otherwise than in making the advances or in payment of the rents reserved by the leases under which the various portions of the mortgaged property were held.

Lastly, I have to consider how the case stands as against the defendants Allott and the representative of Henry Loxley. [His Lordship read the paragraphs of the statement of claim set out in the statement, and continued:] Upon these allegations, which must be taken to be admitted, I should come to the conclusion that the directors, Mr. Allott and Mr. Loxley, advanced the 25,000*l.* upon an

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improper security, and without making those enquiries which persons of ordinary care in their position would have made; and, consequently, that Mr. Allott and Mr. Loxley's estate are liable in respect of that advance. The subsequent advance of 41,000*l.*, and the expenditure for the maintenance and working of the colliery, were made for the purpose of protecting a security which ought never to have been taken, and are therefore as improper as the original advance. I think, therefore, that Mr. Allott and the estate of Mr. Loxley are liable for all the sums mentioned in the statement of claim.

The order I propose to make is as follows:—Declare that the defendant Allott and the estate of Henry Loxley deceased are jointly and severally liable to make good to the plaintiffs the amounts advanced out of the assets of the plaintiffs to Joseph in the statement of claim mentioned, and also the amounts expended out of the assets of the plaintiffs for the preservation or the maintenance and working of the colliery and securities therein also mentioned, with consequential accounts and enquiries, and order them to pay the costs up to the trial; such costs being properly limited, of course, to such a judgment as would be obtained upon the statement of claim. Dismiss the action, with costs, against the representatives of Mr. Leader. Declare that the remaining defendants are not liable to make good to the plaintiffs the amounts advanced out of the assets of the plaintiffs to Joseph, or expended out of such assets in payment of the rents reserved by the leases under which the leasehold estates comprised in the several securities in the pleadings mentioned were, or are, held. Dismiss the action, with costs, against them, so far as it claims relief in respect of the amounts so advanced and expended as aforesaid. Direct an enquiry whether any and what amounts have been expended out of the assets of the plaintiffs for the purposes of the said colliery otherwise than in accordance with the last preceding declaration, and, if so, for what purposes and under what circumstances, and by which of the directors respectively,

and reserve further consideration, and the question of all costs not disposed of by the order.

[An application for costs on the higher scale was refused, but the Court allowed the costs of the shorthand notes of the evidence.]

Solicitors—Geare, Son & Pease, agents for B. Wake & Co., Sheffield, for plaintiffs; Pilgrim & Phillips, agents for Watson, Esam & Barber, Sheffield, for first eight defendants; Arnold Williams & Co., agents for Parker & Brailsford, Sheffield, for Brailsford; Torr, Janeways & Co., agents for Burdekin, Benson & Burdekin, Sheffield, for J. D. Leader, R. E. Leader, and J. W. Pye-Smith, representatives of Leader.

[IN THE COURT OF APPEAL.]

COTTON, L.J.	}	GLASIER v. ROLLS.
BOWEN, L.J.		
FRY, L.J.		
1889. Nov. 20.		

Appeal—Shorthand Notes—Evidence—Judgments—Application after Order passed and entered.

After an order of the Appeal Court has been passed and entered, the Court will not direct the costs of the transcripts of shorthand notes of the evidence in the Court below and of the judgments in a case in the House of Lords used on the hearing of the appeal to be allowed. To do so would be to alter a final order of the Court, which will only be done where, through a slip, the order does not express the intention of the Court at the time when the order was made. An application for that purpose should be made at the hearing of the case, or immediately after judgment is given.

Semble, except in extreme cases, the costs of shorthand notes of the evidence will not be allowed. The Judges' notes, coupled with the notes of counsel, ought generally to be sufficient.

The Court of Appeal gave judgment in this case on the 26th of July, 1889 (1), al-

(1) Now reported 58 Law J. Rep. Chanc. 820; Law Rep. 42 Ch. D. 436.

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lowing the appeal, and the order had since been passed and entered. On the hearing of the appeal, transcripts of the shorthand notes of the evidence in the Court below were used. The transcripts were made for the purposes of the appeal. The hearing of the appeal was postponed pending the decision of the House of Lords in *Derry v. Peek* (2), and shorthand notes of the judgments of the House of Lords in that case were used on the hearing of the appeal, the case not having been then reported. No application was made for allowance of the costs of the shorthand notes of the evidence and judgments when judgment on the appeal was given, and that order, as passed and entered, did not contain any direction as to these costs. The defendants, the successful appellants, now applied that the costs of the transcripts of the shorthand notes of the evidence taken in the Court below, and of the transcripts of the judgments in the House of Lords in *Derry v. Peek* (2), might be allowed as part of their costs of appeal.

Muir Mackenzie, in support of the application.—The costs of the transcripts of the shorthand notes of the evidence in the Court below are asked for on the ground that the Court of Appeal could not have properly decided the point before it without them, and the transcripts were not made for the purposes of the arguments in the Court below, but expressly for use on the hearing of the appeal. The application for costs could not have been made before the expense was incurred; until the transcript is made it is not possible to say whether it will be necessary or not.

[COTTON, L.J.—The application should have been made immediately after the judgment of the Appeal Court was given. FRY, L.J.—*Earl de la Warr v. Miles* (3) lays down the time at which the application should be made.]

Though the application should be made generally before the judgment is drawn up, it may be made afterwards—*Ex parte Steed*; *in re Day* (4). The Judge's notes

and notes of counsel would not in this case, which was one of fraud, have been sufficient to have enabled the Court to decide the question it had to determine, and therefore I submit that the applicants ought to be allowed the costs of the transcripts of the shorthand notes of the evidence. They ought also to be allowed the costs of the judgments in the House of Lords in *Derry v. Peek* (2). The appeal stood over for the decision in that case, and, as it was not yet reported, the only way the judgment could be brought before the Appeal Court was by means of shorthand notes.

He cited also *Phillips v. Phillips* (5).

Warmington, Q.C., and *Solomon*, for the respondent, were not called upon.

COTTON, L.J.—This is an application made to us to direct that the appellants should be allowed the costs of the shorthand-writer's notes of the evidence in this case of *Glazier v. Rolls*, and that he should be allowed also the costs of the shorthand-writer's notes of the judgments in the House of Lords in *Derry v. Peek* (2).

The order has been passed and entered, and, except under a slip-order—where there has been a slip in not embodying in the order what was really the intention of the Court—that order cannot be varied, because the effect would be to alter a final order of the Court already completed. Even if we thought it right to allow the costs of the shorthand notes, we cannot do it now. The order made has directed that the costs be paid by one party to the other, and has ordered these costs to be taxed, and, as regards the costs of the shorthand notes of evidence, the Taxing Master is directed not to allow them unless there is some special direction given by the Judge or by the Court which hears the case; and it has already been laid down by this Court that any application for that purpose ought to be made immediately after or at the hearing at which the order was made, because then the Court is in possession of all the facts of the case, and can say whether or not it is reasonable that these costs should be allowed. As regards the costs of the shorthand notes of the evi-

(2) 58 Law J. Rep. Chanc. 864; Law Rep. 14 App. Cas. 337.

(3) Law Rep. 19 Ch. D. 80.

(4) 33 W.R. 80.

(5) Law Rep. 5 Q.B. D. 60.

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dence, I must say, although that is not what my judgment turns upon, that we should never have allowed these costs here. Either the Judge's notes, or, if these notes were not sufficient, the notes taken by counsel, would be quite sufficient, especially in a case like the present, which did not turn on the *minutiae* of evidence, but on the question what the law applicable to the case was. I am only now speaking from recollection, but I think Mr. Justice Kekewich did not hold that there was any fraud on the part of the appellants, the defendants in the action, but only that they made a misstatement as to the capital, which was an inference to be drawn from the facts. There was some discussion as to what was properly called capital, &c. But certainly we ought never, except in very extreme cases, to allow the costs of the shorthand notes of the evidence; the Judge's notes, coupled with the notes of counsel, ought generally to be sufficient. But I decide this case on the ground only that to allow these costs would, in effect, be altering the order which the Court made on the hearing of the appeal, and that we cannot, and ought not to do so, after that order has become the final order of the Court. That ground applies to the application as regards the shorthand notes both of the judgments in the House of Lords in *Derry v. Peek* (2) and of the evidence.

As regards the notes of the judgments of the House of Lords, they stand in a different position from the notes of the evidence; and if the Taxing Master, having regard to the circumstances of the case, thinks that they can be allowed, then no alteration of the order will be required. But I am of opinion that we cannot, and ought not to make any alteration, even as regards these costs, so as to make the order direct that which in fact, at present, it does not direct. I do not say at all what the effect of the order as it now stands is with regard to the taxation of these costs; but I decline to make any alteration in the order in the events which have happened—namely, after the order has become the final order of the Court, and is passed and entered, and there has been no slip in expressing what the order of the Court was.

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BOWEN, L.J.—I entirely agree with Lord Justice Cotton, and think the judgment of the Court in this matter ought to rest upon the ground on which he has put it. It is quite a different thing to come after a judgment and ask that it should be amended so as to express the real intention of the Court, entertained by the Court at the time the judgment was given. If an intention so entertained by the Court is not expressed in the order, there has been a miscarriage, and you set it right as a slip; but to seek to alter the judgment by asking that something may be embodied in it, the demand for which was not even thought of at the time, and was never brought to the attention of the Court, is really to ask us to make a different judgment from that which has already been perfected. It seems to me, therefore, that it is too late for the applicant to come with any part of his request. I quite agree with what the Lord Justice has said about the general practice as regards shorthand notes. Of course, it is a matter of discretion; we cannot bind the discretion of the Court, nor do we pretend to do so in any similar case; but, looking at the practice of the Court, I think it most expedient that suitors should know that it would require an extreme case to induce the Court to exercise such a discretion. To easily allow the costs of the shorthand notes of evidence on appeal would be, in my opinion, to add a new terror to litigation, of which there are plenty. It seems to me that this application must be dismissed with costs.

FRY, L.J.—I am of the same opinion.

Application refused.

Solicitors—E. T. Tadman, for appellant;
Byrne & Lucas, for respondent.

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NORTH, J. }
 1889. }
 August 3. } *In re BITHRAY.*

Judgment Creditor—Interest in Land—Sale—Dispensing with Enquiries—Judgment Law Amendment Act, 1864 (27 & 28 Vict. c. 112), ss. 4 and 5.

Upon a petition by a judgment creditor, who had obtained equitable execution of the debtor's interest in certain land by the appointment of a receiver of the rents and profits thereof (the land being subject to a legal mortgage), the Court ordered an immediate sale without directing enquiries, the mortgages consenting to the sale, and there being evidence that there was no other charge on the land.

Petition.

This was a petition by a judgment creditor under the Judgment Law Amendment Act, 1864, for the sale of the judgment debtor's interest in land. The land was subject to a legal mortgage, and the petitioner had obtained an order for the appointment of a receiver of the rents and profits thereof, without prejudice to the rights of prior incumbrancers. The order appointing the receiver was registered in compliance with the Land Charges Registration and Searches Act, 1888. The mortgagee consented to the sale. Evidence was adduced as to the debtor's interest in the land; that the judgment debt, with interest, was still due; that the mortgagee had not received notice of any incumbrance affecting the land; that searches had been made by the petitioner's solicitor, who had found that no execution, order, or other process affecting the judgment debtor or his estate had been registered, except the order appointing the receiver; and that no bankruptcy petition had been presented, or receiving order in bankruptcy made, against him.

Welby King, for the petitioner, asked that an immediate order for sale might be made without any preliminary enquiries, and referred to *In re The Calne Railway Company* (1) and *In re Cooper* (2).

- (1) *Law Rep.* 9 Eq. 658.
 (2) 37 *W. R.* 330.

NORTH, J.—I think I can dispense with enquiries in this case. The difficulty I at first felt was that the 5th section of the Judgment Law Amendment Act, 1864, says, "If it shall appear on making such enquiries that any other debt due on any judgment . . . is a charge on such land, the creditor entitled to the benefit of that charge shall be served with notice of the said order for sale." One would not unreasonably have thought from reading that section that enquiries must of necessity be directed. But, as enquiries have been dispensed with in the case of railway companies, I think I can dispense with them in the present case, since I do not find that the Act has made any distinction between railway companies and other cases. On the evidence before me I will, therefore, make an order for immediate sale, dispensing with enquiries.

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 Solicitor—G. Gardner Leader.

[IN THE HOUSE OF LORDS.]
 1889. }
 March 11, 12, 13. } REICHEL (*pauper*) *v.*
 June 6. } THE BISHOP OF OXFORD.

Benefice — Resignation — Acceptance — Condition—Validity.

It is not essential to the validity of a deed of resignation of an ecclesiastical benefice that it should be executed by the clerk in the presence of a notary public.

When a clerk has executed an absolute deed of resignation of a benefice, upon an understanding that the formal declaration of acceptance by the ordinary is to be postponed for a time, he cannot afterwards revoke his resignation.

The rule that the resignation of a benefice (except in the case of an exchange) must be absolute does not prevent a bishop accepting a resignation, but fixing a future time at which it shall come into operation.

The fact that a resignation has been made at the request of the bishop in order to avoid

Reichel v. Bishop of Oxford, H.L.

the scandal of a commission to enquire into the moral conduct of the clerk does not render the resignation void.

Decision of the Court of Appeal affirmed.

This was an appeal from a decision of the Court of Appeal, which affirmed one of North, J.

The proceedings in the Court of Appeal are reported 56 Law J. Rep. Chanc. 1023; Law Rep. 35 Ch. D. 48, where the facts are fully stated.

In 1886 the respondent, the Bishop of Oxford, having notice that grave charges of immorality had been made against the appellant, a clerk beneficed in his diocese, intimated to the appellant that unless he resigned the benefice it would be necessary to issue a commission of enquiry.

On the 28th of May, 1886, the appellant wrote to the bishop accepting a proposal of the latter that the benefice should be resigned, but the resignation not accepted by the bishop until a later date, the appellant in the meantime to be allowed leave of absence from his parish.

On the 31st of May the appellant executed in the presence of two witnesses and sent to the bishop's secretary a deed of resignation of the benefice, accompanied by a letter in which he stated that he had resigned upon the understanding that the bishop's acceptance should be postponed till the 1st of October, a date which had been agreed upon.

On the 10th of June the appellant executed an instrument purporting to withdraw his resignation, and this instrument was sent to the bishop's secretary on the 16th of July.

Shortly afterwards the bishop signed a document dated the 1st of October, whereby he accepted the resignation, and declared the benefice void.

The appellant then brought this action, claiming a declaration that the resignation was null and void, and that it was revoked by him before acceptance, and further asking for an injunction to restrain the bishop from accepting the resignation or taking action upon it.

North, J., dismissed the action with costs, and his decision was affirmed by the Court of Appeal.

The appellant in person.—The resignation of a benefice is a public act, and must be executed in the presence of a notary public or other authentic person—*Constitutions of Otto*, Nos. 27, 28 (*Johnson's Canons*, ed. 1720), *Registrum Brevium*, pp. 306, 307, *Ayliffe's Parergon*, 305, and *Constitutions of Othobon*, No. 10 (*Johnson's Canons*, ed. 1720). According to *Gibson's Codex* (ed. 1761), p. 822, a resignation cannot be made by proxy. The bishop's secretary, to whom the deed of resignation was sent, was by that fact constituted the appellant's proctor—*Archbishop Courtney's Constitution against Choppe-Chapels* (*Johnson's Canons*, ed. 1720). The resignation, being in the hands of the appellant's proctor, could be withdrawn by the appellant at any time before it was presented to the bishop, and the proctor had no authority to present it till the 1st of October. In any case, until the bishop has accepted the resignation the incumbent is entitled to withdraw it—*The Marchioness of Rockingham v. Griffith* (1).

A resignation must be made *purè, sponte, absolutè, et simpliciter*. Here none of these conditions was fulfilled. It was not *purè*, because tainted with simony, the object of the postponement of acceptance being that the appellant might receive the tithe-rentcharge to October—*The Bishop of London v. Ffytch* (2) and *Corpus Juris Canonici Decret. Greg. ix. lib. 1. tit. 9. c. 10*.

It was not *sponte*, because at the time when the bishop accepted it the appellant wished to withdraw it. In *Heyes v. Exeter College, Oxford* (3), the incumbent was willing at the moment of acceptance—*Lyndwood Provinciale*, lib. 2. tit. 5. p. 107 (ed. 1679), note "*renunciants*."

It was not *absolutè*, but conditional. The only condition allowed upon resignation is for an exchange—*Godolphin Abr. Eccl. Law* (ed. 1680), pp. 277, 278, 1 *Van Espen, Jus. Eccl. Univers.*, pars. 2. § 3. tit. 10. c. 8. No. 13, *Reiffenstuel Jus. Canon.* lib. 1. tit. 9, *De Resignatione* (ed. 1755), p. 282, *Ayliffe's Parergon*, pp. 468,

(1) 3 Burn. Eccl. Law (9th ed.), 543.

(2) 2 Bro. P.C. 211.

(3) 12 Ves. 336.

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469, and *Fletcher v. Lord Sondes* (4). A resignation is illegal if executed to avoid criminal proceedings—*Martin v. Mackonochie* (5). Here the ground of the resignation was of that nature. Incontinence is not a ground on which resignation is allowed by the canon law.

F. Mackarness, for the respondent, was not called upon.

Cur. adv. vult.

THE LORD CHANCELLOR (LORD HALSBURY) (on June 4).—On the 28th of May, 1886, Mr. Reichel, then vicar of Sparsholt, wrote the following letter to the Bishop of Oxford:—"Sparsholt Vicarage, Wantage, Berks, May 28th, 1886. My dear Lord Bishop,—I desire herewith to place in your hands my resignation of this benefice of Sparsholt-cum-Kingston-Lisle conformably with your Lordship's wish, and at the same time I gratefully accept your kind proposal to postpone acceptance of my resignation until a date to be agreed upon, your Lordship meantime permitting me to be absent. I am, yours very obediently, Oswald J. Reichel." And on the 31st of May, by desire of the bishop, Mr. Davenport replied in the following words:—"Oxford, 31st May, 1886. Sir,—The Bishop of Oxford desires me to send you a deed of resignation, and to inform you that his Lordship proposes to date his formal acceptance of it on the 1st of October next, and not to declare your benefice vacant until that date if the deed is at once executed by you and remitted to me, and if his Lordship also receives in the meantime an assurance of satisfactory arrangements for the care and duties of the parish during your absence. The deed requires to be executed by you before two witnesses, and if you are unable to obtain the attestation of a notary public in London, it may be remitted to me attested by two persons.—I am, yours faithfully, Thomas M. Davenport.—The Rev. O. J. Reichel."

On the 2nd of June following Mr. Reichel enclosed, executed as a deed, and witnessed, but not before a notary

public, the document of resignation which had been enclosed to him, and which sets forth that without compulsion, fraud, or deceit he did purely, simply, and absolutely resign into the hands of the bishop all right, title, and possession of and in the said vicarage of Sparsholt, and so forth.

On the 10th of June following Mr. Reichel executed another deed purporting to withdraw his resignation; and the sole question is whether he was at liberty so to withdraw it.

It appears to be suggested, first, that the allegation in the deed executed by himself that it was without compulsion is not true, and that he was compelled, in the sense of being threatened. But the argument seems to me to proceed upon a total misapprehension. It is impossible to contend that what happened here was compulsion in any sense.

Grave charges of immorality had been made against Mr. Reichel; whether true or untrue appears to me to be immaterial; that in a collateral trial they had appeared to be established was certain. I say "appeared to be," since I do not think the decision of that case necessarily involved a finding that Mr. Reichel was guilty; but that without some investigation of his conduct, some form of enquiry as to whether the charges made against him were well founded, he could not continue to perform the duties of vicar of Sparsholt was abundantly clear, and the only compulsion which I find as a fact that Mr. Reichel could put forward was that he must either submit to such an enquiry as the bishop should be advised to direct, or that he should cease to hold his preferment of Sparsholt vicarage.

I think it is absolutely established that Mr. Reichel himself voluntarily elected the latter alternative, and, in pursuance of his determination to take that course, he wrote the letter and executed the instrument of resignation to which I have referred.

It is then said that it was not executed before a notary. It seems to me that that is entirely immaterial. The books of authority which are quoted suggest, by way of advice and precaution, that there should be no difficulty in proof of

(4) 3 Bing. 501, 598.

(5) Law Rep. 8 P. D. 191, 195.

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the fact, that resignations should be actually in person to the bishop, or executed in the presence of some persons selected as witnesses, to prove the fact. But no authority whatever, I think, can be cited to shew that the presence of a notary is essential to the validity of a deed of resignation.

I entertain some doubt whether the point principally relied on arises in this case when once the facts are understood. The arrangements for resignation on the one side and acceptance on the other seem to me to have been consummated before the supposed withdrawal of the resignation of Mr. Reichel.

It is true that the bishop agreed not to execute the formal document to declare the benefice vacant till the following 1st of October; but I decline to decide that when a perfectly voluntary and proper resignation has once been made, and by arrangement a formal declaration of it is to be postponed, that is not a perfectly binding transaction upon both the parties to it; and I doubt whether in any view of the law such an arrangement could have been put an end to at the option of only one of the parties.

Mr. Reichel, in his learned argument, relied much on foreign canonists for the proposition that, until the bishop had actually, in some formal manner, accepted the resignation and then and there declared the benefice vacant, it was competent to the incumbent to revoke a resignation, however formal, however freely made, and however unqualified by condition, or other taint of irregularity.

I do not think that even if the authorities quoted were conclusive as to what is the ecclesiastical law of this country, Mr. Reichel would have made out his proposition.

In the passage quoted from Van Espen there is no doubt that a proposition is found which, unqualified and uncontrolled by the context, would seem to establish Mr. Reichel's point; but the passage is to be understood with reference to the Pope's Chancery and the proceedings in his *camera*, in respect of which certain rules of procedure were established. This will clearly appear from other passages in the

same treatise to which Van Espen himself refers to explain what he means. He says: Pars. 2, sect. 3, tit. 10, c. 3, "XIV. Per regulam cancellariæ quæ hodie est 45 et inscribitur, *De consensu in resignationibus et pensionibus*, papa voluit et ordinavit, quod super resignatione cujuscumque beneficii ecclesiastici, seu cessione juris in eo, quam in manibus suis, vel in cancellaria apostolica fieri contingerit, apostolicæ litteræ nullatenus expeditantur, nisi resignans, vel cedens, si præsens in Romana curia fuerit, *personaliter*, alioquin per procuratorem suum ad hoc ab eo *specialiter* constitutum, expeditioni ejusdem in eadem cancellaria expresse consenserit et jura-verit, ut moris est. Etsi ipsum resignantem seu cedentem pluries super uno et eodem beneficio, in favorem diversarum personarum successive consentire contingerit, voluit Sanctitas Sua, quod primus consensus tenere debeat, et alii posteriores consensus ac litteræ eorum prætextu etiam sub priori data expeditæ pro tempore nullius sint roboris vel momenti.—XV. Hæc regula fuit edita ad tollendas fraudes quæ possent oriri; quia posset quis nomine alterius porrigere supplicationem resignationis, et alium privare beneficiis. Nam consensus per supplicationem sufficiebat de jure communi. Igitur ad tollendas fraudes, cautum est requiri consensum præstitum per se vel per procuratorem specialiter ad hoc constitutum. Ita Chokier ad hanc regulam numº 9." The latter paragraph (XV.) explains the meaning and object of the rules of practice which I have indicated as being peculiar and special to the Pope's Chancery. It is therefore manifest that the general phrases which Van Espen here uses, and which undoubtedly in terms make out Mr. Reichel's proposition, are to be qualified and understood only as applicable to the particular rules and procedure enacted as the rules of practice of the Pope's Chancery.

Whatever may be said in respect of this authority, it seems to me to indicate simply the practice of the Pope's Chancery, and to have been specially referable to rules made to check an evil which, if Mr. Reichel's view of the law is correct, never could have existed. So far, therefore, as

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it is an authority at all, it rather points in the opposite direction. But, in truth, the laws ecclesiastical of this country, or, as Lord Coke calls them, the King's ecclesiastical laws, are as much part of the peculiar and native jurisprudence of this country as the ordinary common law. In *Caudrey's Case* (6) the extent and degree to which the law of this country recognises the laws ecclesiastical is set forth with great minuteness and precision, and the Act 24 Hen. 8. c. 12 contains, as Sir Robert Phillimore says, a clear and dignified exposition of the law upon the subject of the liberties and constitution of the national Church.

It is quite certain that none of the authorities quoted by Mr. Reichel from cases decided in an English Court support his contention. Such shadow of authority as there was appeared to come from text-writers, whose phrases, I think, are not to be understood in the sense argued by Mr. Reichel.

The objection to a conditional resignation, as expounded by all writers on the subject, is founded upon the view that money, or money's worth, is to be obtained as a condition to the resignation, and it is treated throughout by the writers who have dealt with the subject as in its nature simoniacal, or as giving opportunities for simoniacal contracts. And the good sense and meaning of such an objection is apparent.

But there was no condition here at all. As I have already said, I find, as a fact, that Mr. Reichel agreed absolutely to resign rather than undergo the enquiry which the bishop would have felt himself otherwise compelled to institute. Neither in form nor in substance was the resignation conditional.

It seems to me, therefore, that there is no ground for the complaint, and there is no authority for the proposition necessary to support this appeal. I am, therefore, of opinion that the appeal must be dismissed.

LORD WATSON.—I also am of opinion that no cause has been shewn for dis-

turbing the judgment of the Court below in either of these cases. Of the many points discussed in the elaborate and learned argument addressed to us by the appellant in person, one only is deserving of serious notice, which relates to his alleged right to recall on the 16th of July, 1886, a resignation of his benefice of Sparsholt, which he had placed in the hands of his ordinary on the 2nd day of the month preceding. Even upon that point a great part of the argument, and the authorities by which it was illustrated, appeared to me to have little relevancy to the state of facts with which we have to deal.

The appellant did not lodge his resignation in ordinary course, with a view to its being first considered, and then either accepted or rejected. He had justly, or unjustly (it matters not which), been exposed to imputations calculated seriously to affect his character and usefulness as a clergyman; and these had been brought under the notice of his bishop, who gave him the option of being proceeded against as a criminous clerk, or of resigning his cure. The appellant chose the latter alternative, his Lordship having previously consented, if the deed was at once executed and placed in his hands, to date his formal acceptance of it "on the 1st of October next, and not to declare your benefice vacant until that date." It was in these circumstances that the resignation, which is in terms absolute and unqualified, was sent to his lordship's secretary on the 2nd of June, 1886, along with a letter by the appellant intimating that it was executed "on the understanding that the bishop will postpone acceptance thereof until the 1st of October next."

I see no reason to doubt that the present resignation of a cure of souls, at and after a future day named, if submitted to the bishop and accepted by him, would instantly become irrevocable, and that on the arrival of the day specified all connection between the resigner and the cure would be severed. That appears to me to have been the substance of the arrangement between the appellant and the Bishop of Oxford—with this difference only, which is not favourable to the

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appellant's contention. His resignation was delivered in pursuance of a mutual agreement which rendered formal or other acceptance altogether unnecessary; the terms of the agreement shewing plainly that the bishop not merely was ready to accept, but insisted upon having it, in order that it might receive full effect upon the 1st of October following. The agreement was perfectly lawful; it being entirely within the discretion of the bishop to judge whether the adoption of proceedings against the appellant, or his unconditional resignation as from a future date, would most conduce to the spiritual interest of the parish. The appellant assented to the arrangement, and on the 2nd of June, 1886, did all that lay in his power to complete it. In these circumstances it is idle to consider what the appellant's position might have been if there had been no such arrangement, and he merely had sent in his resignation without knowing whether it was to be accepted or not. He cannot, in my opinion, be permitted to upset the agreement into which he voluntarily entered, and which he has done all that he could to complete, upon the allegation that there was no formal acceptance of his resignation until the 1st of October, 1886.

I have only to add that having had an opportunity of perusing the opinion which is about to be delivered by my noble and learned friend on my left (Lord Herschell), I desire to express my concurrence in it.

LORD FITZGERALD.—I concur, and I can add nothing with advantage.

LORD HERSCHELL.—The plaintiff appeals from a judgment of the Court of Appeal declaring that the benefice of Sparsholt, which had been held by him, became void on the 1st of October, 1886, by reason of the resignation thereof by the plaintiff, with the approval and consent of the bishop, and the acceptance thereof as from that day, and declaring further that the attempted revocation of his resignation by the plaintiff was invalid and void.

The main question for your Lordships'

consideration is, whether the plaintiff validly revoked his resignation before its acceptance so as to disable the bishop from further proceeding upon it. Owing to scandal alleged to have arisen from the misconduct of the plaintiff, communications took place between himself and the bishop, which resulted in his writing to the bishop on the 28th of May, 1886, a letter in the following terms: "I desire herewith to place in your hands my resignation of this benefice of Sparsholt, conformably with your Lordship's wish, and at the same time I gratefully accept your kind proposal to postpone acceptance of my resignation until a date to be agreed upon, your Lordship meantime permitting me to be absent." In response to this the bishop's secretary forwarded to the plaintiff for execution a deed of resignation, informing him that the bishop proposed to date his formal acceptance of it on the 1st of October following. The plaintiff executed the deed of resignation and returned it, stating that he had executed it "on the understanding that the bishop would postpone acceptance thereof until the 1st of October next." On the 10th of June following the plaintiff executed a deed cancelling and revoking the deed of resignation, and on the 16th of July he communicated the fact that he had done so to the bishop's secretary. The bishop, notwithstanding this, signed a document dated the 1st of October, 1886, accepting the resignation and declaring the vicarage void. The appellant contends that it was not competent for the bishop to do so, that his resignation was not complete until acceptance, and that down to that time he had a *locus penitentie*.

The plaintiff, when he executed the deed of resignation and placed it in the hands of the bishop, had done all that was necessary on his part to denude himself of the benefice, though it is, no doubt, the case that no clerk can, without the consent of his ecclesiastical superior, effectually so denude himself. The bishop has entrusted to him the duty and the right of considering whether, in the interest of the parishioners, the clerk ought to be permitted to resign his benefice, and it is for

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this reason, and to give an opportunity for this consideration, that the act of the clerk is not effectual until the bishop has assented to it. I do not think the word "acceptance" means more than this assent of the bishop, or that it need take any particular form. Now, in the present case, the bishop had intimated to the plaintiff that he was willing to assent to his resignation, and it was in pursuance of this intimation that the resignation was placed in the hands of the bishop. At the time the deed was executed, at the time the bishop received it, and thenceforward down to and after the time of the alleged revocation, the bishop was an assenting party to the resignation, and was known by the clerk to be so, and to have arrived at the conclusion that it was for the interest of the parish that the resignation should be allowed. It is true that he did not sign any document until after the alleged revocation, and that, in mercy to the appellant, he dated his acceptance as of a later date, so that the appellant might not be at once ousted of his benefice. But no authority in English ecclesiastical law has been cited to shew that, under such circumstances as I have detailed, a clerk can undo his act of resignation and retain his benefice, notwithstanding that the bishop has arrived at the conclusion that it is for the interest of the parish that the clerk's resignation should take effect, and has so intimated to him. And I should strongly advise your Lordships not to create any such precedent. Indeed, I am not satisfied that where a clerk has unconditionally resigned his benefice into the hand of the bishop, he can, in any case, by a subsequent act debar the bishop from accepting the resignation and thus avoiding the benefice. No very clear authority to establish that he can do so is to be found in any of the English text-writers on ecclesiastical law. And though passages were cited from foreign canonical writers on which much reliance was placed, it must be remembered that they had reference to a state of ecclesiastical law in many respects different to that which prevailed in England, and they are certainly not to be received here as an absolute guide. It

is, however, unnecessary in the present case to go the length of saying that a resignation can never be withdrawn without the consent of the bishop, for I am of opinion that it certainly cannot be so under circumstances such as those to which I have drawn attention.

It was argued further by the appellant that inasmuch as his resignation was tendered to the bishop on the understanding that it was not to be accepted until a subsequent date, the resignation was a conditional one, and therefore void. I can see no ground for such a contention. The resignation was absolute. It was intended to take effect in any event. Nor do I see anything illegal in an arrangement that the bishop should withhold his formal acceptance and delay the avoidance of the benefice, where such arrangement is not entered into in furtherance of a scheme which is itself illegal.

Other objections of less general importance were taken by the appellant. As to these, I desire only to say that I am unable to see that any one of them can be sustained, and that they are satisfactorily disposed of, in my opinion, by the learned Judges in the Court below.

I am of opinion that the appeal should be dismissed.

LORD MACNAGHTEN.—I CONCUR.

Order appealed from affirmed, and appeal dismissed.

Solicitors—Appellant in person; Cunliffe & Davenport, agents for T. M. Davenport, Oxford, for Bishop of Oxford, respondent.

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

STIRLING, J.

1889.

June 28.

COTTON, L.J.

BOWEN, L.J.

FRY, L.J.

1889.

Nov. 20.

In re THE NEW EBERHARDT
COMPANY (LIMITED); *ex*
parte MENZIES.

Company—Shares—Rectification of Register—Shares to be held as fully paid up in Cash—Registered Agreement—Execution by Company only—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25.

The filing with the Registrar of Joint Stock Companies of an agreement, purporting to be between a company and the persons mentioned in the schedule thereto, for the issue to such persons of shares as fully paid up, but executed by the company only and not by the persons named in the schedule, is not the filing of "a contract duly made in writing" in compliance with the provision of section 25 of the Companies Act, 1867.

Decision of STIRLING, J., reversed.

This was a motion by Menzies to have the register rectified by striking out his name as the holder of 400 preference shares in the company, on the ground that the shares had not been fully paid in cash, and that a proper agreement had not been filed with the Registrar of Joint-Stock Companies, as required by section 25 of the Companies Act, 1867.

In August, 1888, the Eberhardt and Monitor Company (Limited) went into voluntary liquidation for the purpose of a reconstruction. The scheme for carrying out this reconstruction provided that the property, assets, effects, and business of the Eberhardt and Monitor Company (hereafter called the old company) should be transferred to the New Eberhardt Company (Limited) (hereafter called the new company), and that the debentures in the old company should be exchanged for preference shares in the new company.

On the 31st of August, 1888, a meeting of debenture-holders of the old company was held, and a resolution approving of the proposed scheme was duly passed.

Menzies, who was a debenture-holder, voted by proxy for the resolution.

By an agreement dated the 25th of September, 1888, and expressed to be made between the liquidators of the old company and the new company, the new company purchased the assets and business of the old company, on the terms, *inter alia*, that the new company should allot and issue to the debenture-holders of the old company four fully paid-up preference shares in the new company of 5s. each, for every 1l. of principal due on the debentures. This agreement was duly executed by the liquidators of the old company and the new company, but it was not filed with the Registrar of Joint-Stock Companies.

On the 28th of September, 1888, the new company executed a document, which purported to be an agreement between the new company and the persons whose names and addresses were set forth in the schedule thereto, whereby, after reciting the agreement of the 25th of September, 1888, and that the liquidators of the old company had requested the new company to allot and issue to the persons named in the schedule thereto fully paid shares of 5s. each to the amount of their debentures, it was witnessed that, in pursuance of the said agreement and of such request and direction to the liquidators as aforesaid, the company should allot and issue to the persons named in the schedule thereto the number of shares set opposite to their respective names in the fourth column of the said schedule, and having the distinctive numbers set opposite to them in the fifth column of the said schedule, credited as having the full sum of 5s. per share paid up thereon. And it was thereby agreed and declared that shares included in the said schedule so to be allotted were to be held as shares upon which the full sum of 5s. per share had been paid, and that they should be liable and subject to no further payment.

The schedule to this document contained the names of the bondholders in the old company, including the name of Menzies, but the document was not executed by Menzies or any of the other bondholders. The document was duly filed with the Registrar of Joint-Stock Companies on the 1st of October, 1888.

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In November, 1888, 400 fully paid up preference shares in the new company were allotted to Menzies, and in December, 1888, he received a certificate of these shares treating them as fully paid up.

Doubts having arisen whether the registration of the document of the 28th of September, 1888, was a compliance with the provisions of the 25th section of the Companies Act, 1867, Menzies commenced these proceedings and applied as above.

Whinney, for the applicant.—The contract must be a proper binding contract in writing—*Firmstone's Case* (1)—and it must be signed by both parties. It must be such a contract as could be relied upon by both parties to it. A document containing the terms of an agreement as to the amount of costs payable by a client to his solicitor, assented to by the client, but signed by the solicitor only, was held not to be "an agreement in writing" within the Attorneys and Solicitors Act, 1870, section 4—*In re E. D. Lewis; ex parte Munro* (2). The object of the 25th section is that notice shall be given to all the world that a contract has been made, which is binding upon both parties. Unless it is signed by both parties that object is not fulfilled.

In order to satisfy the section the whole of the contract must be in writing, and unless it is signed by both parties that is not the case. There is an obligation on the company to file a proper contract. This is only a memorandum of agreement. There is no entry upon the register whereby anybody inspecting it could ascertain whether a proper binding agreement had been concluded.

The applicant is entitled to have his name removed from the register.

[He also referred to *In re The Almada and Tiritto Company* (3), *Pooley v. Driver* (4), and *Stokell v. Niven* (5).]

(1) 44 Law J. Rep. Chanc. 617; Law Rep. 20 Eq. 524.

(2) 45 Law J. Rep. Q.B. 816; Law Rep. 1 Q.B. D. 724.

(3) 57 Law J. Rep. Chanc. 707.

(4) 46 Law J. Rep. Chanc. 466; Law Rep. 5 Ch. D. 458.

(5) Law Journal Notes of Cases (1889), p. 69; Law Rep. W.N. (1889), p. 100.

Grosvenor Woods, for the company.—The statute does not say that the contract must be signed by both parties, and the signature of the parties is not essential to constitute a written agreement unless required by some statute—*Leake on Contracts*, p. 184. In *Bewley v. Atkinson* (6), which was a case under the Prescription Act (2 & 3 Will. 4. c. 71), James, L.J., said that he found nothing in the Act to say that the agreement there referred to must be signed by both parties, or that anything which would be a sufficient agreement under the Statute of Frauds would not be a sufficient agreement for the purpose of the later statute. All that is necessary is something to estop the company, and to shew the public that the company is estopped. If that is done the object of the section is fulfilled.

Whinney, in reply.—There must be a contract binding on both parties—*In re The Almada and Tiritto Company* (3). There is nothing on the register to shew that both parties are bound by the contract. The point is covered by *Firmstone's Case* (1).

STIRLING, J. [after stating the facts, continued:—]The agreement of the 28th of September, 1888, is a document which is under the seal of the company; it is a document which constitutes an agreement between the company and the persons named in the schedule thereto; and it shews that the company had come under an obligation to issue to the holders of debentures of another company, being the persons named in the schedule, shares with 5s. paid up; and it is an agreement in satisfaction of the obligation to issue shares accordingly, and declaring that the shares so issued shall be deemed to be shares on which the full sum of 5s. has been paid, and liable to no further payment. Now, I have to ask myself this question, Is this a contract duly made in writing determining that the shares to which it relates are to be held otherwise than as subject to the payment of the whole amount thereof in cash? It seems to me that it is. It is a legal document made in accordance with the forms in

(6) 49 Law J. Rep. Chanc. 153; Law Rep. 18 Ch. D. 283.

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which documents under such seal are required to be made according to the English law. It is under the seal of the company, it is binding on the company, and it shews that it was given for valuable consideration—namely, satisfaction of a prior obligation subsisting under an agreement which had been previously made between the existing company and the liquidator of another company. It seems to me, therefore, that it is a contract duly made in writing. That is all that the Act requires. The Act does not say that it shall be signed by all the parties to it, and I do not see on what ground I ought to add those words to the Act. It may be that it would none the less satisfy the terms of the Act if the parties of the second part had signed it, but none the less is this a contract made by the company and in writing. It seems to me, therefore, to satisfy the terms of the section, and I adopt the words of the late Master of the Rolls in *Firmstone's Case* (1), and I ask, is it a contract made by the contracting party? Surely it is. Who is the contracting party here? The company. Under the statute every shareholder in the company is bound to pay up his shares in cash unless upon certain terms. Then a contract is made by the company that the shareholder shall not be required to pay them up in cash. That contract is the contract of the company, and not the contract of the shareholder. Therefore it seems to me that the contract is made in writing by the contracting party, as the late Master of the Rolls said it was required to be. Then it is said it must shew there is some consideration moving from the shareholder. I am unable to follow that. It is necessary that the contract, in order that it may be valid, should have some legal consideration, but it does not appear to me that it is necessary that that consideration should, on the face of it, move from the party to whom the shares are to be issued. I think that this document completely satisfies the terms of the Act, and therefore the foundation for this application fails.

Menzies appealed from this decision.

Whinney, for the appellant.—In order to satisfy the provision of section 25 of

the Companies Act, 1867, "a contract duly made in writing" must be filed with the Registrar of Joint-stock Companies. The document filed—namely, the document of the 28th of September, 1888—did not at the time it was filed constitute a contract at all. It was not then signed, and never has been signed by Menzies or any of the other persons mentioned in the schedule to the document, and it was not a contract duly made in writing, because it was only signed by one of the parties to it—that is to say, the new company. An agreement in writing in a strict sense requires that each of the parties to it should sign it—*Bewley v. Atkinson* (6); and in *Firmstone's Case* (1) Jessel, M.R., referring to the 25th section of the Act of 1867, said "the words duly made in writing" mean made by the contracting parties. An agreement as to payment of costs signed by the solicitor only was held not to be an agreement in writing within the Attorneys and Solicitors Act, 1870, s. 4, in *In re Lewis ; ex parte Munro* (2).

Grosvenor Woods, for the company.—When the document of the 28th of September, 1888, was filed, there was in existence an agreement between the old company and the new company, by which the new company were bound to allot fully paid up shares in exchange for debentures in the old company. Menzies had assented to this agreement, and the agreement was recited in the document of the 28th of September, which therefore contained full particulars of the material facts relating to the issue of the shares. In *Crickmer's Case* (7), James, L.J., referring to the characteristics of a contract in writing required to be registered under section 25 of the Act of 1867, said, "It must be a contract which shews what shares are to be issued fully paid up, and for what consideration they are to be issued." This statement was quoted with approval by Baggallay, L.J., in *Anderson's Case* (8). The document registered here does shew what shares are to be issued and what is the consideration. It is not necessary that the contract in writing

(7) 46 Law J. Rep. Chanc. 870; Law Rep. 10 Chanc. 614.

(8) 47 Law J. Rep. Chanc. 273; Law Rep. 7 Ch. D. 75.

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should be signed by all the parties to it. Applying the decisions on the Statute of Frauds, it is sufficient to satisfy section 25 if that which both parties have agreed to is reduced into writing; it is not necessary that all parties should sign the written documents—*Laythorp v. Bryant* (9) and *Williams v. Byrnes* (10). An offer made in writing, and subsequently accepted in parol, will bind as a contract under the Statute of Frauds—*Reuss v. Picklesley* (11). The contract here was completed when Menzies accepted the shares allotted to him, and the acceptance related back to the date of the document filed. Further, the document filed ought really to be treated as an acceptance by the new company of terms as to the issue of shares which Menzies had previously assented to. I submit that the document filed satisfies all the requisitions of the 25th section, and it certainly was honestly and *bona fide* filed.

COTTON, L.J.—This is an appeal against a judgment of Mr. Justice Stirling refusing to remove the name of the applicant (Mr. Menzies) from the list of shareholders of the New Eberhardt Company (Limited). Now the question is whether Menzies contracted and agreed with this company to take from it certain paid-up shares—that is to say, shares which in law could have no further claim made upon them; but he says that the 25th section of the Act of 1867 has not been complied with, because there has not been before the shares were issued a registration of such an agreement as is required by the statute, and what the statute requires is this. [His Lordship read it, and continued:]

The question upon which this turns is, whether before the issue of the shares there was a contract made in writing and registered with the Registrar of Joint-Stock Companies? What has been done here may have been perfectly honest and well-intentioned, but I am afraid the statute has not been complied with. There had been a proposal on the winding up of

the old company to transfer all the assets of the old company to the new company on certain terms—that is to say, that all the debenture-holders of the old company were to have 5s. shares in the new company to the amount of their debentures. The law has enabled that to be done; but under the Act of 1862 it was necessary that there should be a special resolution passed by the debenture-holders in this company, and that was done—that is to say, the debenture-holders authorised the directors of the old company to make a contract with the new company, and to transfer to the new company the property of the old company in those shares on those terms, and Menzies assented to that.

Then what was done? A memorandum of agreement was prepared, which recited a contract between the liquidator of the old company and the new company, and then it went on in this way: “And in pursuance of the said agreement”—that is, the agreement between the new company and the liquidator of the old one—“and of such request and direction by the liquidator as aforesaid, the company shall allot and issue to the persons named in the schedule hereto, the number of shares set opposite their respective names in the fourth column, and having the distinctive numbers set opposite to them in the fifth column of the schedule, and credited as having the full sum of 5s. per share paid up thereon. And it is hereby agreed and declared that the shares included in the schedule so to be allotted as aforesaid are to be held as shares upon which the full sum of 5s. per share has been paid.” This memorandum of agreement, this document which was the thing that was registered, in my opinion contained no agreement at all; but I think it contained this—an offer to give all the debenture-holders named in the schedule fully paid up shares to the amount standing in their names; and, so soon as that was accepted by the debenture-holders, then there became a contract between them and the new company in the terms of and in accordance with this memorandum.

But I cannot see that there is anything which can amount to a contract in writing registered. As I have before intimated,

(9) 2 Bing. N.C. 735; 5 Law J. Rep. C.P. 217.

(10) 1 Moo. P.C. N.S. 154.

(11) 35 Law J. Rep. Exch. 218; Law Rep. 1 Exch. 342.

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it merely comes to this—an offer made by the new company to issue shares as fully paid up to those persons named in the schedule who would accept them. Now, I cannot see how that can be within the words of this section, “a contract made in writing and filed with the Registrar at or before the issuing of such shares.” At the time when this was filed, there had been no acceptance by any person to whom it was intended to issue these paid-up shares, and, therefore, there was then no contract at all, I doubt whether there would have been a contract made in writing, even although an agreement had been made by the acceptance by these persons of the terms offered. The words of section 25 are: “a contract made in writing.” That is very different from the terms of the Statute of Frauds, because what the Statute of Frauds says is this: “that no action shall be brought unless the agreement upon which such action shall be brought, or some memorandum or note thereof, be in writing, signed by the party to be charged therewith.” It may be—I do not intend to express any opinion upon it—that in accordance with the decisions on the Statute of Frauds, there might be an acceptance by the party, even if the acceptance was not in writing and signed by him, merely by circumstances which were afterwards taken to amount to an acceptance. But the Judges have decided the case upon the words “a note or memorandum in writing of the agreement”; and in one of these cases, *Reuss v. Pickles* (11), it was held that there was an agreement made there by circumstances which amounted to an acceptance of the offer contained in a memorandum which was in writing, and, there being an agreement, it was held that there was within the Statute of Frauds a good memorandum in writing of the agreement, because all the terms were stated in the document, and that was apparently the ground upon which the Court decided, because Mr. Justice Wills said: “All difficulty as to the terms of the proposal is out of the case. It contained the names of the parties and all the terms by reference to the letter of the 8th of September, which must be taken as having been recited in the letter of the 9th. The only question

is whether it is sufficient to satisfy the statute that the party charged should sign what he proposes as an agreement, and that the other party should afterwards assent without writing to the proposal. As to this, it is clear, both on reasoning and authority, that the proposal so signed and assented to does bear a memorandum or note of an agreement within the 4th section of the statute.” But in the present case the words of the statute are not an agreement in writing, or some note or memorandum of an agreement in writing, but “a contract made in writing”—that is, something very different from a memorandum made in writing; and, in my opinion, it is impossible to say that when at the time of registration of this document there was only, in fact, an offer, there was an agreement made in writing at or before the issue of the shares, and which was registered at or before the time when the shares were issued.

In my opinion, subject to the point that I will deal with now, the case entirely fails. But it was ingeniously suggested by Mr. Grosvenor Woods that the document of the 28th of September was not a proposal at all, but that it was an acceptance by the company of a proposal previously made to the shareholders and assented to by the appellant. As I understood the facts, the appellant assented at the general meeting of shareholders to the proposal which was made by the resolution placed before them, that the liquidator should be authorised to enter into the agreement with the new company. There was no proposal made by the debenture-holders to the new company; it was merely that they gave authority to the liquidator to make the proposal to the new company. In my opinion the document registered does not purport to be an acceptance of any offer made by the persons named, so as to constitute an agreement in writing within the requisitions contained in the 25th section of the Act. In the present case, there being merely a proposal made in writing by the company, it cannot, in my opinion, be considered to be an agreement made in writing within the 25th section, or that that section has been complied with.

In my opinion, not taking the same

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view that Mr. Justice Stirling did, we must make an order that the name of the appellant must be taken off the register of shareholders.

BOWEN, L.J.—I am of the same opinion, and I only express my individual view because we are differing from the learned Judge in the Court below. For the reasons given by the Lord Justice, it is plain that this document which has been filed is not an acceptance of an offer. There had been no offer made by the appellant to the company which could be accepted, but only a consent given by him to a resolution which authorised the agreement between the two companies. If this document is not the acceptance of an offer already made, what is it? It is an offer duly made in writing, and only an offer, and filed while it was an offer only. The offer being something short of a complete contract, it was not a complete contract when it was filed, but it was an offer only. It is true that it did turn afterwards into a contract when it was accepted; but it did not, I think, turn into a contract which was duly made in writing, because the offer only was made in writing, and it certainly did not turn into a contract which had been made in writing at the date when the document was filed, and only became a contract long after the document was filed.

It is obvious, therefore, that, unless we are to fritter away this section by putting a forced construction upon it, the section has not been complied with. I regret the judgment, for reasons given during the argument by Lord Justice Cotton. I think it a most unfortunate slip, and that in substance the requirements of the Act have been fulfilled, although the requirements have not been literally complied with. But we must see that the Act of Parliament is carried out in the letter as well as in its spirit. The cases on the Statute of Frauds can have nothing to do with this case, and it would not follow, even if there were held to be a contract within the Statute of Frauds, that therefore the contract dealt with by this section may not be different. *Reuss v. Pickseley* (11), and the case that preceded it of *Smith v. Neale* (12), were

not decisions that the document amounted to a contract, but only that they amounted to a memorandum of a contract. We are bound by *Reuss v. Pickseley* (11), and that no doubt pushed the literal construction of the Statute of Frauds to a limit beyond which it would perhaps be not easy to go; but, unless we found the language of the Statute of Frauds repeated in this section, we should not be bound by *Reuss v. Pickseley* (11); and if we were to follow it, we should be following that which has not a real analogy.

FRY, L.J.—I am of the same opinion. The 25th section of the Companies Act, 1867, requires certain conditions to exempt shares from liability to be paid in cash. Now those conditions are these—first, there must be at or before the date of the issue of these shares a contract; secondly, that contract must be duly made in writing; and thirdly, that contract must be filed with the Registrar. Now all those things must be done, or must be in existence, at or before the date of the issue. You cannot have a contract filed before the issue of the shares if it is not a contract till after the issue of the shares. You cannot have it duly made in writing at that time unless it has been made before the issue of the shares. All those things, therefore, must be done at or before that time.

Now what we have here is this: There was a contract between the old and the new company which provided for the issue of these shares; but that was never registered finally, therefore that is out of the question; but, instead of that, a certain memorandum of agreement of the 28th of September, 1888, was filed. Now that purported to be between the new company and the several persons whose names and addresses are set forth in the schedule thereto. Now not one of those signed the agreement. Not one of those persons is shewn to have given any assent to the agreement until, by acceptance of the shares afterwards, they may be said to have concurred in the agreement. Therefore it appears to me there was, at the time of the issue of the shares, no contract between the parties as to the terms of this instrument; still less

(12) 2 Com. B. Rep. N.S. 67; 26 Law J. Rep. C.P. 143.

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was there any contract duly made in writing.

Now, it is to be observed that we have been asked to attend to cases on the Statute of Frauds; but nothing can be more different than the language of this statute and the language of the Statute of Frauds. That is satisfied if the contract be in writing, or if the memorandum of the contract be in writing signed by the party to be charged therewith. But here the contract must be made in writing, by which I understand that both parties to the contract must signify their assent to the terms of it in writing—and, without going beyond the writing, you can see the existence of the contract between the contracting parties. That is the ground, therefore, on which it appears to me that we cannot convert this into a contract satisfying the language used, by reason of the subsequent acceptance of its terms by some of the persons making the contract.

But then it is said, Oh, but this is not an offer by the company, it is an acceptance by the company of an offer previously made by the shareholders. Then the misfortune is that this document does not contain any writing stating the offer; it does not purport to be an acceptance of the offer, it proceeds on an entirely different footing. Therefore, if it were the fact that there was any such offer (I agree there was not), that is not embodied in this writing, and therefore is not a contract duly made in writing by the proposals of the shareholders.

I regret to have to come to this conclusion, because the document registered is an honest one, and obviously discloses the real transactions between the parties.

Appeal allowed.

Solicitors—Snell, Son & Greenip, for all parties.

NORTH, J. }
1889.
July 22. }

In re PRYTHERCH.
PRYTHERCH v. WILLIAMS.

Mortgagor and Mortgagee—Legal Mortgagee in Possession—Right to give up Possession—Right to Appointment of a Receiver—Judicature Act, 1873, section 25, sub-section 8.

The power given by section 25, sub-section 8, of the Judicature Act, 1873, to appoint a receiver, can be exercised at the trial of the action, as well as upon an interlocutory application.

A legal mortgagee, who has taken possession of the mortgaged property, cannot give up possession whenever he likes; and, as a general rule, the Court will not appoint a receiver at his instance.

Action with witnesses.

Daniel Prytherch, by his will dated the 10th of November, 1854, devised his real estate to trustees, on trust, in the first place, out of the rents of the said devised estates, or by mortgaging or charging the same or a competent part thereof, to raise, in aid of the residue of his personal estate (if insufficient), so much money as should be requisite to satisfy the pecuniary legacy of 14,000*l.* thereafter bequeathed for the benefit of his younger children, and to apply the money to be so raised accordingly; and, subject thereto, in trust for his eldest son Daniel Dalton Prytherch for life, with remainder to his first and other sons in tail male; with remainder to the testator's other three sons and their sons in tail male; with remainder to the testator's six daughters as tenants in common in fee.

The testator died in December, 1854.

This was a redemption action brought by Mina L. Prytherch, the only child of the testator's second son (claiming, as heiress of deceased daughters of the testator, to be entitled to certain shares of his real estate), against the Rev. Robert Price Williams (the surviving trustee of the will), Charles Bishop, and others, alleging that the trustees had mortgaged the testator's real estate for various sums largely in excess of the amount which they were entitled to raise by mortgage;

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that the defendant Charles Bishop had purchased the life estate of Edward Dalton Prytherch (the third son of the testator), who, on the death of his mother (in December, 1875), succeeded to the real estate as tenant for life under the trusts of the will; and that the defendant Charles Bishop had ever since the year 1879 remained in possession of such real estate; and claiming (amongst other things) a declaration that the trustees were jointly and severally liable to make good any loss occasioned to the plaintiff and the other persons entitled to the testator's real estate by raising money in excess of the power; an account of what was properly due for principal and interest on the mortgage, and properly chargeable against the plaintiff and her co-tenants in common in fee; and that, in taking the account, the defendant Charles Bishop might be charged as mortgagee in possession from the 15th of August, 1885 (the day of the death of Edward D. Prytherch).

Charles Bishop delivered a defence and counter-claim. By his counter-claim he stated that, in the month of June, 1876, the then trustees of the will had mortgaged the whole of the real estate of the testator to secure sums amounting to about 9,900*l.*; that they had subsequently created further charges on such real estate; and that, by an indenture of transfer of mortgage dated the 1st of June, 1883, and made between Charles B. Lewis (the surviving mortgagee) of the first part, the defendant Robert P. Williams (the surviving trustee of the will) of the second part, and Charles Bishop of the third part, in consideration of the sum of 10,630*l.* (the amount then due on the said securities) paid by Charles Bishop to Charles B. Lewis, the said sum and interest were assigned to Bishop, and all the hereditaments comprised in the above-stated indentures were conveyed to him in fee. The counter-claim alleged that the rents of the hereditaments were insufficient to keep the buildings in repair, and to keep down the interest upon the principal sum due; said that Bishop was willing to account as mortgagee in possession; and claimed an account of what was due to him by virtue of the said securities; payment of the amount found due, or, in de-

fault, foreclosure or sale; and the appointment of a receiver.

At the trial of the action the only question calling for a report was as to the right of the defendant Bishop to have a receiver appointed, as asked by his counter-claim.

Everitt, Q.C., and *Edward Ford*, for the defendant Bishop.—Since the Judicature Act, 1873, a legal mortgagee, who has taken possession, is entitled to apply to the Court to have a receiver appointed—section 25, sub-section 8, *Tillett v. Nixon* (1)—even though there is no interest in arrear—*Mason v. Westoby* (2); and he is entitled to go out of possession at any time.

[NORTH, J.—Have you any authority to shew that a mortgagee in possession has a right, at any time, to have a receiver appointed simply to relieve himself from responsibility?]

In *Mason v. Westoby* (2) Bacon, V.C., said that the plaintiff was entitled to be relieved from the responsibilities of a mortgagee in possession by the appointment of a receiver.

Higgins, Q.C., and *C. Walker*, for the plaintiff.—In both those cases interest was in arrear when the mortgagee went into possession.

No doubt the Court will occasionally appoint a receiver at the instance of a mortgagee in possession upon special grounds.

They referred to the Conveyancing Act, 1881, section 19, sub-section 1 (iii.).

Cozens-Hardy, Q.C., and *Clare*; *Upjohn* and *Waggett*, for other parties.

Everitt, Q.C., in reply.

NORTH, J.—Mr. Charles Bishop was for a time receiver in possession for some other persons who were mortgagees, but he ceased to fill that character when those persons were no longer mortgagees, and he himself became mortgagee in possession. From that time his character of receiver merged in that of mortgagee in possession.

(1) 53 Law J. Rep. Chanc. 199; Law Rep. 25 Ch. D. 238.

(2) 55 Law J. Rep. Chanc. 507; Law Rep. 82 Ch. D. 206.

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From that time forth he has continued to be mortgagee in possession. It is not altogether immaterial that he had entered into possession and receipt of the rents and profits so far back as 1878; although that was by reason of his having purchased the interest of the tenant for life, who died in 1885. Thus, for eleven years past, he has voluntarily been in possession of the property, receiving the rents, and during part of the time, either as mortgagee in possession himself, or as receiver for other mortgagees, has been filling the position of mortgagee in possession. Now it is proposed that he should be allowed to give up possession, and that a receiver should be appointed. As regards giving up possession, I am not aware that a mortgagee, who has exercised his right of taking possession of the mortgaged property, has any right to give up that possession whenever he likes. He may take possession whenever he pleases, and if when he has elected to take possession he may give it up again, it is clear that he may take possession again, and then, if the contention is well founded, he may give it up again. I have never heard it suggested, nor do I think it is the law, that a mortgagee is entitled to go into and out of possession whenever he likes. In my opinion, when he once takes upon himself the burden which is imposed on all mortgagees who are in possession, he must continue to perform the duty, and he cannot when he pleases elect to give it up. I am satisfied that if there were any such right, some authority to that effect would have been produced. None, however, has been cited to me, nor have I been able to find such authority referred to in any of the text-books which I have looked at myself.

Then it is said that, at any rate, the mortgagee has a right to have a receiver appointed. I do not see how a man who is himself in possession can have a right to have a receiver appointed to assist him in the performance of his duty. I can understand that a mortgagee who is not in possession may be entitled to have a receiver appointed by the Court to receive the rents of the property. Under the old law a legal mortgagee could never obtain that assistance from the Court. His duty was to take possession himself if he wanted

it, and he was not entitled to have another person put in to act for him when he could take possession for himself. If, however, there was a prior mortgage, so that he had no legal right to the property, in that case he could get a receiver appointed. No doubt since the Judicature Act the Court does sometimes appoint a receiver at the instance of a legal mortgagee, though he could take possession for himself; but it only does that because the Legislature has, by sub-section 8 of section 25 of the Act of 1863, enacted that "a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." No doubt the Court has as large a power at the trial of an action as it would have upon an interlocutory application, and those words were added there only for the purpose of making it clear that the enactment applies to interlocutory applications. Now, the Court has power to appoint a receiver when it shall appear to it to be just or convenient to do so. The section says that a receiver "may"—not "shall"—be appointed when it is "just or convenient" to do so. Would it be just or convenient to do so in the present case? I can see no reason why a mortgagee who has voluntarily remained in possession so long should say at the last moment that he will give up possession and put the mortgagors to the expense of a receivership. Of course, if there is a foreclosure, the receiver's costs, coming out of his receipts, will be paid in effect by the mortgagee; and if he had been content to bear those costs in any event, whether the mortgagor should be foreclosed or the mortgage should be redeemed, I should be disposed to assist him by appointing a receiver. But it does not seem to me that it would be either "just or convenient" that the mortgagors should now have the expense of a receiver put upon them. In my opinion, I have a discretion in the matter, which I ought to exercise by not making the appointment. As regards *Mason v. Westoby* (2), I have no doubt that in that case the circumstances were such as to make it "just and convenient" to appoint a receiver; the judgment shews clearly that that was the view of the

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- learned Vice-Chancellor. But I do not regard that case as an authority for saying the word "may" in section 8 is to be read "must," and the words "just or convenient" are to be ignored altogether. Notwithstanding that decision, I think I have a discretion given to me by the statute, and I do not see any reason for exercising that discretion in the present case by appointing a receiver. I will, however—the mortgagors not objecting—appoint Bishop himself receiver, without salary and without security.

[The judgment, as finally settled, appointed the defendant Bishop receiver without salary and without security; and it directed that an account should be taken against him as mortgagee in possession, from the date of the death of Edward D. Prytherch down to the date of the judgment.]

Solicitors—Berkeley & Calcott, agents for C. E. Morris, Carmarthen, for plaintiff; Tucker & Lake, for defendant Charles Bishop; Clarke, Rawlins & Co., agents for Barker, Morris & Barker, Carmarthen; Burton Yeates & Co., agents for Rowland Browne, Carmarthen, and Crowdy, Son, & Tarry, for other defendants.

NORTH, J. } *In re* STANLEY'S SETTLED
1889. } ESTATES.
August 5. }

Practice—Petition for Confirmation of Lease—Married Woman—Separate Examination—Settled Estates Act, 1877 (40 & 41 Vict. c. 18), ss. 26 and 50.

On a petition under the Settled Estates Act, 1877, for the confirmation by the Court of a proposed lease of a settled estate, a married woman beneficially interested in the estate, who has been served with a notice of the petition as provided by section 26 of the Act, and who, in reply thereto, states that she submits her rights and interests to be dealt with by the Court, need not be separately examined.

Petition.

This was a petition under the Settled Estates Act, 1877, asking for the approval by the Court of a proposed lease of mines

under a settled estate. By virtue of a settlement dated the 20th of January, 1871, and of a subsequent partition deed, certain real estate was settled upon trust for James Talbot Stanley for life, with remainder to his sons successively in tail male, with remainders over, and the same real estate was charged with the sum of 10,000*l.* and interest, for Frances Susannah Stanley (the wife of J. T. Stanley) and her younger children.

The petition was not served on any one, but notices were served on all the parties interested (including Mrs. Stanley), as provided by section 26 of the Settled Estates Act, 1877, requiring them to state whether they assented or dissented to the application, or submitted their rights and interests, so far as they might be affected by the application, to the Court. Mrs. Stanley answered in writing that she submitted her rights and interests, so far as they might be affected by the application, to be dealt with by the Court. On the hearing of the petition the question was raised whether it was necessary that Mrs. Stanley should be separately examined.

Cozens-Hardy, Q.C., and *John Dixon*, for the petition.—When a married woman submits her interests to be dealt with by the Court, it is not necessary that she should be separately examined. Section 50 of the Settled Estates Act, 1877, does not mention the case of a married woman who submits her rights to the Court. [They referred to *Seton on Decrees* (4th ed.), p. 1484.]

NORTH, J.—I do not think the separate examination of Mrs. Stanley is, under the circumstances, necessary. The statement on the subject in *Seton on Decrees* seems to be correct.

Solicitors—Bell, Brodrick & Gray.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
BOWEN, L.J.
FRY, L.J.
1889.
Nov. 20.

In re MARK SHEPPARD.
ATKINS v. SHEPPARD.

Judgment for Debt—Death of Debtor—Appointment of Receiver—“Equitable Execution”—Rules of Supreme Court, 1883, Order XVII. rules 1 and 4, Order XLII. rule 23.

A creditor who has obtained judgment against a debtor in an action in which the debtor and another were defendants cannot as of right and ex parte, after the death of the debtor, obtain a receiver of the deceased debtor's estate. The effect of Order XVII. rule 1, is to keep the action alive against the other defendant; but it does not keep the action alive against the deceased debtor so that proceedings can be taken against persons entitled to the property of the dead man who are not parties to the action, without notice to them.

Quære, whether execution at common law could be had without notice after the death of a judgment debtor against his estate.

Decision of CHITTY, J., affirmed.

Cash v. Parker (48 Law J. Rep. Chanc. 671; Law Rep. 12 Ch. D. 293) distinguished.

The Judicature Act does not give any right to equitable execution where there is no impediment in the way of legal execution.

This was an appeal from a decision of Chitty, J.

On the 25th of October, 1888, Cory obtained judgment in an action in the Queen's Bench Division against Mark Sheppard and his son Herbert Sheppard, who was his partner, for 2,032*l.* Mark Sheppard was possessed of some freehold property. He died on the 17th of March, 1889, intestate. On the 3rd of August, 1889, Cory took out a summons in the action in the Queen's Bench Division for the appointment of a receiver of the real estate of Mark Sheppard by way of “equitable execution” of the judgment. The summons came before Pollock, B., the vacation Judge. He first adjourned the summons

to the 15th of August, and then adjourned it to the 22nd of August.

On the death of Mark Sheppard an action was commenced by a creditor against his widow and heir-at-law, another son, for the administration of his estate. On the 21st of August an application was made in this action to Pollock, B., for the appointment of a receiver of all the real and personal estate of Mark Sheppard, and an order was made appointing one Pratt a receiver of the property until the appointment of an administrator or until further order.

On the 22nd of August Cory's summons in the action in the Queen's Bench Division came on before Pollock, B., and he appointed Pratt receiver of the rents of the real estate of Mark Sheppard, upon his giving security. No security had been given. Letters of administration were, on the 17th of September, granted to another son of Mark Sheppard, and on the same day the appointment of the receiver in the administration action was continued.

On the 25th of October a motion was made before Chitty, J., in the administration action, on behalf of Cory, that the receiver appointed in that action might be ordered forthwith to receive the rents and profits of the real estate of Mark Sheppard, and appropriate the same towards the payment of Cory's judgment debt.

Chitty, J., refused the application, on the ground that the judgment creditor could obtain no priority by the appointment of a receiver, because it was only effectual on the receiver giving security, which he had not done; and also that the Court had no jurisdiction to make an order appointing a receiver against the estate which had belonged to the deceased debtor, but which, at the time the order was made, had become the property of the heir-at-law, who was not a party to the action.

Cory appealed.

Romer, Q.C., and Haldane, for the appellant.—The appointment of the general interim receiver did not interfere with the rights of the receiver appointed in the Queen's Bench action—or, at any rate, the rights of the receiver in that action were

In re Mark Sheppard, App.

good against all persons except the interim receiver, and when the interim receiver's appointment came to an end by the appointment of a legal personal representative, the appointment of the receiver in the Queen's Bench action became effective, and directly he gives security the order appointing him operates from the time when it was made. The learned Judge had power to appoint the receiver, notwithstanding the death of Mark Sheppard. By Order XVII. rule 1, a cause or matter does not become abated by reason of the death of any of the parties. Cory was therefore entitled to apply to the Court in the action for the appointment of a receiver, and he could do so *ex parte*. He would have been entitled to have had execution at law against the chattels of Mark Sheppard after his death, without notice to his executors. The appointment of a receiver by way of "equitable execution" is an equivalent or substitute for legal execution, and Cory was therefore entitled to obtain an order for the appointment of a receiver of the real estate of Mark Sheppard without giving notice to the persons to whom that estate passed on the death of Mark Sheppard. The cases of *The Anglo-Italian Bank v. Davies* (1) and *Ex parte Evans* (2) shew that the appointment of a receiver is equivalent to legal execution. In *The Manchester and District Bank v. Parkinson* (3) the order appointing a receiver of the furniture of a judgment debtor after her death was rescinded; but it was rescinded on the ground that no reason was shewn why execution of the judgment in the ordinary course of law by *fiery facias* could not be obtained, not on the ground that the Court had no power to appoint a receiver after the judgment debtor's death. In *Cash v. Parker* (4) a receiver was appointed until a legal personal representative of a deceased defendant had been

constituted. Under Order XLII. rule 23, Cory could have obtained legal execution of the chattels of Mark Sheppard after his death.

They cited also *Eldridge v. Burgess* (5). *Byrne, Q.C.*, and *Dibdin*, for the plaintiff in the administration action, and *Kingdon*, for the administrator, were not called upon.

COTTON, L.J.—This is an appeal from a decision of Mr. Justice Chitty. The facts are, shortly, these. There had been a judgment obtained in an action in the Queen's Bench Division against Mark Sheppard and his son Herbert Sheppard. Then Mark Sheppard died, and, after his death, an administration action was instituted in the Chancery Division, and an order appointing an interim receiver was made. On the day after this order was made the judgment creditor in the Queen's Bench Division action applied to and obtained from Baron Pollock an order appointing the same person receiver, upon his first giving security, of Mark Sheppard's interest in certain real estate, although Mark Sheppard was then, in fact, dead.

Mr. Justice Chitty decided that the judgment creditor could obtain no priority by the appointment of a receiver, on the ground that it was only effectual on the receiver giving security, which he had never done. That view has now been admitted to be erroneous, and was not contested on this appeal. But the learned Judge also expressed an opinion that the Court had no jurisdiction to make an order appointing a receiver against an estate which, at the time the order was made, was no longer the estate of Mark Sheppard, for he was then dead, but had become the estate of his heir-at-law, who was not a party to the Queen's Bench action. In my opinion, there was no jurisdiction to make that order.

It has been said that the order was an "equitable execution," and that as legal execution might be had after the death of a judgment debtor, there was no reason

(1) 47 Law J. Rep. Chanc. 833; Law Rep. 9 Ch. D. 275.

(2) 49 Law J. Rep. Chanc. 7; Law Rep. 13 Ch. D. 257.

(3) 58 Law J. Rep. Q.B. 262; Law Rep. 22 Q.B. D. 173.

(4) 48 Law J. Rep. Chanc. 691; Law Rep. 12 Ch. D. 293.

(5) 47 Law J. Rep. Chanc. 342; Law Rep. 7 Ch. D. 411.

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why "equitable execution" should not be granted after the death of the judgment debtor as well as legal execution.

I by no means assent to the proposition that legal execution could have been obtained after a judgment debtor's death at once, without any other step being taken. I think there are strong reasons for saying that it could not. But, assuming that it could, can an order for the appointment of a receiver be likewise made after the judgment debtor's death? In my opinion the whole argument in favour of that view arises from a confusion in the use of the term "equitable execution." The term itself is an erroneous expression. It is merely a term which has often been used as a short mode of expressing the fact that by a receivership order the same benefit might be obtained in equity as in common law was obtained by legal execution; but it is quite a different thing from execution at common law. A receiver was appointed by way of equitable relief only when difficulties existed in the way of obtaining legal execution. Under the old practice of the Court of Chancery a plaintiff came into equity in order to obtain the same benefit which he might have got by means of his legal right if there had been no impediments in the way. It is wrong, however, to say that the Judicature Act gave any right to obtain this equitable relief against the estate of a legal debtor when there was no difficulty in obtaining execution at law; and if any practice contrary to this has grown up of late, such practice is, in my opinion, entirely wrong.

But, passing from that, does the appointment of a receiver stand in the same position as legal execution? By the appointment of a receiver the judgment creditor obtains relief, arising, not from the mere fact of having obtained judgment at law, but relief to which under the circumstances he is entitled in equity against the estate of the judgment debtor; the appointment of a receiver, therefore, cannot be obtained without an order of the Court—a new order giving the applicant equitable relief. Such an order can only be obtained against a person over whom the Court has jurisdiction.

In the present case the order was ob-

tained against property which by reason of the death of the defendant and by operation of law had then become the property of the heir, and the order was obtained without notice to the heir. It is against the heir this order is made; and the Court has no jurisdiction over him, he not having had any notice.

It is said that the Rules and Orders admit of this being done. It is said that by Order XVII. rule 1, the action is kept alive because it was brought against father and son. The action is no doubt alive against the son, but not against the deceased father. That rule applies when by reason of the death of a party there is a devolution of his interest upon a person who is a party to the action, but it does not apply when the devolution is upon a person who is not a party to the action. The action was not alive against the father. The right to make an order against him was gone by reason of his death, and no order could be made against the property which had been his until the person on whom it had devolved had been made a party to the action.

Reference has been made to the order made by Lord Justice Fry in *Cash v. Parker* (4). There the plaintiff was a person entitled to take out administration if no one else did, and then by analogy to the practice in the Probate Division of appointing a receiver *pendente lite*, the plaintiff undertaking to use all possible speed in obtaining the appointment of an administrator, an interim receiver was appointed in order to protect the property until a legal personal representative was constituted. In that case, therefore, a person who was entitled to invest himself with the legal right to the property was before the Court, and the object of the order was to protect the property until he had done so.

The argument is based on a misconception of Order XVII. rule 1. That rule does not enable the Court to make an order adverse to a person not a party to the action, without hearing what such person may have to say, or without taking the legal means to have such person before the Court.

In my opinion the receivership order

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was made *per incuriam*, the Court having no jurisdiction against the heir-at-law. The decision of Mr. Justice Chitty is, therefore, right, though he decided the case on different grounds.

BOWEN, L.J.—I am of the same opinion. A judgment had been obtained against Mark Sheppard and his son Herbert in the Queen's Bench Division. Mark Sheppard died, and departed this world and the suit at the same time. Afterwards the plaintiff in the Queen's Bench action obtained an order *ex parte* (drawn up erroneously stating that the defendants appeared in person) for a receiver of the rents and profits of the real property of the dead man. That property had been his, but by his death and by law it had passed to some one else, and it is suggested that an order may be obtained *ex parte* against property which no longer belongs to the dead debtor, but which belongs to somebody else who has not been served with notice of the application. I think that cannot be right, it seems to me contrary to natural justice.

But that is not all. It is said that this can be done, because the appointment of a receiver is only equitable execution, and that at common law execution might issue as of right without any one being served. I doubt if it is the practice in the common law division that you may as of right execute a judgment obtained against a debtor, who has since died, against his executor. If such is the practice I am not aware of it. There are certain statutory provisions which allow execution after death of the judgment debtor, but I think notice is required for these proceedings. Certainly this is not a case in which at common law execution could issue as of course. Equitable execution is not merely equivalent to legal execution, but it is relief granted because mere execution at law cannot be obtained; it is a substitute for legal execution where that cannot be had. It is wrong to say that an order for a receiver may be obtained in the Chancery Division *ex parte* without notice being served on the person entitled to the property to be affected. But it is said that it can be done under Order XVII. rule 1. To my mind that is not

so. Rule 1 must be read with rule 4. [His Lordship read the rules, and continued:] The fact that there was a co-defendant who survived Mark Sheppard kept alive the action against him, but the action was not kept alive against the dead man, so that proceedings could be taken against persons entitled to the property of the dead man without notice to them. Order XLII. rule 23 does not govern the case, as it applies to execution and not to the appointment of a receiver; and if it did, it could not be obtained *ex parte*.

FRY, L.J.—The appellant appears to me to assert that the appointment of a receiver is a kind of execution which may be had against a dead man's estate without notice to his executors, and giving priority to the person obtaining it over other creditors. The idea that the appointment of a receiver is a kind of execution is entirely erroneous. It is quite true that the old Court of Chancery exercised this jurisdiction in cases where judgments at law had been obtained; but that was when the applicant had shewn that he had obtained judgment and had sued out the appropriate writs of *fi. fa.* or *elegit*, and was then met by certain difficulties from the nature of the property of the debtor, and then only did the Court of Chancery grant a receiver in aid of the enforcement of legal payments for legal debts. Relief by way of the appointment of a receiver proceeded on the view that no execution could be had on the writ. Further, the appointment of a receiver was an act requiring the exercise of judicial power on the part of the Court; and the circumstances I have referred to would have to be proved before the Court would make the order. The relief therefore granted by the Court of Chancery was not an execution of the judgment at law, but was granted because legal execution could not be obtained. All this has been summarised by Judges at different times under the expression "equitable execution"; but I am apprehensive that that condensed expression has led to misapprehension, and to the idea that the obtaining the appointment of a receiver is a mere form of execution which can be obtained without the attention of the Court being called to the circumstances

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which create the equity, and on which alone the jurisdiction arises. It has been said that in all cases at common law execution could be had without notice against the estate of a deceased person. On that point I will confine myself to expressing great doubt whether it is so.

Appeal dismissed, with costs.

Solicitors—Deacon, Gibson & Medcalf, for appellant; R. J. Witty, for respondents.

[IN THE COURT OF APPEAL.]

LORD COLERIDGE, C.J. } *In re* DAVID;
COTTON, L.J. } BUCKLEY *v.* THE
FRY, L.J. } ROYAL NATIONAL
1889. } LIFE-BEAT INSTI-
Nov. 8, 11, 12, 13. } TUTION.

Mortmain—Interest in Land—Bonds of Harbour Trustees—Assignments of Rates, Tolls, Rents, &c.—Bridge Tolls.

Harbour trustees, under their statutory powers, borrowed money on security of bonds of 100l. each, by which they assigned to the lender "such proportions of the several rates, tolls, rents, and other moneys arising by virtue of the Act as the said sum of 100l. doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, tolls, rents, and other moneys," to hold to the assignee until the sum of 100l., with interest thereon, should be paid:—Held, that the bridge tolls constituted an interest in land within 9 Geo. 3. c. 36, and that, consequently, the bonds could not be given for charitable purposes.

Distinction laid down in Knapp v. Williams (4 Ves. 429 n) and in In re Christmas; Martin v. Lacon (55 Law J. Rep. Chanc. 878; Law Rep. 33 Ch. D. 332) applied.

Decision of NORTH, J. (reported 58 Law J. Rep. Chanc. 542; Law Rep. 41 Ch. D. 168), affirmed.

This was an appeal by certain charities from a decision of North, J. (reported 58 Law J. Rep. Chanc. 542; Law Rep. 41

Ch. D. 168), by which he held that bonds issued by the Swansea Harbour Trustees by virtue of the Swansea Harbour Act, 1854, with which was incorporated the Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), whereby the trustees, in consideration of 100l. paid on each bond, granted and assigned to the lender "such proportion of the several rates, tolls, rents, and other moneys arising and accruing, by virtue of the said Act, as the said sum of 100l. doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, tolls, rents, and other moneys," to hold to the assignee until the sum of 100l. and interest thereon should be paid, were an assignment of bridge tolls specifically, and that these tolls constituted an interest in land within 9 Geo. 3. c. 36, and, consequently, the bonds could not be given to the charities.

The provisions of the Swansea Harbour Act, 1854, the Commissioners Clauses Act, 1847, and the facts of the case, and the admissions made by counsel, are stated in the report of the case in the Court below, or appear sufficiently in the judgments on appeal.

The evidence was not clear upon the point in whom the ownership of the soil covered by the bridge was vested; but the appeal was ultimately argued on the footing that the approaches to the bridges and the land covered by them were, at any rate to a certain extent, vested in the trustees.

Vaughan Hawkins and Dibdin, for the appellants.—The appeal raises two points—first, that the tolls in question are not interests in land; and, secondly, even if so, looking at the Swansea Harbour Act, it does not create an interest in the tolls themselves, but charges the money borrowed on a fund, the proceeds, no doubt, to a certain extent, of the tolls and rates in question, but still not the same thing as the tolls and rates themselves.

North, J., decided the case on the ground that *Knapp v. Williams* (1) was an authority that such things as turnpike tolls were necessarily interests in land, and

(1) 4 Ves. 429 n.

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that he could not distinguish between the bonds in this case and those in the earlier. But we do not know the circumstances of that case, and the bond there was apparently in some exceptional form, carrying real estate, and the decision may have been correct; but it has been questioned, never approved, and, as we submit, disapproved in *Martin v. Lacon*; *In re Christmas* (2). At all events, it is a case standing by itself—see *Myers v. Perigal* (3). The question whether the bond comprises an interest in land depends in each case on the particular statute under which it is created; and we submit that there is nothing in the Swansea Harbour Act to create an interest in land. Again, these tolls are not tolls traverse—that is, tolls in the nature of a rent or reservation for going over a man's property—but tolls thorough—that is, a tax, not something arising out of the ownership of property either dominant or servient, but imposed formerly by the Crown—now by Parliament; and the right incidental to every toll or tax to go on the land to collect it, does not constitute an interest in land.

[They referred and commented on *House v. Chapman* (4), *Finch v. Squire* (5), *Ion v. Ashton* (6), and *The Attorney-General v. Jones* (7); and 3 Geo. 4. c. 126. s. 60, and 4 Geo. 4. c. 95. s. 57, as to the vesting of toll-houses in the trustees of turnpike roads.]

The security created by the bonds is a security, not on the rates, tolls, and rents specifically, but on the undertaking generally—*Attree v. Have* (8) and *Gardner v. The London, Chatham, and Dover Railway Company* (9). No doubt, rates, rents, and tolls are specifically mentioned in the bonds, and there is not in terms an express mortgage of the undertaking, but there is in

effect a mortgage of the undertaking. In construing the bonds, the provisions of the special Act must be considered; and sections 99, 103, 104, 108, 109, 110, and 112 are specially to be noted. It appears that the Swansea Harbour fund must be first applied in payment of interest on the bonds, and then as provided by the Act. The bondholder may, for his interest, have a first claim on the harbour fund, but for his capital he can only come after the harbour navigation has been provided for. The principal is only charged on the net income. If a receiver were appointed under section 104, he could not receive any tolls or rents; he could only receive a proportion of the gross fund. We submit, therefore, that the bonds create no interest in land, though the sources from which the fund charged arises may include real estate, and therefore the bonds do not come within 9 Geo. 2. c. 36—*In re Christmas*; *Martin v. Lacon* (2).

[They cited also *In re Harris*; *Jacson v. The Governors of Queen Anne's Bounty* (10), *Edwards v. Hall* (11), *In re The Manchester and Milford Railway Company*; *ex parte The Cambrian Railway Company* (12), and *Blaker v. The Herts and Essex Waterworks Company* (13).]

Everitt, Q.C., and *Cruickshank*, for the respondents, were not called upon.

LORD COLERIDGE, C.J.—We have to determine whether a set of bonds, a specimen of which is before us (I presume the words are the same in all the bonds which are under discussion), are or are not so far connected with land, and the possession and use of land, as to bring them within the mischief of the Statute of Mortmain. If they are not, then Mr. Justice North was wrong; but if they are, then Mr. Justice North was right.

These are bonds, the power to issue which is created by some of the clauses of the Swansea Harbour Act, 1854, which

(2) 55 Law J. Rep. Chanc. 878; Law Rep. 33 Ch. D. 332.

(3) 2 De Gex, M. & G. 599; 22 Law J. Rep. Chanc. 431.

(4) 4 Ves. 542.

(5) 10 Ves. 40.

(6) 28 Beav. 379.

(7) 1 Mac. & G. 574; 19 Law J. Rep. Chanc. 266.

(8) 47 Law J. Rep. Chanc. 863; Law Rep. 9 Ch. D. 337.

(9) 36 Law J. Rep. Chanc. 323; Law Rep. 2 Chanc. 201.

(10) 49 Law J. Rep. Chanc. 687; Law Rep. 15 Ch. D. 561.

(11) 6 De Gex, M. & G. 74; 25 Law J. Rep. Chanc. 82.

(12) 49 Law J. Rep. Chanc. 365; Law Rep. 14 Ch. D. 645.

(13) 58 Law J. Rep. Chanc. 497; Law Rep. 41 Ch. D. 399.

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has been before us, and the provisions of which have been elaborately examined by Mr. Vaughan Hawkins and Mr. Dibdin. The form of the bond is that given in the schedule to the Commissioners Clauses Act, 1847. The words of the form of the bond given in that Act are closely followed, and the bond sets out that it assigns or mortgages to the holders of the bond "such proportion of the rates, tolls, rents, and other moneys arising and accruing by virtue of the said Act as the said sum of 100*l.* doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, tolls, rents, and other moneys." Those are the words of the schedule to the Commissioners Clauses Act, 1847. The Swansea Harbour Act, 1854, leaves out in the empowering section (the 99th) the word "rent," and empowers the trustee to "borrow any sum not exceeding 80,000*l.* on mortgage of the several tolls, rates, and dues by the Act authorised." Therefore the words of the bond, and the words of the Act of Parliament empowering the bonds to be issued, are different in respect of the word "rents" occurring in the bond.

The word "rents" does not seem to be in terms authorised by the 99th section of the Swansea Harbour Act, 1854. It might be that the bond to the extent of the word "rents" is a bond which the trustees were not authorised to issue by that Act. That is a question upon which a good deal might have to be said if it was necessary to determine it, because the Commissioners Clauses Act, which is incorporated with the Swansea Harbour Act, does appear to give to the trustees power to mortgage these rents, which the words of the special Act do not appear to give them power to do. If it were necessary to consider that question, certainly an interesting and nice, and possibly a difficult, question might arise, because the difference between the two is, as I have said, plain. The word "rents" occurs in the bond, but does not occur in the special Act of Parliament.

But I do not think it necessary at all to discuss that, because, supposing for the sake of argument that the word "rents" is not authorised—I do not decide that, or

express any opinion upon it, but assuming for the purpose of argument it is not—the bond would be good as far as tolls, rates, and dues are concerned; and then the question would arise (which is the first and difficult question in this case) whether the tolls, rates, and dues mortgaged in this bond are or are not within the mischief of the Mortmain Act.

A good deal has been said upon the old case which was determined in 1798 by Lord Loughborough—the case of *Knapp v. Williams* (1), which is reported in a note to a case before Lord Eldon in 4 *Vesey*, 429. Now that case has been certainly open to the observations that have been made upon it by several Judges who noticed it, and especially by my learned brother the Lord Justice Cotton, in the case of *In re Christmas; Martin v. Lacon* (2), in which he goes at some length into the case, and expresses his view upon the case, but which does not appear to me, on the present argument, to express any decided opinion. If the case of *Knapp v. Williams* (1) is binding upon us, then there seems to be clearly an end of this case and of Mr. Vaughan Hawkins's argument, because the apparent meaning of the case of *Knapp v. Williams* (1)—subject, I quite admit, to the difficulties pointed out by my learned brother in his commentary in *In re Christmas; Martin v. Lacon* (2)—was that bonds not distinguishable from those in the present case were held to be within the Statute of Mortmain. But the case is interesting because Lord Loughborough draws the distinction (a distinction which I suppose is perfectly well established) that there are two sorts of tolls—that there is a toll so intimately connected with the possession of land, and so entirely bound up with land and arising out of land, that the mortgage or grant of such a toll would be within the Statute of Mortmain; and the other, a toll clearly severable from the possession of land, and not arising out of its possession, which would not be within the Statute of Mortmain.

I suppose no one who has commented upon the case has at all doubted that that distinction is a distinction well founded in law, and a distinction of importance to be borne in mind in a case of this kind.

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Then a question arises, which sort of a toll is this? Is this so connected with the possession of land as to be within the mischief of the Statute of Mortmain, or is it not? It is a question of fact. I confess it would have been more satisfactory to my mind if I could have had a clearer idea of exactly what the physical position of the bridges in this case is in respect of the use of which the tolls would arise which are the subject-matter of these bonds; but the best judgment I can form upon it is that they are really money paid for the use of land—money paid by the persons who go over the bridges, and go over the approaches of the bridges—at all events in respect of one of them—money paid for the actual use of land, and therefore money so intimately connected with land, and so completely arising from the possession of land, that the mortgage of such tolls would be within the mischief of the Statute of Mortmain.

That seems to me to be reasonably clear. It might have been made rather more clear if we had known rather more about the physical position of the subject-matter in respect of which the tolls arise; but I think that it is sufficiently and reasonably clear to make the tolls in this case of that sort which have been held to be within the mischief of the statute, because they are completely connected with the use of land and arising out of it.

That would in one sense dispose of the case; but Mr. Vaughan Hawkins has raised, as I understand, in his argument a second point, and he says that, properly looked at, that is not the true effect of the bond—that the true effect of the bond is not to mortgage these tolls only, or to mortgage exclusively the rates, dues, and tolls only, but because of certain clauses of the Swansea Harbour Act, 1854, and especially the 102nd, the 103rd, and the 108th sections, relating to the formation of the Swansea Harbour Fund, it will be seen that the bond is really a mortgage not of the tolls, but of the whole undertaking, of all the moneys and payments, and everything that came into the hands of the trustees; that it is really to be considered a mortgage of the Swansea Harbour Fund, and that the Swansea Harbour Fund is really and substantially the same

thing as the undertaking of the Swansea Harbour Trust, and therefore within the distinction of *In re Christmas*; *Martin v. Lacon* (2), and other cases of that nature. That makes it distinguishable from a mortgage of tolls arising out of land, and brings it within the protection of those many cases in which it has been held that where the whole undertaking is the subject-matter of the mortgage, that that is not within the Statute of Mortmain, because it is a giving of all that, which comes out of all the land, and out of all the property, after it is severed from the property, and that therefore it may be considered not as a mortgage of the land from which the moneys proceed, but as a mortgage only of that which proceeds from the land and other matters belonging to the corporation or company, or whatever be the body which issue the bonds. That is Mr. Vaughan Hawkins's second point, as I understand it. If that could be made out I suppose it would be a good point, because it would be within the authority of decided cases with which we have no power to interfere, and with which I do not wish to interfere. But that does not appear to me to be a good point, because the answer is that which was given some time ago in the course of the argument. These clauses of the Swansea Harbour Act exist, and they undoubtedly give directions to the trustees that out of the Swansea Harbour Fund—which I will assume for the purpose of argument is something that comes into the hands of the trustees—I do not know that it is quite correct, but I will assume that it is so—out of all that comes into their hands in respect of that fund they are to keep down the interest on the mortgage, and to create a sinking fund to put an end to the mortgage; but, as was pointed out in the course of the argument, a direction as to what they are to do with moneys in respect of that is a very different thing from mortgaging, or attempting to mortgage, those moneys in themselves; and it seems to me that those sections are merely orders to the trustees as to the fund out of which the interest upon these bonds is to be paid, and give directions for the creation out of the same fund of a sinking fund, in due course to put an end to the mortgages. It seems to me, there-

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fore, that that second point of Mr. Vaughan Hawkins, when we come to look at the Act of Parliament and the sections upon which he relies, fails him as well as the first.

The result, to my mind, is that the judgment of Mr. Justice North is right on that ground and must be affirmed.

COTTON, L.J.—I am of the same opinion. I will take Mr. Vaughan Hawkins's second point first, because if that could be maintained it would be unnecessary to enter into the question whether a charge on the bridge tolls was within the Statute of Mortmain—the statute of 9 Geo. 3. c. 36.

Now the second point, as I understand it, is this, that this is not a charge created by this debenture on any specific tolls or dues, but that it is a charge upon the general undertaking—that is, on the money after it has been received by the trustees and after it has gone into their coffers; and so that the general fund, or the charge on that general fund, would not be an interest in land from whatever source the moneys came originally, and that therefore there would be no objection under the 9 Geo. 3. c. 36. Now the debenture or mortgage is created under section 99 of the Swansea Harbour Act, 1854, with which is incorporated the Commissioners Clauses Act, 1847. The words of the bond are that the trustees assign “such portions of the several rates, tolls, rents, and other moneys accruing by virtue of the said Act as the said sum of 100*l.* doth or shall bear to the whole sum which is, or shall be, borrowed.” In section 99 the trustees have power given them to charge the tolls, rates, and dues specifically; and if these words had been followed, Mr. Vaughan Hawkins's argument could hardly have been addressed to us. But what he said was this, that, having regard to the terms of this bond, what is meant there to be charged is not specifically the tolls, rents, and dues, but the general undertaking of the Swansea Harbour trust. Well, he did not call our attention to the fact, as the Lord Chief Justice has done, that this charge was created not only under the special Act, but under the powers of the Commissioners Clauses Act, 1847; and we do find that under that Act, according to

the form in the schedule, mortgages to be given are on “such rates, rents, profits, and other moneys accruing or arising by virtue of the said Act, as the said sum of *l.* bears to the whole amount borrowed.”

I think I have given the words correctly. To my mind that very much explains why this language is introduced into this debenture, and it is not introduced for the purpose of shewing that although the power under section 99 is to charge specifically tolls, it intends to give, or purports to give, a charge only on the general undertaking—that is, on the moneys from whatever source received when they come into the coffers of the trustees. But even on Mr. Vaughan Hawkins's argument, if there is a charge here specifically on tolls, what he must contend is that any debentures or mortgages granted under this Act are charges on the general undertaking only, and not on the specific tolls which are referred to in the security; and he does so relying on the case of *Gardner v. The London, Chatham, and Dover Railway Company* (9), which was a decision of the Lords Justices. But to my mind that case does not apply. The debentures and charge are of an entirely different character. In *Gardner v. The London, Chatham, and Dover Railway Company* (9) we have the debentures set out there. They are in accordance with the Commissioners Clauses Act, assigning unto Gardner the general undertaking of the company as defined by that Act, and all the tolls or sums of money arising upon or out of the said general undertaking. Although there is there a reference to tolls or sums of money arising upon or out of the general undertaking, yet the Court construed that as a charge not on tolls specifically, but only as a charge on the general undertaking mentioned in the Act; and that Act did require and direct that the railway company should be kept up and maintained, and therefore the Court said that it was not a charge which enabled the mortgagee to take any particular land, or any particular money arising from the undertaking, irrespective of the undertaking being carried on. It is a mortgage of the undertaking as defined by the Act—that is, subject to the obligations which are cast upon the

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railway company by the Act of Parliament.

That case entirely differs from the present case; because here there is power to charge generally the undertaking of this harbour; but to do so in this manner is to charge—what was in the view of the Legislature I do not know—the particular sums of money arising from that undertaking; and in the direction which is given as to the application of this general fund, which comprised, as Mr. Vaughan Hawkins pointed out, certain sums of money which came into the trustees' chest, the first direction is to pay the interest on these debentures, which is entirely different from the directions contained in the railway Act, and entirely inconsistent with the views of the Court of Appeal, and which Lord Justice Turner took, with reference to the directions contained in the railway Acts. The case was heard by Lord Cairns and Lord Justice Turner. That, to my mind, prevents the cases on which Mr. Vaughan Hawkins relies from applying to the present case, and we have to consider what is the effect of giving a charge in the way this is done under the provisions of the Act upon tolls, and, among others, the bridge tolls.

The point which I now propose to consider, and which was the first point raised in the arguments, is, what is the effect of charges specifically on the bridge tolls? The Lord Chief Justice has referred to the case of *Knapp v. Williams* (1), which we had to consider a good deal in the case of *In re Christmas; Martin v. Lacon* (2), and I do not propose to consider it again so fully as I did then, but there is a passage in that case which points out the principle which we have to apply in considering whether this toll is a thorough toll, or whether it is a toll by which there is some interest in the land given. Now what are the facts? We ascertained from Mr. Vaughan Hawkins that he considered part of the approaches to these bridges and the land by which these bridges are supported was the property of the trustees of the dock company, and theirs only, and that the bridges passed over their own land, and the passage over the bridges was connected with the use of their own land. Then what is the toll to

be considered? Is not this sum of money which the trustees had a right to receive connected with the land—rendered to them for the use of their own land—and which they are entitled to receive for the use of their own land? In my opinion it is. They have power given by the Act of Parliament to stop any one who attempts to pass their toll-gate and to pass over their bridges, unless he has paid this sum of money. That, to my mind, is a sum rendered to them for the use of their land, and which they are entitled to have payment of for the use of their land. It is not at all like a toll which they are to take from certain persons without reference to the use of the land.

In the case of *In re Christmas; Martin v. Lacon* (2), we came to the conclusion that the sum of money which was charged there was a sum of money in no way connected with the use of the land, that it was a sum to be paid by all the masters of ships who came within certain limits, not in any way using the land, and the payment was in no way connected with the use of the land. It could not be said, therefore, that the right to receive that was any interest in land. It was in no way connected with the use of the land; but where the sum was only to be received from persons who used the land of the trustees in a particular way, and who used the bridges which were constructed on their land, it would, in my opinion, be wrong to hold that the right to receive the money was not connected with land. It is rendered for the use of land, it comes out of the land. And, in my opinion, it would be wrong to hold in this case that this sum of money which the debenture-holders are entitled to receive is not a sum paid for the use of and is not connected with the use of land.

In my opinion Mr. Justice North's decision is right, and the appeal fails.

FRY, L.J.—This case has been so elaborately argued that I ought perhaps to add a few words to express my conclusions upon it.

The Local Act in question (17 & 18 Vict. c. cxxvi.) incorporates the Commissioners' Clauses Act, and it incorporates those clauses of the Act which authorised the

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mortgaging of the property and contains the form of mortgage. That authorises the mortgage of the tolls, rates, dues, and also of the rents. The same Act also contains a special clause with regard to mortgages—namely, the 99th section which enables the trustees to create a mortgage of the tolls, rates, and dues. The first question seems to me to be this. Does the mortgage validly include the rents? The question is a somewhat nice one, upon which I do not intend to express any opinion. If the mortgage did include the rents, then the contention that the mortgage did not create an interest in the land seems to me unarguable. If, on the other hand, the word rents ought to be left out, then we are driven to the enquiry whether the tolls and rates and dues are so connected with the land as to be an incorporeal hereditament.

The cases of *Knapp v. Williams* (1) and *In re Christmas; Martin v. Lacon* (2) have drawn and approved a distinction between two kinds of tolls, the one which is not connected with the land so as to make it an incorporeal hereditament; the other which is so connected with the land as to make it an incorporeal hereditament. Now, whether that distinction was rightly drawn in the particular case of *Knapp v. Williams* (1) with regard to the particular tolls, is entirely immaterial for the purpose of our present enquiry. It is enough that the decisions which are binding upon us have drawn that distinction, and that compels us to enquire to which of the two kinds of tolls do the tolls in question belong.

Now I find the tolls in question are tolls to be levied for passing over a bridge, and I find that the 137th section provides that the trustees may demand and take at every one of their gates which they may erect the tolls in question before any person or cattle is permitted to pass through the toll-gate, and I find, further, that there is power to appoint a receiver of the necessary part of these tolls. I can have no doubt that that receiver is authorised to occupy, so far as is necessary, the toll-house, to go on the land therefore, and to shut the toll-gate, unless the toll is paid, in order that he may receive the toll into his hands. It appears to

me, therefore, that the mortgage carries with it the right to have recourse to the land itself; and it further appears to me, considering the admissions or concessions made by Mr. Vaughan Hawkins with regard to the facts of the case—namely, that the bridges, or the substantial part of the land connected with the bridges, are or is the property of the trustees themselves—that the tolls so to be raised are part of the usufruct and enjoyment of the land. That being so, it appears to me to be reasonably plain that the tolls in question are tolls connected with the land so as to constitute them an incorporeal hereditament.

Mr. Vaughan Hawkins has argued (in spite, as it appears to me, of the plain language of the terms of the charge) that the charge is not one of the tolls, rates, and dues, but is a charge upon the floating balance for the time being of the harbour fund. It appears to me that it is impossible validly to contend that that is the true meaning of the mortgage. A mortgage which charges the tolls, which enables a receiver of the tolls to be appointed, cannot, in my judgment, be a mere charge on the floating balance of a fund of which the toll is only one of the constituents. I think that the true effect of the Act, in this respect, is very much as if the trustees had created a mortgage upon certain real estate, and had accompanied that with a direction given to their bankers to apply the balance of their banking account from time to time to keeping down the interest on that fund.

I think, therefore, that Mr. Justice North was quite right in his view, and that this appeal must be dismissed, with costs.

Appeal dismissed, with costs.

Solicitors—Clayton, Sons & Fergus, for appellants; Murray, Hutchins & Stirling, for respondents.

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

KAY, J.
1889.
May 27.
COTTON, L.J.
BOWEN, L.J.
FRY, L.J.
1889.
Oct. 30.
Nov. 12.

In re FRISBY.
ALLISON v. FRISBY.

Principal and Surety—Mortgage—Joint and Several Covenant by Mortgagor and Surety—Payment by Mortgagor—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8—Co-contractor—Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14.

A mortgage-deed was executed on the 10th of December, 1872, by E. F., to secure a sum of 800l., and E. F. and M. F. as the surety for E. F., jointly and severally covenanted to pay the aforesaid sum and interest. E. F. paid the interest up to the 10th of December, 1880. On the 5th of April, 1889, the mortgagee claimed to rank as creditor against the estate of the surety, who had since died, for the mortgage-debt and unpaid interest:—Held (affirming the decision of KAY, J.), that the claim was not barred as against the surety's estate; for assuming that section 8 of the Real Property Limitation Act, 1874, applied to the case of a surety, the debt was kept alive as against him by the payment of interest by the mortgagor, and the surety was not within the protection of section 14 of the Mercantile Law Amendment Act, 1856, that section not referring to 3 & 4 Will. 4. c. 27, nor, consequently, to the Act of 1874.

Held, by COTTON, L.J. (differing from KAY, J., and BOWEN, L.J.; FRY, L.J., expressing no opinion on the point), that section 8 of the Act of 1874 does apply to an action brought against a surety, and is not confined to an action brought against the mortgagor himself or his representatives.

The payment necessary to satisfy the words in section 8 is a payment by any one liable to pay.

This was an appeal from a decision of Kay, J., who held that an action by a mortgagee against a person who had

joined, as surety, in the covenant for payment of principal and interest in a mortgage-deed pertaining to land, was not barred by the 8th section of the existing Real Property Limitation Act, 1874, when a payment had been made by the principal debtor to the mortgagee within twelve years.

On the 10th of December, 1872, by a mortgage-deed Edward Frisby covenanted to surrender certain copyhold property to secure a sum of 800l. advanced to him by Miss Scotney, with interest thereon at four and a quarter per cent. Matthew Frisby joined in the deed as a surety for the mortgagor, and the deed contained a joint and several covenant as follows: "And they the said Edward Frisby and Matthew Frisby (as the surety for the said Edward Frisby) do, and each of them doth hereby for himself and themselves, and each of their heirs, executors, and administrators, covenant, promise, and agree to and with the said Mary Ann Scotney, her heirs, executors, and administrators, in manner following (that is to say), that they the said Edward Frisby and Matthew Frisby, their heirs, executors, or administrators, shall and will on the 10th of June next, well and truly pay or cause to be paid unto the said M. A. Scotney, her executors, administrators, or assigns, the aforesaid sum of 800l. with interest thereon, at the rate of four and a quarter per cent. per annum," to be computed from the date of the deed. The deed did not contain any covenant for the payment of interest after the day fixed for the payment of the principal, in case the principal should not be then paid. Edward Frisby paid interest upon the mortgage-debt up to the 10th of December, 1880, the debt not having been paid at the time appointed. In November, 1882, the executors of a Mr. Perkins, a prior mortgagee, took the mortgaged property in execution under a writ of elegit. In January, 1889, the mortgagee obtained a judgment against Edward Frisby for the mortgage-debt, but he was unable to satisfy the judgment. Matthew Frisby died on the 21st of June, 1888, and on the 5th of April, 1889, an originating summons was taken out by the executrix of Miss Scotney, who was dead, to obtain a declaration that she was entitled to

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prove against Matthew's estate as a creditor in respect of the 800*l.* and the unpaid interest. The claim was resisted by Matthew's administrator.

Renshaw, Q.C., and *Townsend*, for the plaintiff.

Marten, Q.C., and *Percival*, for the defendant.

KAY, J. [stated the facts and continued:]—From these dates it appears that the mortgage-debt is not barred as against Edward Frisby the mortgagor, and that the claim against Matthew's estate is made within twenty years from the date of the covenant, and less than twelve years after the last payment of interest by Edward Frisby, the principal and debtor. The defence is that the remedy is barred under the 8th section of 37 & 38 Vict. c. 57, which provides that "no action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action, or suit, or proceeding shall be brought but within twelve years after such payment or acknowledgment; or the last of such payments or acknowledgments, if more than one, was given." This section is in the same words as section 40 of 3 & 4 Will. 4. c. 27 (the Act for limiting actions and suits respecting real property), except that "twelve" is substituted for "twenty." Chapter 27 received the royal assent on the 24th of July, 1833, but the operation was not to begin till after the 31st of December, 1833. Chapter 42 received the royal assent on the 14th of August, 1833, and section 3 relates to any action commenced

after the end of that session of Parliament in which it was passed—that is, before chapter 27 came into operation. In *Doe v. Williams* (1), where, however, the question did not directly arise, Mr. Justice Littledale said, referring to chapter 27: "The 40th section relates to actions brought to recover the money, and those actions, in the case of mortgages, are either upon the covenant usually inserted in the mortgage-deed, or on the bond which commonly accompanies it." On the other hand, as to section 42 of chapter 27, which limits six years for the recovery of arrears of rent or interest on money charged on land, the two statutes have been reconciled by holding that if there be in addition to the charge a covenant for payment, the remedy on the covenant exists for twenty years. The point has been discussed in many cases, the most material of which are mentioned in the judgment of Lord Chancellor Cottenham in *Hunter v. Nockolds* (2), his Lordship saying, at p. 652, "the provisions of the two" statutes "must, if possible, be reconciled, which can only be done by considering the first Act as applicable only to the land, and the latter as applicable only to the person." If the construction were adopted as to section 40, an action upon a covenant in a mortgage would be governed, not by that section, but by the other statute, 3 & 4 Will. 4. c. 42. Nevertheless, in *Sutton v. Sutton* (3) the Court of Appeal held that the enactment in the words of section 8 in the later Act, 37 & 38 Vict. c. 57, deprived the mortgagee of his remedy by action against the mortgagor upon his covenant in the mortgage deed after twelve years. And in *Fearnside v. Flint* (4) it was decided that the same limitation applied to an action against the mortgagor upon a bond given by him to secure the mortgage debt.

In a later case of *In re Powers* (5) the Court of Appeal decided that this did not

(1) 5 Ad. & E. 291; 5 Law J. Rep. K.B. 231.

(2) 1 Mac. & G. 640; 19 Law J. Rep. Chanc. 177.

(3) 52 Law J. Rep. Chanc. 333; Law Rep. 22 Ch. D. 511.

(4) 52 Law J. Rep. Chanc. 479; Law Rep. 22 Ch. D. 579.

(5) Law Rep. 30 Ch. D. 291.

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apply to an action against sureties on a bond by them conditioned to be void if the mortgagor should pay the debt and interest according to his covenant in the mortgage deed. The ground of this decision, as stated by Lord Justice Bowen, was that the action against the surety was not a proceeding against the mortgagor, nor to recover the mortgage debt, but was an action to recover damages because the mortgagor did not pay. Lord Justice Cotton does not treat it as an action for damages, but he says, "the debts are different debts, one is the debt of the mortgagor, the other is the debt of the surety." Lord Justice Lindley says, "It is difficult to say that the bond is for the same debt," and he also said that the bond remained in force because the remedy against the mortgagor had been kept alive by the payment of the interest by him within twelve years. Lord Justice Bowen adds, "If the bond could be brought within the 8th section I think it must be held that the part payments by the mortgagor would prevent that clause from barring the remedy." These last remarks point to a curious result of the decision in *Sutton v. Sutton* (3). The statute 3 & 4 Will. 4. c. 42. s. 3, limits twenty years after the cause of action as the time within which an action may be brought upon a bond or covenant. The Mercantile Law Amendment Act, 1856, section 14, expressly referring to that section, provides that no co-contractor or co-debtor shall lose the benefit of that enactment by reason of payment of any principal or interest by a co-contractor or co-debtor. There is no similar provision, saving the benefit of the Act 37 & 38 Vict. c. 57. So that in this case, although the payments by the mortgagor would not avail to prevent the bar of twenty years under the Act of Will. 4, they would prevent the bar of twelve years under the later statute, assuming that it applies to the surety, if made within twelve years, even though the twenty years had expired. The case of *In re Powers* (5) shews a disinclination on the part of the Court of Appeal to extend the construction adopted in *Sutton v. Sutton* (3) to a covenant by any person other than the mortgagor himself. An action upon a bond is not, strictly speak-

ing, an action for damages. But where the condition points to indemnity, the debt on the bond is cut down to such an amount as will satisfy that liability. In the action on this covenant against the surety no more can be recovered than the amount left unpaid by the mortgagor. In that sense it is as much an action of indemnity as the other, but I do not rely on that reason after all. Suppose A. borrowed money and gave a bond in which B. joined jointly and severally, and B., being only a surety, gave to the lender a collateral mortgage, would the remedy against A. be barred in twelve years? Or suppose A., B., C., and D. joined in a joint and several bond for money lent to them all, and one of them gave a mortgage, is the remedy against all the rest barred in twelve years? Or, again, if A. gave a bond alone for money borrowed by him, and B., who did not join in the bond, gave a mortgage for the amount as surety, is the remedy against A. barred after twelve years?

If the remedy against the surety in this case is barred by the lapse of twelve years, I do not see why it should not be in all the cases I have put. In my opinion it would be extravagant to say that the statute applies in any of these cases, and I think, I confess, that the decision in *Sutton v. Sutton* (3) ought not to be extended beyond the case of an action against the mortgagor himself. On this ground I hold that it does not apply in the present case. If it otherwise would apply, I see no reason why the payments by the principal debtor do not keep the debt alive against the surety.

From this decision the defendant, the administrator of the surety, appealed.

Marten, Q.C., and *Percival*, for the appellant.—We submit that section 8 of the Real Property Limitations Act, 1874, applies to a mortgage deed like the present; and, further, that the payments of interest by the mortgagor do not keep the debt alive against the surety. The payment, to bring a case within the exception in the section, must be made by the person against whom the action is brought, seeking recovery of the mortgage, so that if, as here, no claim is made upon the surety, or

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no interest paid by him for more than twelve years, he is entitled to the benefit of the section, even although payment has been made by the mortgagor, and this case is governed by the decision of this Court in *Sutton v. Sutton* (3), and of Fry, J., in *Fearnside v. Flint* (4). In the case of *In re Powers* (5) this Court held that in the circumstances of that particular case the debt of the surety was a separate debt from that of the mortgagor; but that case is distinguishable from this, because here the covenant is to pay the aforesaid sum of 800*l.*—that is, the sum mentioned in the proviso for redemption, one and the same debt—while in that case there was a distinct bond; and further, the time for bringing the action against the surety did not commence running until the mortgagor made default; here it began to run against the surety and mortgagor at one and the same time. The question of identity of the debt arises in the case of the principal debtor just as much as in the case of a surety. The debt on the land and under the covenant are distinct debts, but yet *Sutton v. Sutton* (3) has decided that whether the debt be identical or separate the time at which the debt is barred is to be twelve years.

In the case of *Dickenson v. Teasdale* (6) an acknowledgment by one devisee was held not to keep alive a charge against another devisee under the same will, and the Mercantile Law Amendment Act, section 14, applies to the case of a surety—*Cockrill v. Sparkes* (7). The payment, to take the case out of the statute, must be by the person bound to pay—that is, we submit, the person against whom payment is sought by the action.

They referred to *Chinnery v. Evans* (8).

Renshaw, Q.C. (*Townsend* with him), for the plaintiff.—The real question is whether the twenty years given to the plaintiff to sue by 3 & 4 Will. 4. c. 27. s. 3, has been cut down by any subsequent Act. *Sutton v. Sutton* (3) only decides that, as between mortgagor and mortgagee, the mortgagee's remedy on

the mortgagor's covenant is barred at the end of twelve years, and *Fearnside v. Flint* (4) decides as between the same parties that the execution by the mortgagor of a separate bond to secure payment of the mortgage money makes no difference; but neither of those cases has any application where on the face of the deed the person against whom the action is brought is stated to be a surety. It is admitted that the liability of the surety arises at the same time as that of the principal debtor, yet the debts are different. The debt of the mortgagor is secured on the land, while that of the surety is a merely personal liability. All the Judges pointed out this difference in the case of *In re Powers* (5). If the 8th section does apply to the case of a surety, at any rate section 14 of the Mercantile Law Amendment Act does not help the appellant; that section only refers to certain statutes therein specified, among which the Act of 3 & 4 Will. 4. c. 27, is not included.

But section 8 does not apply; its application is confined to proceedings brought against the owner of the land—that land being the subject-matter to which the Act relates. The Act does not affect 3 & 4 Will. 4. c. 42, nor actions on the covenant. But even so, the plaintiff's right is saved by the proviso in section 42 of the 3 & 4 Will. 4. c. 27, for the prior mortgagee took possession under his elegit on the 21st of November, 1882, since the last payment of interest. As there is no covenant in the deed to pay interest after the six months, all that the plaintiff can recover in respect of interest is by way of damages—*In re Roberts; Goodchap v. Roberts* (9). In one sense there is no cause of action on which the plaintiff could have sued until the mortgagor had made default; and it is contrary to all practice when a surety joins in a mortgage for the interest to be paid by the surety.

Marten, Q.C., in reply.—If the principal debtor is discharged after a lapse of twelve years, it would be an inversion of the general law if the surety were to remain liable. Why should the relief that is provided for the principal debtor not be applied to the person who is not primarily

(6) De Gex, J. & S. 52; 32 Law J. Rep. Chanc. 37.

(7) 1 Hurl. & C. 699; 32 Law J. Rep. Exch. 118.

(8) 11 H.L. Cas. 115.

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(9) Law Rep. 14 Ch. D. 49

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responsible? The intimation on the deed that a person is joining as a surety is to inform the mortgagee and transferees of the fact, and that he is liable to be discharged for all the reasons which have the effect of discharging the surety. The acknowledgment of liability must be made by the person against whom that liability is sought to be enforced in the action.

Cur. adv. vult.

COTTON, L.J. (on Nov. 12).—This is an appeal against the judgment of Mr. Justice Kay, holding that the claim of the plaintiff against the defendant is not barred by section 8 of the 37 & 38 Vict. c. 57.

This is the case of a mortgage transaction, and the plaintiff who is seeking to enforce the covenant is the mortgagee. The mortgage was one given by Edward Frisby on his own property, and he, and Martin Frisby as his surety, joined in a joint and several covenant for payment of the mortgage debt. This action is brought against the representatives of Martin Frisby to enforce the covenant for payment so entered into by him. No interest has ever been paid by the surety, but it has been paid down to 1880 by Edward Frisby, the principal debtor.

It has been contended that this action is barred by the 8th section of the Statute of Limitations, 1874. [His Lordship read the section and proceeded:] No interest having been paid by the surety, the question is whether this section bars the plaintiff's right. This Court has already decided, in *Sutton v. Sutton* (3), that that section not only refers to actions to enforce the mortgage security against the land subject to it, but also applies to actions to be enforced personally against the person bound by the covenant.

But it is said that it does not apply except in an action brought against the person who gave the security; but I find no such limitation in this section. The words are "no action"; it does not say against whom. This is money secured by mortgage, and this is an action brought to enforce payment of it, and we have no right to put such a construction on the section as is contended for. It is true that when there were two Acts of Par-

liament subsisting passed at different times in the same session—one of which related to actions to recover the land, and another to merely personal actions—a decision was arrived at—*Hunter v. Nockolds* (2)—not in accordance with the view which we expressed in *Sutton v. Sutton* (3) upon this Act. But it would not be reasonable to hold that the section in the present Act applies only to the person who gave the mortgage, while there is another person who, by the same deed, has made himself liable for the debt as well.

But it is said that the remedy has not been kept alive against the surety by the payment of interest by the mortgagor only. In my opinion it has been. There is nothing in the section which says by whom it ought to be paid; if the surety gets the benefit of the section, he must also bear the burden of the exception when there has been part payment; and it would be unreasonable to hold that the surety is within the protection of the section, and at the same time that the restrictions of that section do not apply to him.

We have already intimated that the Mercantile Law Amendment Act cannot apply to this case. Section 14 of that Act, which provides that the payment by one co-contractor or one co-debtor shall not keep alive the debt as against the other co-contractor or co-debtor, applies only to the particular statutes referred to in that section. The Statute of Limitations is not one of those statutes.

Though there is no case actually bearing on the point raised by the appeal, the case of *Chinnery v. Evans* (8) before the House of Lords was referred to in support of the case of the appellant; but though not a decision on the point, I think it tends to support the view which I have expressed. There were mortgages of three estates; the equity of redemption of two of these estates had been sold to a purchaser. A receiver had been appointed over the three estates, but he had in fact only entered into possession of the other estate not included in the sale, and had paid the interest on the mortgage debt; and it was held that the payment by the receiver, which must be treated as a pay-

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ment by the mortgagor, kept alive the right of action even as against the estates in the hands of the person who had purchased them. That decision tends to support the view that in this case the surety is prevented from relying on the bar of the section, by the payments made by the principal debtor.

The decision of Mr. Justice Kay must be affirmed.

BOWEN, L.J.—I am of the same opinion. Though not precisely on the same grounds, I should have been inclined to agree with Mr. Justice Kay both as to the result and the reasons for the result. It strikes me that this section is not intended to apply to a case except that of an action brought against the mortgagor or his representatives. I think the section points to one liability, not a several liability; to one payer, not more. If, however, the section does apply to such a case, I see no reason why payment by the principal debtor did not keep the remedy alive as against the surety.

FRY, L.J.—Whether this section does or does not apply to a surety as well as the mortgagor himself, I concur in the conclusion of Mr. Justice Kay. If, as Mr. Justice Kay thinks, it does not apply, there is an end of the case. If it does apply, then we must refer to the terms of the section with regard to what payment prevents the right of action being barred. Those terms are, “unless in the meantime some part of the principal money, or some interest thereon, shall have been paid.”

In my opinion a payment is made which satisfies those words whenever there is a render of money to a person entitled to receive it by any person liable to pay it. I agree that a merely voluntary render of money by a stranger is not payment; but when made by the person liable, or by any of such persons when more than one are liable, such a render is payment within the meaning of the words of the section. It is obvious that any other construction put on these words, confining the words to payment by the person subject to be charged primarily, would involve great injustice, because, to take the common case of a

mortgage where a surety joins, the interest is usually paid by the mortgagor; and it would be contrary to the ordinary course of practice to require that the payment of interest should be made partly by the mortgagor and partly by the surety, so as to keep alive the mortgage in its entirety.

I decline to express an opinion whether this case does or does not fall within the words of the section; but I think that, if it does, the payment therein mentioned is satisfied by payment by any one liable to pay, and that, consequently, the debt has been kept alive by payment of interest by the mortgagor.

Solicitors—Clarke, Rawlins & Co., agents for Percival & Son, Peterborough, for appellant; Beaumont, Son & Rigden, agents for Maurice Brown, Peterborough, for respondent.

KAY, J. { *In re JOHNSON. MANCHESTER*
1889. { *AND LIVERPOOL BANKING COM-*
July 26. { *PANY v. BEALES. JOHNSON v.*
 { *HOOLEY.*

Practice—Order in Chambers—“Further Consideration”—“Final Order”—Motion to discharge—Time—Rules of Court, 1883, Order LVIII. rule 15—Judicature Act, 1873, s. 50.

The rules which relate to appeals to the Court of Appeal do not relate to motions to discharge orders made in chambers, and the Court will not act by analogy and give a party moving to discharge a final order made in chambers the same time—one year—as a person would have to appeal from a final order made in Court to the Court of Appeal. No longer time will be given in the case of a final than in that of an interlocutory order in chambers.

An order on further consideration made in chambers which does not wind up the action, and gives liberty to apply, is not a final order.

Motion.

These were administration actions, in which an order was made by the chief

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clerk in chambers, dated the 13th of July, 1888. It was, however, admitted that the order was not pronounced until the 10th of August, 1888, and passed and entered on the 13th of August, 1888. The order was expressed to be made upon the "second further consideration" of the actions.

Liberty was reserved to all parties interested to apply in chambers as to the payment of the legacies and annuities given by the testator in the first action, and as to the disposal of the balance, if any, remaining in Court after the payments directed by the schedules to the order, and also to apply generally.

In 1881 Charles Johnson, who was plaintiff in the second action, and now had the conduct of both, mortgaged his beneficial interest in the estates being administered in the actions to A. P. Llewellyn. Llewellyn, in 1884, obtained leave to attend the proceedings at his own expense. By the order of the 13th of July, 1888, one set of costs was given to Johnson and his mortgagee Llewellyn, and the present motion was made to disallow the mortgagee's costs, on the ground that he had leave to attend at his own expense only.

The notice of motion was dated the 6th of July, 1889, and the question was whether it was in time, being within a year from the date at which it was pronounced.

Dunham, for the motion.—This is in its nature a final order made in chambers, from which a year is allowed to appeal—*In re Lewis*; *Lewis v. Williams* (1). This being an order on further consideration is final—*Cummins v. Herron* (2). As there is no certificate we cannot go to the Court of Appeal. In *Pheysey v. Pheysey* (3) the order was held to be interlocutory.

Marten, Q.C., and *Tyssen*, for the mortgagee.—The case is exactly covered by *In re Lewis* (1), in which an order was made by a Judge personally in chambers directing the taxation of costs and the application of the funds in Court in payment of

debts. In *Dickson v. Harrison* (4) it is laid down that the practice in the Chancery Division is that no motion shall be made to discharge a Judge's order in chambers after twenty-one days.

[They were stopped by the Court.]

KAY, J.—This is an application to discharge an order made in chambers on the 13th of July, 1888. The order, it seems, was not made at first by the Judge, but by the chief clerk, and the application, of course, is made under section 50 of the Judicature Act, which provides that "no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the Judge by whom such order was made, or of the Court of Appeal." Now, the ground for the allegation is this: It is said that the order which was made was in the nature of a final order, because it was an order on further consideration made in chambers; and the principal point in which it is sought to be varied is that the order contains what may be called the usual directions, when a mortgagor and mortgagee are both parties, that one set of costs only shall be allowed out of the estate. I am told that the present applicant was plaintiff in one of the actions in which this order was made, and that he was a beneficiary. But at some time—when, I am not told—a mortgage was executed to the mortgagee in question, whose name is A. P. Llewellyn. I am not told when that mortgage was made, but it certainly was made before this order of the 13th of July, 1888. A very important question indeed is raised—namely, what time must a person who considers himself aggrieved by an order of this kind have to discharge it. No authority has been adduced. I have never heard of the point before; but it is argued that he has the same time as a person would have who was appealing from an order made by the Court to the Court of Appeal. It is quite obvious that the rule which regulates appeals does not relate to proceedings in chambers, or motions to discharge orders in chambers. But the argument is, that the Court

(1) Law Rep. 31 Ch. D. 623.
 (2) 46 Law J. Rep. Chanc. 423; Law Rep. 4 Ch. D. 787.
 (3) Law Rep. 12 Ch. D. 305.
 (4) 47 Law J. Rep. Chanc. 761; Law Rep. 9 Ch. D. 248.

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will act by analogy, and give to a person who moves to discharge an order made in chambers the same time—that is, a year—which he would have to appeal to the Court of Appeal. The result would be this, that he would have a year to come to the Judge to move to discharge the order in chambers, and then another year to go to the Court of Appeal. He might then go to the House of Lords, if he felt disposed. Unless the orders were expressly to that effect, I should be most reluctant to come to that conclusion. It is said, however, that the Court must come to that conclusion by analogy to the time given for appealing from an interlocutory order, which is the same in the case of a motion to discharge an order made in chambers as in the case of an appeal to the Court of Appeal. And, by analogy, the same must apply to final orders, because no time is fixed by the section of the Act which I read, or by the Orders. Well, if that point came before me for decision for the first time now, I should say that no longer time ought to be given to move to discharge an order made in chambers, which is a final order, than would be given to move to discharge an interlocutory order made in chambers, because the Court always has power to enlarge the time. It seems to me the proper application would be, in the case of a final order, an application to enlarge the time. In the case of an interlocutory order, before a motion is made to the Court, the person moving to discharge an order made in chambers has to obtain leave to move. The view, therefore, that I take is that no longer time should be given to move to discharge a final order than would be given in the case of an order which was not final; but that in either case, if longer time is wanted, application must be made to enlarge the time.

But I am not satisfied that the point does arise, because although this is an order on further consideration made in chambers, it is not a final order in the sense of winding up the matter. It leaves the ultimate destination of the balance of the funds to be still determined, and gives liberty to apply to determine them. It is a case in which, even if the point did arise, I should be most loth to extend the

time or to give this application any facility whatever. This is, in effect, what the applicant says: "There is a direction that one set of costs be given to me and my mortgagee. My mortgagee was not formally a party to this action, but obtained leave to attend at his own expense. An order was made, and I admit that I was present when the order of which I complain was made. I was a party to that order. It was drawn up in my presence, but I am now asking to vary it because it gives one set of costs only to me and my mortgagee, although there had been an order giving leave to attend at his own expense, which order was not entered." Now this is an objection which ought to have been raised on the minutes of the order before it was passed and entered. The objection really is that this is not the proper form of order; but to raise a point of this kind which ought to have been raised on the minutes is an extravagant proceeding. And even if an application were made to me to enlarge the time in such a case, I should decline to do so. But the excuse is this. The applicant says, "I changed my solicitor about that time, as he did not understand the matter." But I understand this was not the only change. He has changed his solicitor again, and it is the new solicitor who makes this application. If a man chooses to change his solicitor, he can hardly expect not to increase his costs. This proceeding seems to me to be absolutely irregular. This change of solicitor not only embarrasses the parties, but embarrasses the Court, because the only excuse is that the applicant says he has not got the office copy of the order. But I see through the whole thing. This is a device on the part of the new solicitor. It is an utterly unfounded proceeding, and ought to be discouraged. I should be most loth to enlarge the time, and if the time were enlarged I should refuse to vary the order. The motion must be dismissed, with costs.

Solicitors—Scott, Jarman, Trass & Jarman
agents for F. O. Mayer, Burslem, for the
motion; H. Tyrrell & Son, for mortgagee.

NORTH, J. }
 1889. } *In re* DRUMMOND'S PATENT.
 Nov. 9. }

Practice—Petition to revoke Patent—Patents, Designs, and Trade Marks Act, 1883, section 26—Patentee (Respondent) out of the Jurisdiction—Notice—Service.

A patentee, the sole respondent to a petition for the revocation of a patent, was resident and domiciled in Scotland. A copy of the petition and of the particulars of objections had been delivered to him personally, and he had written to say that he did not intend to appear on the hearing of the petition. Upon an application by the petitioners for directions as to the trial of the petition, the Court made an order nisi that, unless the respondent should before a named day appear and shew cause to the contrary, the petition should be heard as an action with witnesses, and set down in the list of witness actions.

Petition.

This was a petition presented by Thomas Fletcher and Alfred Clare (trading together as Thomas Fletcher & Co.), Gas Engineers, under the Patents, Designs, and Trade Marks Act, 1883, for the revocation of a patent granted in the year 1886 to one William A. Drummond.

The petitioners alleged that they had "publicly manufactured, used, and sold within this realm before the date of the patent" the contrivance or method claimed by the patentee as his invention (see section 26, sub-section 4 (e), of the Act).

Particulars of objections were delivered with the petition.

William A. Drummond, the respondent, was resident and domiciled at Dundee, in Scotland.

On the 25th of October, 1889, a copy of the petition and of the particulars of objections was given to the respondent at Dundee.

On the 30th of October a registered letter was sent to the respondent from the petitioner's solicitors informing him that on the hearing of the petition "they should ask the Judge to give the necessary directions as to the trial, and submit that the same should be heard with wit-

nesses *viva voce*, and (if necessary) be transferred to the witness list."

To this letter, on the 31st of October, the respondent sent the following reply: "I have yours of the 30th inst.; but I do not intend to make any appearance on the petition at your client's instance against me, as I am not under the jurisdiction of the English Courts."

Moulton, Q.C., and Lawson, for the petitioners.—We now ask the Court to give directions as to how the petition shall be tried.

A petition for the revocation of a patent is not analogous to a personal action. Upon the presentation of such a petition, the Court is at once seized of jurisdiction; and the difficulty as to technical service of original petitions out of the jurisdiction does not arise in the present case. It is not necessary, in order to found the jurisdiction, that there should be technical service on the patentee.

[NORTH, J.—Is there any section of the Act which provides for service of the petition?]

No; but under section 26 the present procedure is substituted for the old procedure by *scire facias*; and, under that procedure, if the patentee was out of England, technical service on him was not necessary—*Hindmarsh on Patents*, pp. 391, 392.

If we had taken proceedings in Scotland to revoke the patent, our rights would have been much more limited—section 109.

The Court will merely require, in the interests of justice, that the patentee shall have full notice of the proceedings.

We ask that the petition may go into the list of actions with witnesses, and be heard on *viva voce* evidence.

NORTH, J.—I shall make an order nisi that the petition be heard with *viva voce* evidence, and that it be placed in the list of witness actions; unless the respondent, on or before the 29th inst., appears and shews cause why such a course should not be adopted. It will then be open to him to argue that the Court has no jurisdiction to hear the petition.

I do not now decide the point of jurisdic-

In re Drummond's Patent.

tion, but I think the petitioners have made out a case under which the Court is bound to do something.

Notice of this order must be given to the respondent forthwith.

Solicitors—J. H. Johnson, Son & Ellis, for petitioners.

[IN THE COURT OF APPEAL.]

LORD ESHER, M.R.

COTTON, L.J.

FRY, L.J.

1889.

May 11.

NICHOLL v. THE EBERHARDT COMPANY.

Company — Liquidation — Scheme of Arrangement—Transfer of Assets—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161—Joint Stock Companies' Arrangement Act, 1870 (33 & 34 Vict. c. 104), s. 2.

A scheme for the transfer of the assets of a company in liquidation to a new company, if sanctioned by an order of the Court under section 2 of the Joint-Stock Companies' Arrangement Act, 1870, is binding in all its terms upon all the contributories of the company in liquidation, notwithstanding that some of such terms are not authorised by section 161 of the Companies Act, 1862, and cannot afterwards be impeached except in the form of an appeal from the order of the Court.

Decision of KEKEWICH, J. (58 Law J. Rep. Chanc. 398), affirmed.

This was an appeal by the plaintiffs from a decision of Kekewich, J., holding that they were bound by an arrangement of compromise which had been sanctioned by an order of Court under the Joint-Stock Companies' Arrangement Act, 1870, section 2. The case is reported at length 58 Law J. Rep. Chanc. 398.

The plaintiffs were the executors of R. Towne, who died on the 12th of November, 1885, being at the time of his death the holder of 570 fully paid-up shares in the Eberhardt Company, which, by virtue of special resolution passed and confirmed at

two general meetings held respectively on the 13th and 28th of October, 1885, had gone into voluntary liquidation. In addition to the ordinary shareholders there were debenture-holders in the company.

On the 28th of October, 1885, a general meeting of the Eberhardt Company was held, at which a special resolution was passed (and was duly confirmed at a subsequent general meeting held on the 13th of November, 1885) that the liquidator be authorised to sell and transfer all the estate, property, and effects of the company upon the terms of a draft agreement submitted to and read to the meeting, and the same be approved, and the liquidator be directed to carry out the sale, &c., either under the 161st section of the Companies Act, 1862, or otherwise.

The agreement above referred to, which was executed on the 18th of November, 1885, between the liquidator of the Eberhardt Company and a trustee for a company about to be formed and registered under the name of "The Eberhardt and Monitor Company (Limited)," provided for the sale of the assets of the Eberhardt Company, in consideration of 1*l.* shares credited as paid up to the extent of 15*s.*, and contained the following provision:—

"4. The liquidator shall, on or before the 1st of December, 1885, make out and hand to the new company a list or lists of the fully paid-up shareholders in the old company (both preference and ordinary) who are entitled to apply for and receive shares in the new company in pursuance of the terms of this agreement, and thereupon the new company shall allot shares to such holders in manner hereinbefore provided upon receiving application for the same. All shares in the new company not applied for by shareholders in the old company within such time as may be determined on by the directors of the new company shall be at the disposal of the new company, and may be issued by the directors thereof at such price or prices, and credited with such amount paid up upon each share, as and when the directors of the said new company shall think fit."

On the same 18th of November an order was made in the matter of the Eberhardt Company, and of the Companies Acts, and

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the Joint-Stock Companies' Arrangement Act, 1870, confirming the scheme embodied in the agreement.

On the 21st of November, 1885, a supervision order was made, superseding the voluntary winding-up of the Eberhardt Company.

Neither the testator nor the plaintiffs voted at any of these meetings.

On the 26th of November, 1885, the new company was incorporated, and on the 1st of January, 1886, the agreement of the 18th of November, 1885, was ratified. No shareholder in the old company expressed dissent from the special resolution within the time limited by section 161.

By resolutions of the directors it was determined that all shares in the new company not applied for by the shareholders of the old company before the 20th of December, 1885, should be at the disposal of the new company.

The plaintiffs received, in December, 1885, due notice of the directors' determination, and a form of application for shares from the liquidators of the old company; but not having then obtained probate of their testator's will, they were unable to deal with his shares, and so informed the liquidator, and the time was extended for them until the 23rd of January, but on the terms of accepting the shares at once. They obtained probate on the 16th of February, 1886, but on applying for an allotment of shares in the new company were met with the objection that they had no longer any property in the old company, and consequently no rights under the agreement of the 18th of November, 1885.

The plaintiffs thereupon brought the present action, on behalf of themselves and all others the shareholders of the Eberhardt Company, against the old company and the liquidators, and also against the new company, claiming a declaration that the agreements of the 18th of November, 1885, and the 1st of January, 1886, were *ultra vires* and void; an injunction against carrying the same into effect, or payment of the value of the plaintiffs' interest in the old company; or otherwise, an enquiry as to their rights in respect of the testator's 570 shares.

S. Hall, Q.C., and Boome, for the appellants.—The arrangement entered into is one not sanctioned by section 161 of the Companies Act, 1862. A liquidator should not enter into an arrangement under which shareholders will be liable to forfeit property or be subject to greater liability—*Clinch v. The Financial Corporation* (1).

Then the liquidator, selling on the part of the old company, under section 161, had a duty imposed upon him of fixing a reasonable time in the contract within which the shares were to be applied for, and he was wrong in leaving it for the directors of the purchasing company to fix the time. Those directors gave an unreasonable time, and in consequence thereof the plaintiffs have been deprived of the benefit of these 570 shares, except upon terms which compelled them to assume a new liability; and that they cannot do—*Griffith v. Paget* (2).

Again, the provision enabling the directors of the new company to dispose of the shares not applied for as they think fit is not sanctioned by section 161.

No doubt the plaintiffs are within section 2 of the Arrangement Act, 1870, according to the strict terms of that section, but they ought not to be deprived of their rights, and they will ask for leave to apply to the Judge before whom the liquidation is pending to rescind the agreement.

[They referred to *In re The City and County Investment Company* (3).]

Barber, Q.C., and Grosvenor Woods, for the Eberhardt and Monitor Company; and *Warmington, Q.C., and A. Rowden*, for the Eberhardt Company and the liquidators, were not called upon.

LORD ESHER, M.R.—In this case it was urged before us that the agreement for the sale of shares is *ultra vires*, and that therefore the whole transaction is void. It is said that the agreement is void on two grounds—first, because the clause

(1) 37 Law J. Rep. Chanc. 281; 38 *ibid.* 1; Law Rep. 5 Eq. 450; *ibid.* 4 Chanc. 117.

(2) 45 Law J. Rep. Chanc. 493; Law Rep. 5 Ch. D. 894.

(3) 49 Law J. Rep. Chanc. 195; Law Rep. 13 Ch. D. 475.

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providing that "shares in the new company not applied for by shareholders in the old company within such time as may be determined on by the directors of the new company, shall be at the disposal of the new company," is *ultra vires*, inasmuch as it gives the new company the power of determining the time. The second objection is this, that even supposing the objection as to time cannot be maintained, the stipulation that shares not so applied for "shall be at the disposal of the new company, and may be issued by the directors thereof at such price or prices, and credited with such amount paid up upon each share, as and when the directors of the said new company shall think fit," is an illegal stipulation. It is not necessary that we should give a binding judgment on these objections. With regard to the first I have some doubt. As to the second, I think it is a formidable objection; but as the point has not been argued on both sides, I shall assume for the purposes of this judgment (but without determining the question judicially) that the stipulation is wrong, and goes further than section 161 of the Companies Act, 1862, would allow. But on that assumption we have this, that the compromise or arrangement was proposed between the company and a class of creditors—namely, the debenture-holders—and agreed to between the liquidator of the company and that class of creditors, and that three years ago that compromise or arrangement was brought before the Court as between the liquidator and that class of creditors, and that that arrangement was based upon and is practically the arrangement which it is now sought to impeach as *ultra vires*. But that arrangement was sanctioned by an order of the Court under section 2 of the Joint-Stock Companies' Arrangement Act, 1870. If it were not for that section, that arrangement would not be binding upon persons who were not parties to it and in one sense were not before the Court; but by the plain words of section 2, when such a compromise or arrangement between a company which is in course of winding up and any class of creditors is sanctioned by the Court, not only can the majority of such class of creditors bind the minority,

but the sanction of the Court makes it also binding on the liquidator and contributories of the company. Words more plain I cannot conceive. It is not possible to avoid them; and they are distinctly applicable to the case before us. We cannot, therefore, avoid them without striking out the words at the end of the clause, "and also on the liquidator and contributories of the company." We have no power to do this, and therefore this section of the Act is plainly applicable to this case, and whether this agreement be within section 14 or not, it is now binding on the present plaintiffs; and if so, we have only to see whether they are not prevented from maintaining this action by the very words of section 2. There is no doubt that they did not elect to take the shares within the time which was fixed by the directors of the new company, and which on the whole was not an unreasonable time. In my opinion they are distinctly within the terms of the Act, and cannot now claim the shares. To tell the honest truth, I do not understand the whole of the judgment of the learned Judge; but, dealing with such part of his decision as I do understand and as is applicable to this point, I am of opinion that it must be affirmed.

COTTON, L.J.—This action was commenced on the 14th of May, 1887, and the object of it was to set aside an agreement entered into under section 161 by the liquidator of the Eberhardt Company, under which all its assets were transferred to another company which I will call the Monitor Company.

Certain objections were raised to the validity of the agreement, one at least of which, in my opinion, would deserve serious consideration if it were open to the plaintiffs now to call in question the validity of the agreement. There were debenture-holders of the company in which the plaintiffs' testator was a member; and under the Joint-Stock Companies' Arrangement Act, 1870, an agreement of compromise was come to with those debenture-holders, under which they gave up all claim against the Eberhardt Company, taking in substitution a claim against the Monitor Company, on the footing that all

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the assets of the Eberhardt Company were to be transferred to the Monitor Company under the terms of the agreement made in November, 1885—that is to say, although the Monitor Company was not then in existence, it was on the terms of an agreement, being made in accordance with a memorandum which had been already drawn up. That agreement not only was sanctioned by the Court, but had its force and effect by virtue of section 2 of the Act of 1870, which says that if an agreement with any class of creditors is sanctioned by the Court, that becomes binding not only on all such creditors, although some only may actually assent to it—but also on the liquidator and contributories of the company. We cannot get out of those words. The Act of Parliament seems to expressly provide for such a case as this, and such an agreement will be binding on creditors who agree to take certain things in lieu of their original rights, and binding also on the company—that is, on the liquidator and contributories, whose rights which they would have independently of the compromise are interfered with. This agreement was sanctioned by an order of the Court, and, that being so, this part of the clause takes effect. The order was made in November, 1885, and so long as that order stands I do not see how it is possible to set aside the agreement on which that compromise and order were based. It appears to me that the first step would be to set the agreement aside; but we cannot do it as long as that order stands, and in my opinion it would be wrong for the Court of Appeal now to give leave to appeal against that order, even if we thought that, on the matter being reconsidered, the Court would not sanction that compromise with the creditors, on the ground that the agreement under section 161 which was proposed to be made under it, and was in effect so made, was one that ought not to have been made and is not valid. Unfortunately for the plaintiffs, they have been ill-advised in the course they have taken; but we cannot, in consequence of their taking steps that could not be made available, depart from what our judgment ought to be; and, in my opinion, Mr. Justice Kekewich was right in saying that in

consequence of the agreement of compromise with the debenture-holders, which in substance recites the terms under which the assets were handed over to the new company, the plaintiffs can get no relief. We are precluded from entering into the question as regards the validity or invalidity of this arrangement made under section 161 of the Companies Act, 1862, and I give no opinion on it. The appeal therefore fails.

FRY, L.J.—I am entirely of the same opinion, and have nothing to add except to point out that the agreement of compromise between the company and the debenture-holders does not merely, in point of fact, rest upon the agreement entered into between the new company and the old, but in point of form and expression it is made to depend upon it; because the second of the terms of the compromise with the debenture-holders states the formation of the new company, the sale by the old company to the new of their assets “upon the provisions of the scheme and in consideration of the issue of shares to the shareholders therein as follows”—then it sets out the proportions of shares to be allotted, and that the shares are to be allotted on the terms of an agreement there specifically referred to. Everybody reading that agreement knows exactly, or has the means of knowing, the terms come to between the old company and the new company, and sees that the arrangement with the debenture-holders is based (as in fact it was) upon the earlier agreement. I think, therefore, it is impossible to allow this appeal.

Solicitors—Anthony Pulbrook, for appellants;
Henry Kimber & Elliott; Snell, Son &
Greenip, for respondents.

KAY, J. } *In re MASSINGBERD'S SETTLEMENT.*
 1889. } *In re CLARK'S SETTLEMENT.*
 Feb. 7. } *CLARK v. TRELAWNY.*

Trustees—Breach of Trust—Improper Investment—Sale of Trust Funds—Liability of Trustees to replace Stock sold.

Trustees, having power to invest in real securities and to vary investments, in 1875 sold bank annuities forming part of the trust funds, and invested the proceeds of sale on a contributory mortgage of real estate, which was subject to a jointure and portions. It was admitted that this mortgage was an improper investment. The tenant for life having since died, the money on mortgage was now being called in, and the whole of the principal was forthcoming, so that no loss would follow directly from the investment; but the remaindermen, who were now entitled to the capital, claimed that the trustees ought to replace the bank annuities sold in 1875, which at that time stood at a much lower value than their present value:—Held, that the sale being made for the purpose of making another investment which was improper, the sale was improper also, and the trustees were liable either to replace the stock or to repay the proceeds of sale, at the option of the remaindermen.

This was an adjourned summons and motion, which it was agreed should be treated as the trial of the action. The action was by the trustees of the settlement of Mrs. Clark against the trustees of the Massingberd settlement, to make them responsible for the sale of two sums, 23,695*l.* Consols and 14,173*l.* Reduced Annuities, alleged to have been improperly sold by the defendants in 1875.

The sums in question formed part of the trust funds comprised in the Massingberd settlement, made in 1843, under which the defendants had power to invest in real securities in England or Wales, and a power to vary investments with the consent of Mr. and Mrs. Massingberd during their joint lives, and of the survivor of them during his or her life, and afterwards at the discretion of the trustees.

In 1875, the defendants, with the consent of Mr. Massingberd, who had survived his wife, sold the sums in question, and

(with the like consent) advanced the proceeds of sale, amounting to about 35,000*l.*, on a contributory mortgage for 65,000*l.* on estates of the Marquis of Exeter, which were subject to a jointure of 3,000*l.* a year and portions for 60,000*l.* It was admitted that the sale was made for the purpose of the reinvestment, and that the reinvestment was not authorised by the power to invest in real securities.

Mr. Massingberd, the tenant for life, died in 1887, and the money on mortgage had been called in, and the whole of the principal was forthcoming, so that no loss would follow directly from that investment.

The plaintiffs (as trustees of Mrs. Clark's settlement), under and by virtue of the Massingberd settlement, were, in the events which had happened, entitled to the capital on the death of Mr. Massingberd, and they now brought this action claiming that the defendants ought to replace the stock sold in 1875, which at that time stood at a much lower value than its present value.

Renshaw, Q.C., and *Badcock*, for the plaintiffs.—To invest on a contributory mortgage was a breach of trust—*Webb v. Jonas* (1). Further, the mortgage was practically a second mortgage, being subject to jointure and portions. The sale of the bank annuities has resulted in a loss, and the defendants are liable to make it good—that is, to replace the stock sold, or pay the difference between its value then and now.

Clare, for the defendants.—I admit that if there had been any loss on the mortgage the trustees would have had to make it good, but the technical breach of trust committed in this case involves no other consequences. The two transactions—the sale and the investment—can be separated. The trustees thought at the time they could invest on a contributory mortgage, and the sale was therefore properly made with a view to what was thought to be a proper reinvestment, and it was only after the receipt of the money that this technical breach of trust was committed, and that results in no loss.

(1) 57 *Law J. Rep. Chanc.* 671; *Law Rep.* 39 *Ch. D.* 660.

In re Massingberd's Settlement.

The only liability, therefore, is to replace the money with interest at four per cent., which the trustees are in a position to do—*Robinson v. Robinson* (2) and *Rees v. Williams* (3). The case of *Marsh v. Hunter* (4), in which the contrary view was adopted, was overruled in *Robinson v. Robinson* (2). If the sale had been made without any investment in view, the tenant for life only, and not the remainderman, could have objected to the sale; and if the trustees *bona fide* thought they had power to sell, and did sell, it is the same thing as if they had received the trust property in the form of cash. Cases such as *Philpison v. Gatty* (5) and *Norris v. Wright* (6) are therefore distinguishable.

J. Henderson, for other parties.

No reply was called for.

KAY, J.—In my opinion the trustees are liable. There are two classes of cases, which are quite distinct, and which I observe are treated as distinct in the last edition of *Lewin on Trusts* (8th ed. 1885, pp. 335–6). The first is, where trust moneys come properly into the hands of trustees in the shape of cash, and they then make an improper investment—in which case they are liable not for the amount which they might have got if they had made a proper investment, but for the sum of cash which was properly in their hands, with interest at four per cent. *Robinson v. Robinson* (2) is a case of that nature. But where trustees, under a power to vary investments, sell trust funds which are properly invested for the purpose of making an improper investment, the Court will not separate the transaction into two acts, and say that they had a right to sell, and that therefore the money came into their hands as cash, and that they are therefore only chargeable with the money they received, together with interest at four per cent. Here the sale was under a power to vary investments—that is, to sell for the purpose of making another investment; and if that purpose

was improper, then the sale was improper—that is, if the investment which they contemplated was a breach of trust, then the sale in order to make that investment was also a breach of trust. That is the distinction between the two classes of cases; and where the sale itself was a breach of trust, where the conversion of an investment was a thing not authorised, then it appears to me to follow inevitably that the *cestui que trust* may have his option either to take cash with four per cent. interest, or to make the trustees liable for the amount of the proper investment which they have sold—that is, to make them replace the proper investment.

Now, here, under the Massingberd settlement, there was a proper investment in Consols, and the trustees had power to vary the investment under a power to vary, and, in exercise of that power, they sold a large sum of Consols and another sum of Reduced Annuities, and invested the proceeds of sale in a mortgage, which seems to have been a second mortgage, being subject to a jointure and portions, and also what is known as a contributory mortgage—that is, a mortgage for a large sum of which they took part only. Well, it is not denied that that investment was an improper one. The money, it is said, will be replaced in full; the income went to different persons, and on the death of Mr. Massingberd, who was tenant for life, the capital became the property of the trustees of another settlement, called Clark's settlement, being a settlement of the reversionary interest of Mrs. Clark; and these trustees now have a right to the capital, and claim to have the capital in the position in which it would have been if it had not been improperly sold. Now, is there any answer to that? I am afraid there is none. The case of *Philpison v. Gatty* (5) is explicit on the point; and although, as I have said, it has been decided in *Robinson v. Robinson* (2) by the Lords Justices that where money is properly in the hands of trustees they are only liable for the amount, with interest at four per cent., if it is improperly invested, yet that decision does not apply to the improper sale of a proper investment, and in such a case the *cestui que*

(2) 1 De Gex, M. & G. 274; 21 Law J. Rep. Chanc. 111.

(3) 1 De Gex & S. 314.

(4) 6 Mad. 295.

(5) 7 Hare, 516.

(6) 14 Beav. 291.

In re Massingberd's Settlement.

trust has the option of either taking the capital with four per cent. or the Consols. Here the trustees of the subsequent settlement are bound to do their best for their own *cestuis que trust*, and say, "Re-invest the amount of Consols which was improperly sold." That is the liability of the trustees, and, as I have said, in the last edition of *Lewin on Trusts* the cases establishing that liability are referred to as not affected by the other rule, which applies only to cash which is properly in the hands of trustees, and which they invest improperly.

Clare submitted that the trustees should have their costs of these proceedings out of the estate, on making good the breach of trust.

KAY, J.—This is not an administration action. It is a personal claim against the trustees, and they must pay the costs of the action.

Solicitors—Dawes & Son, for plaintiffs; Walfords, for the Massingberd trustees; S. W. Johnson & Son and Collyer, Bristow & Co., for other parties.

KAY, J.
1889.
June 25. }

In re STEPHENS.
WARBURTON v. STEPHENS.

Administration—Statute of Limitations—Charge of Debts on Real Estate—Lapse of more than Six but less than Twelve Years—Remedy against Real Estate—37 & 38 Vict. c. 57. s. 10.

Testator, by his will, gave all his property to the plaintiff, his executor, in trust to sell and convert, and after payment thereof of his debts to divide the residue as therein mentioned. The testator died in 1882 possessed of real estate. The defendant, who claimed to be a creditor of the testator, in 1883 sent in his claim in answer to the plaintiff's advertisements, under 22 & 23 Vict. c. 35. s. 29, but took no other steps. The plaintiff in 1887, when more than six years, but less than twelve years,

had elapsed since the alleged debt was incurred, took out an originating summons to have the defendant's claim adjudicated on, and set up the Statute of Limitations:—Held, that the alleged claim was barred as against the personal estate, but not as against the real estate.

Notice by a creditor of his claim in answer to advertisement by an executor under 22 & 23 Vict. c. 35. s. 29, does not prevent the Statute of Limitations from running.

The testator, who died on the 9th of August, 1882, by his will dated the 4th of August, 1882, gave all the property of which he was possessed to his executors and trustees, in trust to sell and convert the same into money, and after payment thereof of his just debts, funeral and testamentary expenses, to divide the residue into two equal parts, which he disposed of as therein mentioned.

The testator died possessed of real estate.

The plaintiff, who was the sole executor and trustee, advertised for creditors under Lord St. Leonards' Act, 1859 (22 & 23 Vict. c. 35), s. 29, and on the 28th of December, 1883, the solicitors of the defendant sent in a claim for a debt which was not particularly specified, but which was said to be about 1,000*l*. The plaintiff asked for particulars. Particulars were not sent, but a correspondence took place which it was not suggested amounted to any acknowledgment of the debt. Nothing further was done on either side till the 7th of February, 1887, when the plaintiff took out this summons, asking that the claim of the defendant might be adjudicated on by the Judge, and that, in default of the defendant substantiating his claim within a time to be named for the purpose, the plaintiff might be at liberty to distribute the estate of the testator without regard to the defendant's claim.

The alleged debt was incurred more than six years, but less than twelve years, before the summons was taken out.

Renshaw, Q.C., and F. Thompson, for the plaintiff, submitted that the claim was barred by the Statute of Limitations.

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Marten, Q.C., Inderwick, Q.C., and Herbert Robertson, for the defendant.—The will charges the debts on the real estate if it does not create a trust for their payment out of the proceeds of sale—*Shallcross v. Finden* (1) and *Tompkins v. Tompkins* (2). As to the real estate, therefore, the Statute of Limitations has not yet run—*Scott v. Jones* (3), *Cadbury v. Smith* (4), *In re Hepburn; ex parte Smith* (5), 3 & 4 Will. 4. c. 27. s. 42, and 37 & 38 Vict. c. 57. s. 10.

They also contended that the sending in the claim in answer to the plaintiff's advertisements under 22 & 23 Vict. c. 35. s. 29, was sufficient to prevent the statute running, and referred to 13 & 14 Vict. c. 35, ss. 19–25, and 23 & 24 Vict. c. 38. s. 14.

Renshaw, Q.C., in reply, referred to *Bowyer v. Woodman* (6), *Dickinson v. Teasdale* (7), *Jacquet v. Jacquet* (8), *Tench v. Cheese* (9), *Allan v. Gott* (10), and *Mutlow v. Bigg* (11).

KAY, J., read the will as stated above, observing that, beyond question, it created a charge of the debts upon the real estate of the testator, if it did not amount to an express trust, and that it was indifferent whether it was a charge or express trust since the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10, under which a trust does not keep the debt alive longer than a charge, and a charge does not keep the debt alive for longer than twelve years. [His Lordship stated the other facts set out above, and continued:] It is argued that because the claimant sent in his claim in writing to the executor, and the executor now comes to have it adjudicated on, there is something in the statutes 22 & 23 Vict. c. 35

and 23 & 24 Vict. c. 38, to keep the debt alive. I do not follow that argument. These statutes were only meant to relieve an executor from personal responsibility if, after taking certain measures to ascertain what the debts are, he discharges such debts as he knows of—to relieve him from any personal liability for debts of which he does not know, and as to which the creditor has not chosen to send in a claim after advertisements issued. That is the purpose of these statutes, and, so far as I know, the only purpose. There is not, so far as I am aware, a single sentence in any one of these statutes which in any shape or way says or indicates that a creditor who does not put the matter in adjudication by some proceeding of his own, before the Statute of Limitations has run, is to have his debt kept alive. His merely making a claim does not keep his right alive in any way. Now over six years have elapsed since the debt which the defendant claims was incurred, and in the interval he did nothing, except send in this claim. I am of opinion, therefore, that he has done nothing to keep his right alive, and that the Statute of Limitations has been running uninterruptedly since the alleged debt was incurred; and if this debt is barred by the lapse of six years, then the six years ran before the trustee took out this summons.

Now in *Scott v. Jones* (3) it was decided that where there was a similar direction to pay debts, that direction did not create a trust to prevent the operation of the Statute of Limitations against the personal estate. In that case there was a direction to pay debts out of real and personal estate; but there was not any real estate, and the question was whether the direction to pay debts out of real and personal estate kept the debt alive beyond six years as against the personal estate, and it was held, after considerable deliberation—three years' deliberation, the House of Lords being accustomed to be more deliberate in those days than at the present time—that it did not. The same point came before Mr. Justice Cave in *In re Hepburn; ex parte Smith* (5). In *Scott v. Jones* (3) there was leasehold property which was treated by the testator as freehold; in *In re Hepburn; ex parte Smith* (5) there was

(1) 3 Ves. 738.

(2) Prec. Chanc. 397.

(3) 4 Cl. & F. 382.

(4) Law Rep. 9 Eq. 37.

(5) 54 Law J. Rep. Q.B. 422; Law Rep. 14 Q.B. D. 394.

(6) Law Rep. 3 Eq. 313.

(7) 1 De Gex, J. & S. 52; 32 Law J. Rep. Chanc. 37.

(8) 27 Beav. 332.

(9) 6 De Gex, M. & G. 453.

(10) 41 Law J. Rep. Chanc. 571; Law Rep. 7 Chanc. 439.

(11) 45 Law J. Rep. Chanc. 282; Law Rep. 1 Ch. D. 385.

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a gift very like the gift in the present case, a devise of real estate to trustees on trust for sale, with a direction that the proceeds of sale should form part of the testator's residuary personal estate, and a bequest of all the residuary personal estate upon trust for sale and conversion, with a direction that the moneys arising therefrom, together with the proceeds of sale of his real estate, should be applied in payment of his debts and testamentary expenses. There was no real estate, and Mr. Justice Cave held, in accordance with *Scott v. Jones* (3), that that direction did not keep the debts alive against the personal estate beyond the six years. In *Cadbury v. Smith* (4) the point was brought to the attention of Lord Romilly, where he said, "It has been determined in *Scott v. Jones* (3), and that class of cases, that if a testator gives real and personal estate in trust to pay debts and legacies, that is no bar to the Statute of Limitations; for if a testator merely imposes upon his executors that which it is their regular duty to do, he does not, except as to real estate, create a trust." Observe the words, "except as to real estate." It is not the regular duty of executors to apply real estate in the payment of debts. When, therefore, the testator gives real estate to the same persons whom he appoints executors, and makes a blended fund, and directs them to apply that fund in payment of his debts, he does impose on them a duty which is not within the ordinary scope of the duty of executors. Accordingly, therefore, the reasoning of *Scott v. Jones* (3) does not apply, as Lord Romilly pointed out, to the case of a charge on real estate. There is no doubt that in this will there is at least a charge of debts on the real estate, if not an express trust for their payment out of the proceeds of the real and personal estate, and it is indifferent now whether it is a charge or trust for the purpose of the Statute of Limitations, because by the Act of 1874 (37 & 38 Vict. c. 57), s. 10, the time of limitation is the same—namely, twelve years—whether it is a trust or a charge, and if that limit, the limit of twelve years, applies, it is admitted that this claim is not barred, since the alleged debt was incurred within that period. There may remain another ques-

tion, upon which I will not give any opinion now. According to a series of cases which were considered in *Allan v. Gott* (10), such a direction as we have here would make the whole debts payable rateably out of the real and personal estate, and it is open to argument whether such part of the debts as is properly attributable to the personal estate must not be treated as barred by the statute; but I leave that question entirely alone at present. At present I only decide that there is a charge of debts on the real estate which would be available for twelve years, and that therefore this claim, so far as regards the real estate, is not barred by the Statute of Limitations. I make a declaration accordingly, and refer the rest of the matter back to chambers, and I reserve all costs.

Solicitors—Warburton & De Paula, for plaintiff;
Crosse & Sons, for defendant.

KAY, J. } WESTRUP v. THE GREAT YAR-
1889. } MOUTH STEAM CARRYING COM-
Dec. 2. } PANY (LIMITED).

Towage—Maritime Lien.

Mere towage services are not the subject of a maritime lien.

Adjourned summons.

This was a summons taken out in the winding-up of the company, for a declaration that the applicants were entitled to a lien upon the vessels of the company for services rendered by the applicants' steam-tugs in towing the vessels of the company in and out of the harbour of Great Yarmouth. It was admitted that the services in question were not in the nature of salvage, but were rendered for the mere purpose of accelerating the speed of the company's vessels.

Gorell Barnes, Q.C., and Pyke, for the applicants.—Towage services are the subject of a maritime lien no less than salvage services; and it was expressly so held in *The Isabella* (1), a case decided before the

(1) 3 Hagg. 427.

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3 & 4 Vict. c. 65 (1840), and in two cases decided after that statute—namely, *The Constancia* (2) and *The St. Lawrence* (3). Then came the case of *Northcote v. The Henrich Bjorn* (4), where it was held that the statute 3 & 4 Vict. c. 65. s. 6, does not give a maritime lien in respect of necessities supplied to a foreign ship in an English port, and it is said that the *dicta* of the Court of Appeal and Lord Bramwell in that case extend to towage as well as necessities; but those *dicta* were not necessary for the decision, and cannot be taken to overrule the three express decisions on the subject, which are not referred to in the judgment of the Court of Appeal or of Lord Bramwell—*Williams and Bruce's Admiralty Practice* (2nd ed. 1886, p. 175). We admit that the Admiralty Act, 1840 (3 & 4 Vict.), c. 65. s. 6, did not confer a lien if none already existed, that Act merely extending the locality of the Court's jurisdiction within the body of a county. On the other hand, it is equally clear that that Act did not take away any lien already recognised by law.

[They also cited *The Princess Alice* (5), *The Wataga* (6), and *The General Palmer* (7).]

H. Smith, Q.C., and *Alexander*, for the official liquidator, who was also receiver in a debenture-holder's action.—The decision of the Court of Appeal in *Northcote v. The Henrich Bjorn* (4), and the judgment of Lord Bramwell in the House of Lords, are decisive against the argument that mere towage services are the subject of a maritime lien. In the cases relied on by the other side the point was not taken or argued, and the question whether there was a lien or no may have been of no practical consequence. *The Isabella* (1) was commenced as a salvage suit. In neither *The Constancia* (2) nor *The St. Lawrence* (3) was the point really argued,

and the towage in these two cases may have been towage in the nature of salvage.

They also cited, as to the meaning of "towage," *The Charlotte* (8) and *Turnbull v. Strathnaver* (9); and as to the jurisdiction of the Court of Admiralty, *Greenway and Barker's Case* (10), *The General Iron Screw Collier Company v. Schurmanns* (11), 13 Ric. 2. c. 5, 15 Ric. 2. c. 3, 2 Hen. 4. c. 11, *Coke 4 Inst.* 134, *Comyn's Digest*, tit. "Admiralty," 3 & 4 Vict. c. 65. s. 6, *The Alexander* (12), *The Ocean* (13), and *The Two Ellens* (14).

Pyke, in reply.

KAY, J.—The question before me is, whether there is any authority for the proposition that there exists a maritime lien for services rendered to a ship not in the nature of salvage, but for simply towing the ship. Of course, if it were towing for the purpose of salving the ship, nobody would hesitate to say that it comes within the doctrine as to salvage. But here it is admitted that no element of that kind exists, and that the towing was merely to accelerate the speed of the ship on either leaving or returning to the port. Now, the direct authority on the question is the case of *Northcote v. The Henrich Bjorn* (4), and there Lord Bramwell discusses 3 & 4 Vict. c. 65, which enacts that the Court of Admiralty shall have jurisdiction to decide all claims or demands whatsoever in the nature of salvage for services rendered, or damages, or anything in the nature of towage or for necessities. That case was one in which necessities had been supplied to the ship, and the argument seems to have been that because the statute which I have just mentioned gave the High Court or Admiralty jurisdiction with respect to necessities, therefore necessities became the subject of maritime lien. Lord Bramwell, in answering that, said: "Jurisdiction is by the section given in cases of

(2) 4 Notes of Cases, 512; 10 Jur. 845.

(3) 49 Law J. Rep. P., D. & A. 82; Law Rep. 5 P. D. 250.

(4) 54 Law J. Rep. P., D. & A. 33; Law Rep. 10 P. D. 44; and in the House of Lords, 55 Law J. Rep. P., D. & A. 80, at p. 85, *per* Lord Bramwell; Law Rep. 11 App. Cas. 270, at p. 283.

(5) 3 W. Rob. 138.

(6) Swab. 165.

(7) 2 Hagg. 176.

(8) 3 W. Rob. 68.

(9) Law Rep. 1 App. Cas. 58.

(10) Godbolt's Rep. 260.

(11) 1 Jo. & H. 80; 29 Law J. Rep. Chanc. 877.

(12) 1 W. Rob. 288, 293, 346, 360.

(13) 2 W. Rob. 91, 368; 9 Jur. 381.

(14) 41 Law J. Rep. Adm. 33; Law Rep. 4 P. C. 161.

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towage, and it cannot be pretended that there was any maritime lien as to that when it occurs on the high seas. It was, indeed, said it was a sort of salvage; but it certainly is not. And the Admiralty Court, I take it, would have under the statute jurisdiction in a case of towage where the ship had been let and the owner was not liable." Then, later on, he says: "Jurisdiction as to towage was not created by the statute. It existed before, with no maritime lien." Now, that case first came before Sir James Hannen, whose decision seems to have been reversed by the Court of Appeal, consisting of Lord Esher and Lords Justices Bowen and Fry. The judgment of the Court was delivered by Lord Justice Fry (which on this point was the unanimous judgment of all the Judges), who says: "It has been suggested that the way in which necessities are associated with salvage and damage implies an intention to give in respect of necessities the same lien as existed in respect of salvage; but the argument is not satisfactory, especially when it is observed that necessities are more closely associated with towage which gave no lien, than with salvage or damage." Therefore, I have the considered opinion of Lord Esher and Lords Justices Bowen and Fry, affirmed by Lord Bramwell in the House of Lords, that towage on the high seas does not give a maritime lien. Now, suppose that statement is extra-judicial. I do not think that it is altogether extra-judicial, because it is a link in the argument. The argument was, "the statute does not give a maritime lien in respect of necessities in respect of which admittedly there was no maritime lien before; it is said that it does, because necessities are coupled with the word 'salvage'; but the answer to that is that they are also coupled with the word 'towage,' in respect of which also there is no lien." That was an essential part of the *ratio decidendi*, therefore it is rather more than an extra-judicial dictum. Now what is the authority on the other side? No case has been cited raising the neat point whether towage did give a maritime lien on the high seas before the Act, or within the body of a county since the Act. Three cases have been cited in which towage was

treated undoubtedly as if it gave a maritime lien. They are *The Isabella* (1), *The Constancia* (1), and *The St. Lawrence* (3). But in not one of these cases was the point argued. Towage was treated on the footing that there was a maritime lien with respect to it when coupled with other things as to which there was undoubtedly a maritime lien. In some cases that may have been so, and perhaps it was not worth while to insist upon the distinction, or it may have been in each case, except *The Isabella* (1), that the towage was in the nature of salvage. In *The Isabella* (1) it was certainly found that the towage was not in the nature of salvage. But there, again, I cannot find that there was any distinct argument, or distinct decision, on the point that towage, apart from salvage, created a maritime lien. The weight of authority is against that contention, and the summons must be dismissed, with costs.

Solicitors—Ingledew, Ince & Colt, agents for Chamberlin & Leech, Great Yarmouth, for applicants; H. Montagu, for respondent.

NORTH, J. }
1889. }
Dec. 7. }

In re WELLS.
WELLS v. WELLS.

Infant—Past Maintenance—Life Interest—Accumulations—Conveyancing and Law of Property Act, 1881, s. 43, sub-s. 2—Two Funds.

Property was bequeathed to trustees, upon trust to pay the income to R. W., an infant, during her life, with remainders over. R. W. attained twenty-one:—Held, that the accumulations of income during her minority belonged to her absolutely, and were not to be held for the benefit of remaindermen.

A fund was bequeathed to trustees, upon trust, if R. W. should attain twenty-one, to pay the income to her during her life, and there was an express power in the will to apply the income of this fund for maintenance. Another fund was bequeathed, by the same will, to the trustees, upon trust to

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pay the income to R. W. during her life :— Held, that the past maintenance of R. W. was primarily payable out of the former fund, that being most for her benefit ; and that, as the trustees had not exercised any discretion in the matter, the Court could now exercise it for them, upon an application made after R. W. had attained twenty-one.

Adjourned summons.

This was a summons taken out by the trustees of the will of Michael Wells, for the determination (amongst others) of the following questions—first, whether the defendant Rose Wells was entitled to payment or transfer of the whole of the accumulations arising during her minority, (a) from one moiety of a legacy of 2,600*l.* and a freehold house called Orchard House, and (b) from her share of the residuary estate of the said testator ; and secondly, in what manner the payments, which had been made for the past maintenance of Rose Wells, ought to be apportioned between the income of the respective trust funds.

Michael Wells, by his will dated the 26th of April, 1883, gave a legacy of 2,600*l.*, and his freehold house called Orchard House, to his trustees, upon trust as to one moiety thereof, if and when his granddaughter, the defendant Rose Wells, should attain the age of twenty-one years, to pay the income arising from such moiety to her during her life for her separate use without power of anticipation ; and, after her death, should stand possessed of the said moiety of the said trust fund and freehold hereditaments and the annual income thereof, in trust for her children as therein mentioned, with remainders over. Provided always that if Rose Wells should be under age at the testator's decease, the trustees might, in their discretion, apply the whole or such part as they should think fit of the income arising from the said moiety for the maintenance of Rose Wells, and such part of the income as might not be required for such purposes should be accumulated and invested so as to follow the *corpus* of the fund from which it arose. And the testator devised and bequeathed the residue of

his real and personal estate to his trustees, upon trust to sell, convert, and invest as therein mentioned. And he directed his trustees to stand possessed of his residuary estate, upon trust, as to one equal third part thereof, to pay the annual income thereof to his daughter Elizabeth Wells for her life for her separate use, without power of anticipation ; and after her decease, upon trust for her children as therein mentioned ; and, as to one sixth part of his residuary estate, upon the same trusts in favour of the said Rose Wells and her children as were declared in favour of his daughter Elizabeth Wells and her children, with remainders over. The other moiety of the legacy of 2,600*l.* and the freehold house called Orchard House, and the remaining one-sixth part of the residuary estate, were given upon exactly the same trusts in favour of the testator's granddaughter Christina Well and her children. Michael Wells died in March, 1884.

In July, 1886, an order was made ordering (amongst other things) that a sum of 200*l.* a year should be allowed for the maintenance of Rose Wells, and a sum of 190*l.* a year for the maintenance of Christina Wells, and that the trustees of the will of Michael Wells should pay certain proportions of such allowance to their guardian on account of such maintenance "out of the funds, subject to the trusts declared by the said will" in favour of the said infants. The rest of the maintenance was provided out of other property in which the infants were interested.

On the 21st of May, 1889, Rose Wells attained the age of twenty-one years.

Down to that time the proportions of maintenance moneys were paid out of the income of the trust funds under the will pursuant to the above-mentioned order, and the residue of such income was accumulated and invested.

Such payments had been made out of the income as a whole, and as to the accumulations no distinction had been drawn between income arising from the legacy of 2,600*l.* and the freehold house called Orchard House, and income arising from the shares of the infants in the

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residuary estate; but such accumulations had been blended together.

There was evidence that the income arising from the legacy of 2,600*l.* and the freehold house amounted to about 135*l.* a year—that is to say, was less than the annual sums ordered to be allowed for maintenance out of the “will trust funds.”

The trustees of the will, in their affidavit made in support of the summons, stated that if they had been required to exercise their discretion, they would have taken the maintenance out of the income of the 2,600*l.* and Orchard House in the first instance, before applying the income of any property in which the infants took a vested interest, and they were desirous to exercise such discretion now, if the Court thought they were at liberty so to do.

James Rolt, for the trustees.—The accumulations of income arising from the two sources of income—first, the trust fund and the freehold house; and, secondly, the shares in the residuary estate—have been blended together, and the trustees have not exercised any discretion in the matter.

F. H. Colt, for Rose Wells and the infant Christina Wells.—Rose Wells is absolutely entitled to the accumulations which have arisen from her share of the second source of income—*In re Buckley's Trusts* (1). Sub-section 2 of section 43 of the Conveyancing Act, 1881, could never have been intended to alter the legal rights of the parties.

As the trustees have not exercised any discretion as to which of the two sources of income was primarily applicable for maintenance, the Court will exercise it for them; and, in so doing, will have regard solely to what was for the benefit of the infant—*Lucas v. King* (2). In that case it would seem that the application was made to the Court after the infant had attained twenty-one.

Marcy, for persons entitled in remainder.—I rely on the language of the Act of Parliament. Sub-section 2 of sec-

tion 43 says that the trustees shall hold the accumulations “for the benefit of the person who ultimately becomes entitled to the property from which the same arise.”

[NORTH, J.—The Act does not say “capital”; why should the word “property” refer exclusively to capital?]

In *In re Buckley's Trusts* (1) the infant was absolutely entitled to the property; here the infant was only entitled for life. The trustees have not exercised any discretion, and it is now too late for them to do so.

NORTH, J.—I think the point quite clear. The decision in *In re Buckley's Trusts* (1) applies exactly to the present case. In my opinion, the accumulations of the income of the residue belong to Rose Wells absolutely. And further, I am not satisfied that, in the direction given to trustees in section 43, sub-section 2 of the Act to hold the accumulations “for the benefit of the person who ultimately becomes entitled to the property from which the same arise,” the word “property” does not mean the rents out of which the accumulations have taken place. At any rate, it is not necessary to say that the word “property” there used is to be confined to capital. If necessary, I should be prepared to hold this lady to be the person who had “ultimately become entitled to the property” from which the accumulations arose.

This statute was passed with a view to shorten and simplify the practice of conveyancing, and was never intended to alter the devolution of property.

Then, as to the adjustment of this matter now, *Lucas v. King* (2) is an authority exactly in point to shew that I can do so. At first I thought that the trustees had exercised a discretion in the matter—and if they had, I am not at all sure that I could have considered it now—but it is now clear that they have not exercised any discretion at all. All that they have done has been to receive the income of the infant as a whole—both the income of the residue and the income of the legacy and house; to take so much thereof as was necessary for the maintenance of the infant, and to accumulate the

(1) 52 Law J. Rep. Chanc. 439; Law Rep. 22 Ch. D. 583.

(2) 11 W.R. 818.

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surplus income. And I can now say that the past maintenance must be considered as taken from that part of the income which would be most for the benefit of the infant.

There must, therefore, be a declaration that Rose Wells is absolutely entitled to the accumulations which have arisen from her share of the residue; and there must be a declaration that, as between the legacy of 2,600*l.* and the house on the one hand, and her share of residue on the other hand, her past maintenance ought to have been paid out of the income of the former fund.

Solicitors—Wheatly, Son & Daniel.

KAY, J. }
 1889. }
 Nov. 30. } *In re* THE BRISTOL ATHENÆUM.
 Dec. 2. }

Company—Literary Society—Winding-up—Companies Act, 1862, section 199—Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), sections 29, 30, and 33.

An unregistered literary society, not established for the purposes of gain, cannot be wound up under section 199 of the Companies Act, 1862, which applies only to unregistered trading associations. The property of such a society on its dissolution ought to be given to some kindred institution, in accordance with the provisions of the Literary and Scientific Institutions Act, 1854, section 30. A society of this character is not within the proviso in section 30 of that Act, which excepts from its operation institutions established by the "contributions of shareholders in the nature of a joint-stock company," although some of its members may be shareholders.

Petition.

The Bristol Athenæum was established in 1844 for the promotion of "moral and intellectual improvement by means of

libraries for circulation and reference, newspapers and periodical publications, lectures, discussions, and classes for instruction and improvement in literature and the arts and sciences." By the original rules the society was to consist of life members who had given 20*l.* and upwards, and of 10*l.* and 2*l.* shareholders, and of annual subscribers, and its property was vested in five trustees, with power to sell or exchange such property for the benefit of the society at the request of the board of directors, and such rules were not to be altered except by the authority of an annual general meeting. No trust-deed, however, was ever executed, and the society had never been incorporated or registered under any Act of Parliament.

By an alteration in the rules of the society effected in March, 1888, it was provided that the society should not be dissolved unless a resolution were carried by a majority of at least two thirds of the life members and shareholders present at a special meeting, and such resolution were confirmed by a like majority at a second special meeting. The property remaining after the discharge of all liabilities was to be divided *pro rata* among the shareholders. No dividend, gift, division, or bonus in money was to be made to any of the members.

The society was in occupation of certain leasehold property vested in the trustees, who, in 1884, mortgaged it for 1,750*l.* The mortgagee, in August, 1888, sold the leasehold premises; and of the purchase-money, after satisfaction of the mortgage, there remained about 800*l.*, which was paid to the solicitors of the surviving trustees. On the 22nd of August, 1888, a general meeting of the life members and shareholders was held, at which it was resolved that the society should be dissolved, and at another meeting, held on the 1st of October, this resolution was confirmed. The trustees claimed the surplus money to indemnify themselves against any liability under the original lease. In November, 1888, the books, furniture, and other effects of the society were sold for about 150*l.*, and it was calculated that after meeting all possible liabilities there would be a considerable surplus. But as

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it was not known who the present shareholders were, as many of them had died and others had left Bristol, or had transferred their shares to persons who had not registered the transfer, the petition was presented by certain shareholders for the winding up of the society under the provisions of the 199th section of the Companies Act, 1862, which relates to the winding up of unregistered companies.

Edward Ford, for the petition.—I ask your Lordship to wind up this society under the 199th section of the Companies Act, 1862, which deals with the winding up of unregistered companies. It is true the society was not a trading association; but the term “place of business” used in that section need not necessarily imply trading. We cannot come within section 30 of the Literary and Scientific Institutions Act, 1854, because the proviso in that section excludes institutions “established by the contributions of shareholders in the nature of a joint-stock company.” The case of *In re Dutton* (1) is the only case I can find resembling the present, and there that Act was referred to.

A. G. Ford, for the society.

KAY, J.—I think on the whole that this is not a society which comes within the Joint-Stock Companies Acts. It is not a trading association at all. I pointed out that section 199 of the Companies Act, 1862, provides that any partnership, association, or company, except railway companies, consisting of more than seven members, and not registered under that Act, thereafter included under the term “unregistered,” may be wound up. Now, of course, this society is not registered. But if it comes within any section, it is not section 199, because the 1st sub-section of that section provides that an unregistered company shall, for the purpose “of determining the Court having jurisdiction in the matter of the winding-up, be deemed to be registered in that part of the kingdom where its principal place of business is situate.” Therefore a company,

association, and so on, must be one of those hereinafter included under the term “unregistered company”; and an “unregistered company” under the section must be wound up at its place of business, and “business” must ordinarily be trading under the Act. But, in the first place, this does not seem to me to be a joint-stock company, because it is constituted by rules which do not permit of any dividend, division, or bonus among its members. But the funds which are provided by the rules are to be subscribed by life members, subscribers, and shareholders. The objects of the society are entirely within the 33rd section of the Literary and Scientific Institutions Act, 1854, to which I have been referred. Therefore, undoubtedly, it is an institution within that Act of Parliament. Now that Act of Parliament provides that when such an institution—speaking generally, a literary institution, to call it by that name for this purpose—is dissolved, which this has been by both classes of members, its property shall be given to some other institution, to be determined either by the members or by the County Court—some other like institution. No doubt these rules contain a provision that when a society is dissolved its property shall be divided, not among those who contributed, but among the shareholders only. That is distinctly contrary to the Act of Parliament. No rule can obviate or get rid of the effect of a public Act of Parliament. It seems to me, therefore, that this Act of Parliament applies, and that this institution does not come within the exception in section 30, which excepts joint-stock companies. But this, for the reason I have given, seems to me not to be a joint-stock company, and I think, therefore, that the proper view to take is that the shareholders cannot dissolve the company, as to which there seems to be a difficulty, because it has not been ascertained who they are and where they all are. The institution to which the property must be given must be determined by the Court. This, however, cannot be done until all the liabilities are discharged. It is suggested that there may be a liability under covenants in the leases to which the institution is subject. The Court will, of

(1) 48 Law J. Rep. Exch. 350; Law Rep. 4 Ex. D. 54.

In re Bristol Athenæum.

course, see that proper provision is made to indemnify the members. I am glad to come to this conclusion, because if I were to make a winding-up order, a great part of the funds would be dissipated in costs, whereas now by a simple application the fund may be saved for the benefit of some other useful institution of the same class and character. I am, therefore, of opinion that the institution comes within the first part of the 30th section of the Literary and Scientific Institutions Act, 1854, and is not affected by the proviso in that section. The costs of the petition and of the association will be paid out of the assets of the institution.

Solicitors—J. J. Harlow, agents for J. H. King, Bristol, for petitioners; Robinson, Preston & Stow, agents for Jacques, Pease & Jacques, Bristol, for respondents.

KAY, J. }
 1889. } *In re FROST. FROST v. FROST.*
 Dec. 4. }

Contingent Remainder—Possibility on a Possibility—Remoteness.

Testator gave freehold lands to the use of trustees during the life of his daughter, in trust for his daughter for her separate use, and after her death to the use of any husband she might thereafter marry, and after the death of the survivor of them to the use of the children of his daughter as she should appoint, and in default of appointment to the use of the children of his daughter living at the death of such survivor or previously dead leaving issue then living, and if there should be no such child, to the use of the testator's sons and other daughters then living or previously dead leaving issue then living. The daughter, after the testator's death, married a person living at the testator's death, and died without having had issue:—Held, that the limitations in default of appointment, after the death of the survivor of the daughter and her husband, were void for remoteness.

The application of the rule against per-

petuity to contingent remainders considered and defined, and Cole v. Sewell (4 Dr. & W. 1; 2 H.L. Cas. 186) distinguished.

Adjourned summons.

Thomas Frost, by his will dated the 19th of March, 1870, made the following devise: "I give to my sons, John Frost, Edwin Frost, and Albert Frost, all those my closes of land and hereditaments situate in the parish of South Brent aforesaid, which are described in the 7th schedule of this my will, to hold the same unto and to the use of my said sons, John Frost, Edwin Frost, and Albert Frost, and their heirs, during the life of my daughter, Emma Frost, without impeachment of waste, upon trust, so long as she shall continue unmarried, to permit her to receive the rents and profits thereof to her own use, but in case she shall hereafter marry, then upon trust to receive the rents and profits thereof, and pay the same to my said daughter, Emma Frost, for her separate use, free from the debts, control, or engagements of any husband whom she may hereafter marry, and her receipt alone to be a good discharge for the same; and after the decease of my said daughter, Emma Frost, then to the use of any husband whom she may hereafter marry, and his assigns, during his life, without impeachment of waste, and from and after the decease of the survivor of them, the said Emma Frost and such husband, to the use of all and every or such one or more of the children of my said daughter, Emma Frost, for such estate or interest, and subject to such charges, and in such manner, without prejudice to the executory devise over hereinafter contained, as my said daughter Emma Frost shall, by deed or will, notwithstanding coverture, appoint, and in default of appointment, and so far as no such appointment shall extend, to the use of all and every the children or child of my said daughter, Emma Frost, who shall be living at the time of the death of the survivor of them the said Emma Frost and such husband of the said Emma Frost, or shall have previously died leaving issue then living, their, his, or her heirs and assigns, if more than one, in equal shares, as tenants in common; but in case no

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child of the said Emma Frost shall be living at the death of the survivor of them the said Emma Frost and such husband, or shall have previously died leaving issue then living, then to the use of such of my sons and of my other daughters as shall be then living, or shall have previously died leaving issue then living, their, his, or her heirs and assigns, if more than one, in equal shares, as tenants in common." The will also contained a devise of residuary real estate to the same trustees, upon trusts for sale, and payment of debts, funeral, and testamentary expenses out of the proceeds of sale, and for distribution of the surplus amongst his eight children therein named, including Emma Frost, as tenants in common.

The testator died in 1870 leaving his eight children surviving him. Emma Frost was unmarried at the testator's death, but afterwards married Robert Tyley, and died in 1872 without having had issue. Robert Tyley died in 1888.

This was an originating summons taken out to ascertain whether, according to the true construction of the will, the lands devised in trust for Emma Frost for her life had, in the events which had happened, become subject to the trusts declared of the residuary real estate, and what persons were now beneficially entitled to the said lands or the proceeds of sale thereof, and in what proportions.

The question was whether the limitation to the testator's sons and other daughters was void for remoteness, and it was argued on the footing that this limitation was, in the events which had happened, an alternative contingent remainder, and not an executory devise.

Badcock, for persons interested under the residuary devise.—The gift over after the death of Robert Tyley in default of appointment by Mrs. Tyley is void for remoteness. This case comes exactly within *In re Harvey*; *Peck v. Savory* (1), where Cotton, L.J., says, "The gift is to a class not to be ascertained till the death of the survivor of the daughter and her husband, present or future," and

the gift there was declared to be void. In this case the husband might not have been born at the testator's death. No doubt *Cole v. Sewell* (2) will be relied upon as establishing that the rule against perpetuity does not apply to legal remainders. But the decision in that case depends upon the fact that there was a previous estate tail, the barring of which at any time would have destroyed the subsequent estate. There is no estate tail here. In *Catlin v. Brown* (3), which was decided after *Cole v. Sewell* (2), Page Wood, V.C., says, "I apprehend that a contingent remainder cannot be limited as depending on the termination of a particular estate whose determination will not necessarily take place within the period allowed by law." These limitations come expressly within the definition of a perpetuity quoted with approval by your Lordship from *Lewis on Perpetuities in The London and South Western Railway Company v. Gomm* (4), as "a future limitation which will not . . . necessarily vest within the period fixed and prescribed by law, . . . and which is not destructible by the persons for the time being entitled to the property subject to the future limitation." *Cole v. Sewell* (2) has never been extended to a case in which there was no estate tail. If the present gift is an executory devise, it is clearly void for remoteness.

Rouden, for persons in the same interest.

W. J. Lee, for persons claiming under the gift over.—The limitation to the testator's sons and other daughters was a good alternative contingent remainder, and was ready to vest on the death of Robert Tyley. In Butler's note to *Fearne's Contingent Remainders*, p. 565, the law is stated to be that the remoteness of a remainder, however great, is no objection on its creation if the remainder would vest in possession immediately on the determination of the preceding estate—see also *Williams on Real Property* (13th ed.), pp. 271, 276. In *Cole v. Sewell* (2) Sir E. Sugden says "Where a limitation is to take effect as a remainder, remoteness

(2) 4 Dr. & W. 1; 2 H.L. Cas. 186

(3) 11 Hare, 372, 374.

(4) 51 Law J. Rep. Chanc. 530; Law Rep. J Ch. D. 562, 575.

(1) Law Rep. 39 Ch. D. 289, at p. 298.

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is out of the question, for the given limitation is either a vested remainder—and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries or for all time—or it is a contingent remainder, and then by the rule of law, unless the event upon which the contingency depends happen, so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all. . . . A remainder may be prevented from taking effect, but it can never lead to remoteness.” The House of Lords affirmed that decision, and Lord Brougham expressly says that the law respecting perpetuities cannot apply to contingent remainders.

[KAY, J., referred to *In re Finch*; *Abbiss v. Burney* (5).]

There the limitations were all equitable, which stand on the same footing as executory devises, and the decision in that case has never been extended to legal remainders.

[KAY, J.—Is not the limitation a possibility on a possibility?—His Lordship referred to *Whitby v. Mitchell* (6).]

That doctrine only forbids a limitation to an unborn person for life, with remainder to the issue of such unborn person, and this is what is meant by the rule against remoteness applied to a contingent remainder referred to in the authorities cited against me.

Badcock, in reply.—*Cole v. Sewell* (2) has never been extended to any case in which there was no previous estate tail. From the remarks in *Sugden's Law of Property* (p. 120) it seems that Lord St. Leonards was relying on the previous estate tail, and Lord Cottenham's judgment in the House of Lords was entirely based on the fact that the contingent remainder was always barrable. *Fearne* (10th ed. p. 501) expresses the view that contingent remainders which tend to a perpetuity are void.

[KAY, J., referred to *Mainwaring v. Baxter* (7) and *Beard v. Westcott* (8).]

(5) 50 Law J. Rep. Chanc. 348; Law Rep. 17 Ch. D. 211.

(6) Not then reported; since reported *ant* p. 8; Law Rep. 42 Ch. D. 494.

(7) 5 Ves. 458.

(8) 5 Taunt. 395.

Cole v. Sewell (2) is discussed in *Jarman on Wills* (4th ed. 1881, vol. i. p. 258; vol. ii. Appendix, p. 845).

He also referred to *Humberston v. Humberston* (9).

KAY, J.—I believe there would be no advantage in reserving my judgment in this case, because, as far as I know, the amount of authority is not very extensive, and I have no doubt that counsel have called my attention to the most important cases. The limitation under this will is in this form: [His Lordship read the limitations, observing that the limitations after the death of Emma Frost were clearly all legal limitations, and continued:] Now the question is, whether that limitation is good? It is very clear that if it were a limitation of personal estate, or by way of executory devise, it would offend against the rule against perpetuity, because Emma Frost was unmarried at the date of this will. She might have married after the death of the testator a person who was not born in his lifetime, and it might, therefore, have been a limitation to Emma Frost for life, remainder to a person unborn for his life, with a contingent remainder over to the children of Emma Frost living at the death of that unborn person, or such of them as should be then dead leaving issue then living, with an alternative limitation to other persons still to be living at the death of that unborn person or to have left issue then living. That clearly would be a limitation which would offend against the rule against perpetuity, because it would tie up the estate not merely during the life of Emma Frost, who was in existence at the death of the testator, but during the life of Emma Frost's husband, who might possibly not be living at the death of the testator. But it is said, “This is not an executory devise, but simply a legal limitation by way of contingent remainder, and therefore the rule as to perpetuities does not apply to the case at all.” Let it be so. No doubt contingent remainders were invented long before the rule against perpetuity, and they were not originally

(9) 1 P. Wms. 332.

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subject to any such rule. But they were subject, before this rule was invented, to another rule, which was thus expressed in the old legal language, that you could not limit a possibility upon a possibility; and the familiar illustration is, that you could not limit by way of legal devise or conveyance to A., an existing person, for life, with remainder to his unborn son for life, with remainder to the children of that unborn son. That last remainder was void, because, according to the phrase used by the old lawyers, it was a possibility upon a possibility. Now I think there is no question that this is the law to this day, although the reason for it has been contested by modern lawyers, and a learned argument for it may be found in that very valuable book, the late Mr. Williams's *Treatise on the Law of Real Property*. I lately had to consider the case (10), and I decided that the rule exists to this day. I find in *Butler's Note to Fearn v. Blyth* on *Contingent Remainders*, at page 565 of the 10th ed. (1844), this statement: First of all he deals with the doctrine of perpetuities, or excessive restraint upon alienation, and he says: "No question of perpetuity could arise at the common law or under the statute De Donis. It has been shewn that after the statute De Donis, and before the introduction of executory uses, future estates could only be created by way of remainder. The remoteness of a remainder, however great, was no objection to it on its creation. If the event upon which it was to vest took place during the continuance of the preceding estate, or at the instant of its determination, the remainder would vest in possession immediately on the determination of the preceding estate; if the event did not take place during the continuance of the preceding estate, or at the instant of its determination, the remainder would wholly fail of effect. During this period, therefore, of our law all enquiry respecting perpetuity was out of the question. The cases of a possibility upon a possibility may be considered as exceptions from this rule. They proceeded on a different ground, and gave rise to this important rule, that if land is

limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person's issue." There the rule is confined, no doubt, to that person's issue. I read the note because it recognises that the rule exists, and has as much force in the present day as when it was originally invented. What was the reason of that rule? As expressed by the learned lawyers of that day, it was on the ground of a possibility upon a possibility? What does that mean? It means that there might never be such a person as an unborn person who was to take for life. That was an obvious contingency. Besides that, there was another contingency: there might never be issue of that person. Therefore there was a double contingency or a double possibility. I quite agree that the contingency in this case is not of that kind precisely; but is not the mischief the same? There is the double possibility. There might never be an unborn husband—I mean a husband of Emma Frost unborn at the death of the testator. Then if there were, the other contingency which is to take effect upon his death might never happen. There you have a double contingency, or a double possibility, as the old lawyers would have said. I confess I think that this limitation would have been held to fall within the same doctrine, and would most probably have been held void if the ingenuity of lawyers had ever imagined such a limitation. But if it is not void upon that ground it is certainly void as a perpetuity if the rule against perpetuity applies to the case; and I have to ask myself the question whether the rule against perpetuity applies to the case or not. Lord St. Leonards, in *Cole v. Sewell* (2), used language which has been read as meaning that the doctrine of remoteness never could apply to a contingent remainder, and the same language, or something like it, is also used in what I have read from Butler's note. But in every one of these cases the language refers simply to the case of an estate for life, or an estate tail limited to a person *in esse* when the limitation takes effect. If this is so, it is quite clear that no contingent remainder to take effect upon the determination of

(10) See *Whitby v. Mitchell*, ante, p. 8; *Law Rep.* 43 Ch. D. 494.

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that estate could be exposed to any objection on the ground of being too remote. But none of that language contemplates the case of there being interposed a possible estate for life to a person not in existence, and a contingent remainder over on the death of that person. However, I do not at all agree that under the law of this day there cannot be any application of the rule against perpetuities to remainders. I find in *Fearne on Contingent Remainders* (10th ed. 1844), on page 502, this statement of the law: "Here, indeed, it may not be improper to remark, once for all, that any limitation in future, or by way of remainder of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our Courts considered as void in its creation." Here there is a clear statement of the law, in a book of great authority, that the rule against remoteness will be applied to contingent remainders as well as to contingent limitations by way of executory devise, and I take the meaning to be this: There are limitations which would have been void under the old law because they would have been treated as possibilities upon possibilities; and the like limitations would now be void, but perhaps for a different reason — namely, because they offend against what is known by our modern law as the rule against perpetuity.

I think, therefore, on the whole that the balance of authority is that this limitation, although a legal limitation, is void, because it offends against the rule against perpetuity. There will be a declaration accordingly, and that the lands in question fall into the residue.

Solicitors—H. Queckett Louch, agent for Louch & Son, Langport, for plaintiff; Pridcaux & Sons, agents for J. R. Poole & Son, Bridgewater, for defendants.

[IN THE HOUSE OF LORDS.]

1889. { BIRCH v. CROPPER AND
July 23, 25. { OTHERS. *In re THE BRIDGE-
August 9. { WATER NAVIGATION COM-
PANY, LIMITED.*

Company—Winding-up—Surplus Assets—Distribution—Preference Shareholders—Shares partly paid up—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133, sub-ss. 1 and 10.

Where in the winding-up of a limited company the assets are more than sufficient to return to the shareholders the amounts paid up on their shares, the surplus assets ought, in the absence of any direction in the articles of association, to be distributed among the shareholders, preferred and ordinary, in proportion to the nominal value of their shares, whether fully paid up or not.

Decision of the Court of Appeal reversed.

This was an appeal from a decision of the Court of Appeal which affirmed one of North, J. The proceedings in the Court below are reported 57 Law J. Rep. Chanc. 809; Law Rep. 39 Ch. D. 1, where the facts are fully stated. For the purpose of this report the following summary will suffice.

In consequence of the purchase of its undertaking by the Manchester Ship Canal Company, the Bridgewater Navigation Company went into voluntary liquidation. After payment of all the liabilities and costs of liquidation, and returning to the shareholders the amounts paid up on their shares, there remained a surplus of about 550,000*l.*, and an application was made by motion before North, J., for the purpose of determining how this surplus ought to be distributed. At the commencement of the winding-up the capital of the company consisted of 100,000 ordinary shares of 10*l.* each, on which 3*l.* 10*s.* per share had been called up, and 30,000 preferred shares of 10*l.* each, all of which were fully paid up. The preferred shares were entitled to priority in the payment of a dividend of five per cent., but there was nothing in the articles of association or regulations of the company to place them in a different position from the

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other shares in respect to the distribution of assets, nor was there any direction as to the mode of distribution of assets between fully paid and unpaid or partly paid shares.

North, J., and the Court of Appeal held that the surplus assets ought to be distributed among the shareholders, ordinary and preferred, in proportion to the amounts respectively paid up on their shares.

Sir H. Davey, Q.C., and Cozens-Hardy, Q.C. (O. Leigh Clare with them), for the appellant Birch, representative of the ordinary shareholders.—The question is, what is the true principle of dividing the assets in a voluntary winding-up? The Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133, sub-ss. 1 and 10, leave the principle of division open; it is to be “among the members according to their rights and interests in the company” (sub-section 1); the liquidator is to “adjust the rights of the contributories amongst themselves.” No doubt the principle would be the same as in a compulsory winding-up under section 109. Three modes of distributing the surplus suggest themselves.

First, the surplus value may be treated as profit. In this case the ordinary shareholders are entitled to the whole of it, the preference shares being limited to five per cent. for so long as the company is going, and to a return of their capital when it comes to an end. In winding up a partnership the balance of authority is in favour of this principle—*Robinson v. Ashton* (1), *per Jessel, M.R.*, where the rise in value of a mill was treated as profit; and see *Watney v. Wells* (2), *Binney v. Mutrie* (3), *Lindley on Partnership* (5th ed.), p. 402, and *Griffith v. Paget* (4).

Secondly, the distribution might be in proportion to the market value of the shares.

Thirdly, it may be in proportion to the subscribed capital—that is to say, to the whole nominal value of the shares after calling up, or treating as called up, the full amount payable thereon—*The Oakbank Colliery Company v. Crum* (5) and *Ex parte Maude* (6). The Court of Appeal have followed their own judgment in *Sheppard v. The Scinde, Punjab, and Delhi Railway Company* (7). That judgment has been affirmed by this House, but the appeal was decided upon the particular terms of a special Act of Parliament. The *dicta* of the Lords who heard the case favour the view that in an ordinary winding-up the distribution should be in proportion to the subscribed capital.

Rigby, Q.C., and Buckley, Q.C. (Swinfen Eady with them), for the respondent Schofield, representing the preference shareholders.—There is little or no authority on the question here raised. It was raised in *Somes v. Currie* (8) and in *Sheppard v. The Scinde, Punjab, and Delhi Railway Company* (7), but there were special circumstances in those cases. The latter case, however, was decided in the Court of Appeal on the principle contended for by the preference shareholders. The profits and surplus assets here were derived from the property which was purchased by the paid-up capital. The only approach to a canon of distribution that has been laid down is that it should be in proportion to contribution—*Lindley on Partnership* (5th ed.), p. 455. It is impossible to say what value, if any, is to be attributed to uncalled capital. It ought therefore to be disregarded.

S. A. Sampson, for the respondents Cropper and others, liquidators, did not address the House.

Sir H. Davey, Q.C., in reply.

Cur. adv. vult.

LORD HERSHELL.—The only question for determination in this case is upon what principle the balance of the proceeds of the realisation of the assets of the Bridge-

(1) 44 Law J. Rep. Chanc. 542; Law Rep. 20 Eq. 25.

(2) 36 Law J. Rep. Chanc. 861; Law Rep. 2 Chanc. 250.

(3) Law Rep. 12 App. Cas. 160.

(4) 45 Law J. Rep. Chanc. 493; Law Rep. 5 Ch. D. 894.

(5) Law Rep. 8 App. Cas. 65.

(6) 40 Law J. Rep. Chanc. 21; Law Rep. 6 Chanc. 51.

(7) 56 Law J. Rep. Chanc. 866.

(8) 1 Kay & J. 605.

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water Navigation Company remaining after satisfying all the liabilities of the company and returning to the shareholders the paid-up capital is to be distributed, as between the holders of the ordinary and preference shares of the company. The company was formed in 1872 for the purpose of acquiring the Bridgewater and other canals, with a capital of 500,000*l.*, divided into 500 shares of 1,000*l.* each. By resolution duly passed in September of that year, it was provided that the capital, instead of being divided into shares of 1,000*l.*, should be divided into 50,000 shares of 10*l.* each, and should be increased to 1,300,000*l.*, consisting of 130,000 shares of that amount.

Prior to April, 1880, 100,000 shares out of the capital of 1,300,000*l.* had been issued as ordinary shares upon which 2*l.* 10*s.* per share had then been paid; and on the 27th of that month it was resolved at an extraordinary meeting that the balance of the uncreated capital—namely, 300,000*l.*—should be created, and that the 30,000 new shares should be issued as preference shares, entitling the holder to a preferential dividend of five per cent. In pursuance of this resolution the shares were issued accordingly, and the additional capital of 300,000*l.* was paid up. At the same time a call of 1*l.* was made on the ordinary shares, raising the amount paid up on them to 3*l.* 10*s.* per share.

In 1887 the Manchester Ship Canal Company purchased the undertaking and assets of the Bridgewater Canal Navigation Company for the sum of 1,710,000*l.*, and it was thereupon resolved that the latter company should be wound up voluntarily. In the September following the liquidators repaid to the preference and ordinary shareholders the amount of capital paid up on their shares. After making this return to the shareholders, and after discharging all the debts and liabilities of the company, there remained in the hands of the liquidators a surplus of about 550,000*l.* The question is how this surplus ought to be distributed amongst the ordinary and preference shareholders respectively.

The Court below has determined that

the distribution ought to be made in proportion to the amounts respectively paid up on their shares, and your Lordships have to determine whether this is the correct principle to apply. It is contended on behalf of the appellant who represents the ordinary shareholders that they are entitled to the whole of the surplus; but, failing this contention, it is insisted that the division ought to be made according to the capital subscribed, and not to the amount paid up on the shares.

The Companies Act affords very little assistance in terms towards a decision of the question. It provides that in the case of a voluntary winding-up the property of the company shall be applied in satisfaction of its liabilities, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company. But this leaves undetermined what those rights and interests are.

The learned counsel for the appellant argues that, except in so far as the provisions of the Companies Acts necessarily create a distinction between the rights of its members and those of partners, the principles of the law of partnership are applicable and ought to be applied; and they urge that, in the case of a partnership, unless the terms upon which it is entered into provide otherwise, surplus assets are distributable amongst the partners in the proportions in which they are entitled to share the profits. Even assuming that the doctrine laid down with regard to the division of surplus assets in the case of a partnership be correct (upon which I pronounce no opinion), I am unable to see how it establishes the appellant's claim, that the ordinary shareholders should receive the whole of the assets. The appellant's argument appears to assume that the preference shareholders are not entitled to any share of the profits of the company. I do not think this is the case. What they are to receive is indeed limited in its amount, but it is none the less a share in the profits. To treat them as partners receiving only interest on their capital and not entitled to participate in the profits of the concern, or to regard

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them as mere creditors whose only claim is discharged when they have received back their loan, appears to me out of the question. They are members of the company, and as much shareholders in it as the ordinary shareholders are; and it is in respect of their thus holding shares that they receive a part of the profits. I think, therefore, that the first contention of the appellant wholly fails.

The other point raised by the appeal is to my mind one of considerable difficulty. There is no decision bearing directly upon the point, and it must therefore be determined upon general principles of equity. Some stress was laid in the Court below upon the decision in the case of *Sheppard v. The Scinde, Punjab, and Delhi Railway Company* (7); but I do not think that case can be relied on as an authority except where the circumstances are precisely similar. All the noble and learned Lords who took part in the consideration of that case in this House rested their opinions upon the very special facts of the case, and intimated that they were not laying down any general principle.

The view taken by the Court below has presented to my mind from the outset some formidable difficulties. I cannot but feel that it would in some cases be most inequitable to take into consideration in distributing the surplus assets only the amount of capital paid up by the several classes of shareholders and to make the distribution accordingly. In the Court of Appeal, Lord Justice Cotton and Lord Justice Fry were guided to their conclusion by the provisions contained in the articles of association of this particular company. With all deference, I do not think that they really afford the assistance that was supposed. The 85th article of association prescribes that the net profits of each year shall be divided *pro rata* upon the whole paid-up capital of the company, and that the directors may declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon. But this article is clearly inapplicable to the preference shareholders who do not share *pro rata* in the profits of the year. Their rights are determined by the resolution creating the new capital,

which provided that the new shares were to entitle the holders thereof to a dividend of five per cent. per annum "upon the amount for the time being called up thereon," and taking precedence over all dividends on the ordinary shares. This clearly by implication excludes in the case of these shares the operation of article 85. Lord Justice Cotton, after pointing out, I think correctly, that under the articles, both as regards the ordinary shareholders and the preference shareholders respectively *inter se*, the right to the dividend was to be on the footing of its being in proportion to the sum paid up on the shares, proceeds to say: "That is the footing upon which to decide it. All question of preference is now at an end, and the shareholders are to be dealt with as having equal rights, because the provision in the articles creating the preference shares as regards dividend to arise on the working of the capital is at an end. We must deal with them all as shareholders having equal rights without reference to profits, and in my opinion when that is so, and when there is the indication in the articles of association which form the contract of partnership that profit is to be divided when it is a going concern and arising from the working of the business in accordance with the sums paid upon each share, then in this particular case, and having regard to that provision, the true equitable mode of dividing this sum is to divide it among all the shareholders in accordance with and in proportion to the amount paid up by them on their shares." I have a difficulty in seeing how the provisions of the articles alluded to shew that the equitable mode of distribution is that suggested. It is conceded that they cease to be applicable when the company comes to be wound up; but if they are to be regarded at all, I think that their full effect must be borne in mind. It is not the case that when the company was a going concern the profits earned were to be divided in accordance with the sums paid on each share. The share of the profits to which the preference shareholders were entitled was limited in amount. It did not depend upon the proportion which the profits

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bore to the total paid-up capital. And the ordinary shareholders were in fact receiving a proportion of the profits exceeding that which they would have been entitled to had such profits been divided to each shareholder in proportion to the capital paid up. I do not say that this indicates the mode in which the surplus assets should be distributed, but it does appear to me to shew that it does not follow from the method in which profits were divided that the equitable mode of dividing surplus is to let all the members share alike in proportion to the amount paid up on their shares. In the present case, too, it cannot be doubted that in estimating the price to be paid by the canal company, the future prospects of the Bridgewater Company, the probable development of its property and the increase in its value, were taken into account. In these future prospects the preference shareholders had no concern save in so far as they improved the security for the payment of their interest. If that security was already ample, the benefit arising from the increased value of the company's undertaking would, down to the time of its being wound up, enure entirely to the ordinary shareholders. And yet, in so far as the price represented this increased future value, the result of the decision is to give to the preference shareholders approximately one half of it. Now I do not mean to say that any principle can be laid down which will ensure perfect equality in this respect, but that which has been adopted appears to me to tend to raise the inequality to a maximum. The articles of association do not appear to me to afford the means of deciding this case upon any special grounds peculiar to this company. Their provisions are such as are commonly to be found regulating the distribution of profits in the case of joint-stock companies. I think the determination of the question at issue must be arrived at upon principles wider and of more general application. In my opinion, one consideration of essential importance, if an equitable distribution of the assets is to be attained, has been altogether lost sight of. The payment of 3*l.* 10*s.* per share was not the only contribution made by the ordinary

shareholders to the assets of the company. They had each come under liability to pay the balance due on the shares held by them. Such a contribution might in many cases be just as valuable, and tend just as effectually to the prosperity of the company, as if they had actually paid the amount. I cannot think that this ought to be disregarded in estimating the respective rights and interests of members in the company and its property. In the case of *Sheppard v. The Scinde, Punjab, and Delhi Railway Company* (7) Lord Justice Bowen said: "Was the sum produced in any way by the liability to pay calls? That is a question of fact, and I am satisfied that the liability to pay calls was not in any way an element in the production of this purchase-money." I am not by any means prepared to say the same of this company. On the contrary, I think it most probable, looking to the large sums of money raised on loan at a moderate rate of interest, that the liability of the shareholders did add very materially to the ease with which these loans were obtained, and to the consequent development and prosperity of the undertaking. In the same case Lord Justice Fry said: "It seems to me that in this case distribution must be proportionate to contribution. But it is said, suppose the property to have been produced not by unequal contributions, but by unequal liabilities to pay, the proceeds must be distributed according to the unequal liabilities. I agree that in that case the distribution must be guided by the amount of the liabilities. I conclude that in this case the assumption of liability by the shareholders has not in any way produced the property, and that it cannot be said that the capital has been in the least increased by the liability." In the present case that learned Judge appears to have discarded altogether these considerations, apparently because he thought the matter settled by the terms of the articles of association; but for the reasons I have given I cannot concur in this view. I am fortified by the observations of the two learned Judges I have quoted in the view that a scheme of distribution which overlooks an important part of the contribution can scarcely be regarded as equitable.

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It would be impossible, to my mind, to enter upon an enquiry in each individual case how much the liability incurred and the money provided had respectively contributed to the prosperity of the company or the value of its property. Some general rule must be laid down. I quite admit that it may be urged with force that if the distribution is to follow, not the paid-up, but the subscribed capital, the liability would always be treated as of as much value as actual money. But if there must be a general rule—and I have to choose between so regarding it or treating it as valueless—I believe the former would, on the whole, be the more equitable course. I, of course, exclude such a case as that of *Sheppard v. The Scinde, Punjaub, and Delhi Railway Company* (7), where the constitution of the company determined the amount of purchase-money to be given for the undertaking, and by the mode in which it was to be ascertained indicated what was the equitable mode of distributing it. In making these observations with reference to the unpaid liability upon shares, I do not desire to be understood as indicating that they are decisive of the question how surplus assets are to be divided, but only as explaining why I cannot feel satisfied that the principle which has been adopted in the Court below is the correct one. Let me put an illustration which occurred to me whilst the appeal was under argument. Take the case of a company whose entire paid-up capital was obtained by the issue of preference shares bearing a limited rate of interest, nothing being paid up on the ordinary shares. The prosperity of such a company might be very largely due to the liability of the ordinary shareholders, which might be just as valuable to the company as if they had paid a large sum on their shares; yet in such a case, if the undertaking were sold, the whole of the surplus after discharging the liabilities of the company and returning their capital to the preference shareholders would, on the principle adopted by the Court below, have been the property of such shareholders, and it must have been declared that the ordinary shareholders had no title to it, or to share in its distribution—

that, though members, they had no “rights or interests” in the company. I admit that the case I have put is an extreme, though it is not an impossible, one; but I think it may well be put to test the equity of the principle laid down. It may be said that in the case I have put the profits could not be payable according to the amount paid up on the shares, and that in that case some other principle must be applied, and the amount subscribed, or some other test, must be taken. But if this be so, the principle on which assets were to be distributed would be altered, it may be in a manner most detrimental to the ordinary shareholders, as soon as any call, however small, was made on the shares.

I turn now to the considerations which have led me to the conclusion that the surplus ought to be divided amongst the shareholders according to the shares which they hold in the company.

The present company has been prosperous, and the result of the winding-up is to leave a considerable surplus of assets over liabilities after returning all the capital. But I think we are naturally led to enquire how the different classes of shareholders would have been dealt with if the reverse had been the case and a loss had resulted. This has been the subject of decision. It has been held, and I think rightly, that in such a case, where there is no provision to the contrary in the articles of the company, the loss is not to be borne in the proportion in which it has been declared in the present case that the surplus is to be distributed. In the case of *The Anglesea Colliery Company* (9) it was held by Lord Hatherley, when Vice-Chancellor—and his judgment was affirmed on appeal—that the liquidators were entitled to make a call for the purpose of adjusting the rights of the members so that the losses should fall equally on all, without regard to the amount which they had paid up on their shares. And in the case of *Ex parte Maude* (6), where some of the shareholders had paid 20*l.* and others 25*l.* a share, and

(9) 35 Law J. Rep. Chanc. 809; Law Rep. 1 Chanc. 555.

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a surplus was left after discharging the liabilities of the company, the liquidators were held to be bound to pay out of these assets 5*l.* to each shareholder who had paid 25*l.* before distributing the surplus rateably. One of the articles of that company provided that the directors might declare a dividend to be paid to the shareholders in proportion to the number of their respective shares "and the amount paid up thereon respectively"; and this was relied on as shewing that the loss ought to be proportioned to the amount paid up. Lord Justice Mellish, however, said: "In my opinion we cannot draw any inference from article 114 beyond that which it states, and we cannot infer that the shareholders meant to make such an important alteration as that in the case of the company being wound up the losses should be divided in proportion to the amount paid up, and not to the amount subscribed." And he held that the true view of the Companies Act was that the losses were to be borne, not in proportion to the amount paid up, but to the subscribed capital. Where the articles are silent on the subject, why should a different rule prevail as regards surplus assets? Where there is no agreement as to either, it would seem only natural and equitable that loss should be borne and benefits shared in the same proportion. And, in my opinion, this is the true principle to apply. In the course of the argument I put the case of a company being wound up, having a large asset of doubtful value, and not capable of immediate realisation. In such a case it might be necessary or prudent to call up the unpaid capital in order to discharge the liabilities of the concern, even though it turned out that this asset was more than sufficient to meet them. If the capital were thus called up, the surplus would be distributed rateably amongst all the shareholders; whereas, supposing the judgment under appeal to be correct, if the asset had been first realised the distribution amongst the two classes of shareholders would have been very different. The rights and interests of the shareholders in the company would thus be made to depend on the urgency of the creditors or the timidity of the liquidators

—a result neither satisfactory nor equitable. I observe that the same consideration occurred to Lord Justice Mellish in the case I have just referred to. He said: "If any other construction were adopted, it would make the way in which the losses are borne depend upon the accident whether the assets could be immediately realised, or whether it was necessary to make a call to pay the debts. If the 5*l.* per share had been called up to pay pressing debts, it could not be denied that the assets, when got in, would be divided *pro rata*—that is to say, the losses would be borne by the shareholders in proportion to their subscribed capital. Here it happened that the assets were immediately realised, or that the creditors did not press for payment, so that a call was not necessary before the assets were divided; but that accident ought not to alter the way in which the assets are to be divided." Surely all this applies with equal force to the profit resulting on the winding-up of the undertaking. The truth is, that each member who has subscribed for a 10*l.* share owns the same share in the company whether it be or be not paid up; and if he is so regarded for the purpose of meeting losses, I cannot see that it is equitable that he should be otherwise dealt with when we are considering to what share of the profit he is entitled. When the whole of the capital has been returned, both classes of shareholders are on the same footing, equally members, and holding equal shares in the company, and it appears to me that they ought to be treated as equally entitled to its property. It may be that the principle which I recommend your Lordships to adopt will not secure absolutely equal or equitable treatment in all cases, but I think that it will in general attain that end more nearly than any other which has been proposed.

I am therefore of opinion that the judgment appealed from should be reversed; and that it should be declared that the balance of the proceeds of sale ought to be divided amongst the holders of all the shares in the Bridgewater Navigation Company (Limited) in proportion to the shares held by them respectively.

I accordingly move your Lordships that

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the judgment appealed from be reversed, and that the declaration I have just read be made; and that, as agreed between the parties, it be further declared that the costs of the liquidators and of the appellant and the respondents, both in the Court below and in your Lordships' House, as between solicitor and client upon the higher scale, may properly be retained and paid by the liquidators out of the assets of the Bridgewater Navigation Company.

LORD FITZGERALD.—My noble and learned friend who has just spoken has in his exhaustive judgment not only carefully given all the facts, and criticised and disposed of the various contentions, but he has also examined the case in all its bearings, and fully and clearly indicated his reasons for not adopting the decision of the Court of Appeal. I concur in the conclusion at which he has arrived, though I do not find it necessary to say that I accept all his reasons. I am to be followed by a second elaborate speech from Lord Macnaghten, the notes of which I have read, and as he arrives at the same result I need not express my concurrence a second time. Coming between such weighty authorities, I confidently anticipate your Lordships' sanction to my being concise.

The Bridgewater Canal Company, Limited, formed in 1872, had become the proprietors of an extensive and valuable undertaking, which appears, as far as we can judge, to have been worked ably and profitably with an increasing business down to 1880, when the company deemed it expedient to raise 600,000*l.* for the purpose of paying off a mortgage of the like amount, and their financial plan appeared to be as follows: the company had already called up 250,000*l.* of their subscribed capital; they made a further call of 1*l.* a share, amounting to 100,000*l.*, and in the exercise of the powers which they undoubtedly had they passed a resolution calling into existence their uncreated capital by the creation of 30,000 further shares of 10*l.* each, to be paid up in full within the two years succeeding. The terms and conditions on which the new

shares were to be issued and the new shareholders to be received in respect of those shares as members of the company are fully stated in the letters of allotment. "Allotment letter, dated the 27th of April, 1880.—The Bridgewater Navigation Company, Limited, five per cent. preference shares.—Sir, I beg to inform you that at an extraordinary general meeting of the members of the Bridgewater Navigation Company, Limited, held on the 27th of April, 1880, the following resolution was passed. That the balance of the uncreated capital of the company—namely, 300,000*l.*—be now created, and that there be issued 30,000 new shares of 10*l.* each on the following terms and conditions—namely, 1. The new shares to entitle the holders thereof to a dividend after the rate of five per cent. per annum upon the amount for the time being called up thereon, and taking precedence of and priority over all dividends and claims of the holders of the ordinary shares of the company. 2. The calls upon the new shares to be payable as follows: 1*l.* per share on the 30th of June, 1880; 1*l.* 10*s.* per share on the 31st of December, 1880; 2*l.* 10*s.* per share on the 30th of June, 1881; 2*l.* 10*s.* per share on the 31st of December, 1881; 2*l.* 10*s.* per share on the 30th of June, 1882. 3. Interest at the rate of five per cent. per annum, to commence from the date when each call becomes due. 4. Any moneys paid and received with the consent of the directors in advance of calls to bear interest at the rate of four per cent. per annum. That in the first instance the new shares shall be allotted to the holders of ordinary shares registered in the books of the company at this date as near as may be in the proportion of three new shares for every ten ordinary shares. That any new shares not accepted by the members to whom they are allotted remain at the disposal of the directors, to be issued at such times, on such terms, and in such manner as they may think fit for the benefit of the company. An allotment of your proportion of the new shares is annexed hereto."

The subsequent practice of the company seems to have been to pay out of profits to the preference shareholders the

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preference dividend of five per cent., and the net residue of the annual profits, after deducting all outgoings and providing for a reserve, was distributed equally amongst the holders of the original 10l. shares, on which 3l. 10s. only had been paid up.

The next step was the statute sale of the whole undertaking to the Manchester Ship Canal Company. It seems to have been a successful stroke of business for the Bridgewater company, and probably was not a losing one to the Manchester company, as they got a property necessary for the purposes of their great undertaking, and got it as a going and profitable concern, with fair prospects of increasing annual profits. The Bridgewater company as a working company having thus come to an end, a voluntary winding-up was resorted to. The liquidators paid off every liability, and they further paid to the preference shareholders their whole capital with interest at five per cent., and to the ordinary shareholders their capital with their share of profits. The Bridgewater company thus became clear of every liability, and the liquidators found that there remained the clear surplus of 550,000l., to be distributed amongst those who had been the shareholders, whether ordinary or preference. The question is, on what principle is that surplus to be divided.

The case came first before Mr. Justice North, and the Court of Appeal adopted his decision. Mr. Justice North says, "I find, therefore, that the parties have not entered into any contract as to the mode of division of this surplus, and that it is to be divided on equitable principles. There is little direct authority to assist me in the matter." I quite concur so far with the learned Judge. He adds: "But the question I have to decide is not what is a reasonable mode, but what is the equitable mode of distributing the increment in question. In my opinion the recent case before the Court of Appeal of *Sheppard v. The Scinde, Punjaub, and Delhi Railway Company* (7), is so like the present as not only to assist me, but to furnish an authority I ought to follow." That case, as an authority on the present appeal, has been already disposed of by

my noble and learned friend. Mr. Justice North then quotes a passage from the judgment of Lord Justice Cotton in the *Scinde* case:—"I think the general law is, that after providing for the capital at the credit of each partner, the surplus assets should be distributed in the proportions in which the capital has been contributed by the partners." There is the principle on which Mr. Justice North acted as the equitable mode of distributing the surplus. The Court of Appeal adopted it.

I have felt myself unable to act on this supposed rule as applicable to such an undertaking as the Bridgewater Canal Company, Limited, and there is no authority for doing so. It may fit an ordinary common law partnership, but when applied to an association such as is now before us it works out inequality and injustice and not equity. The error seems to me in supposing that there is an exact analogy between an ordinary commercial partnership and a statutable undertaking called into existence under the Joint-Stock Companies Acts and regulated by the statute and its own memorandum of association and articles. There may be likeness in some particulars, but there is no real analogy.

Then what rule is to guide this distribution? There is, in my opinion, no contract to guide us in the circumstances which have arisen, and there is nothing to be found in the memorandum of association, or in the articles, or in the statutes, to give us any real help. The resolutions calling into existence the preference shares are equally a blank on the subject, but I have no doubt that the able men who then directed the affairs of the company, if they had foreseen the probability of a surplus on winding up, would have been the last to agree to give up the lion's share to the preference shareholders.

Then on what rule or principle are we to proceed? I concur in what my noble and learned friend has adopted as the equitable principle to be acted on. There is a clear stage to act on. The shareholders have been all reduced to one common level. Each shareholder of a share represents a former share in the company, and we have some authority

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that between the several classes of shareholders each represents 10*l.* in the subscribed capital of the company, and that for the present purpose and in this particular case it matters not whether the 10*l.* had been actually paid up in full, or subscribed for and partially paid.

We have some authority for this in *The Oakbank Company v. Crum* (5), which, though not an authority in point, at least imports that the proper interpretation of "share" is the shareholder's proportion in the subscribed capital of the company which appears in his name on the register of shareholders.

I am clearly of opinion that the only equitable principle to be acted on in this case is that of equality. That is an equitable principle, and in giving effect to that rule each and every shareholder should receive in respect of his share an equal proportion of this surplus.

LORD MACNAGHTEN.—The question involved in this appeal appears to be novel. No direct authority on the point was cited. Nor am I aware of any, except a decision of Mr. Justice Stirling in *In re The London and Brighton Stock Exchange (Limited)*, August 12, 1887, which is only to be found in the *Times* reports (10). The case of *Sheppard v. The Scinde, Punjab, and Delhi Railway Company* (7), which was treated as an authority in the Courts below, has since been reviewed in this House; and in affirming the decision of the Court of Appeal, every one of the noble and learned Lords who addressed the House relied simply and solely on the special circumstances of the case.

The question before your Lordships is this: In the liquidation of a company limited by shares, what is the proper mode of distributing assets not required for payment of debts and liabilities, or for the costs of the winding-up, or for the adjustment of the rights of the contributors amongst themselves? As incidental to that question your Lordships have to consider whether the mode of distribution can be in any way affected by one or more of the following circumstances—first,

that the shares of the company were paid up unequally, some being fully paid up, others being paid up only in part; secondly, that the fully paid-up shares were issued separately as preference shares, carrying a preferential dividend of five per cent., without any further right to participate in the profits of the business; thirdly, that by the regulations of the company dividends on the company's shares were payable in proportion to the amounts paid up thereon.

The answer, as it seems to me, must depend on the principles applicable to companies limited by shares, and on the provisions contained in the Companies Act, 1862. It is, perhaps, rather beside the mark to discuss the general doctrines of partnership, and to examine particular cases of partnership contracts. The scheme of the Act and the directions to be found there are, I think, a safer guide than any analogies can be.

Every person who becomes a member of a company limited by shares of equal amount becomes entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations of the company, entitled, as a necessary consequence, to the same proportionate part in all the property of the company, including its uncalled capital. He is liable, in respect of all moneys unpaid on his shares, to pay up every call that is duly made upon him. But he does not by such payment acquire any further or other interest in the capital of the company. His share in the capital is just what it was before. His liability to the company is diminished by the amount paid. His contribution is merged in the common fund. And that is all.

When the company is wound up new rights and liabilities arise. The power of the directors to make calls is at an end; but every present member, so far as his shares are unpaid, is liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities, the costs of winding-up, and such sums as may be required for the adjustment of the rights of the contributors amongst themselves.

In the case of compulsory winding-up,

(10) 4 Times Law Rep. 2.

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the Act says, in section 109, that "the Court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that remains amongst the parties entitled thereto."

In the case of voluntary winding-up the language is not quite the same, and the directions are rather more explicit; not that there can be any difference as to the proper mode of distributing assets in the two cases; no one has suggested that. A sufficient reason for the difference of language is, I think, to be found in the circumstance that while the privilege of voluntary liquidation is confined to companies under the Act, any partnership or association consisting of more than seven members may be wound up compulsorily. To meet every case of compulsory liquidation it was necessary to use the most general language. Besides, it is obvious that specific directions, useful and proper for the guidance of voluntary liquidators, are not so requisite when the liquidation is under the Court. As Lord Cairns points out in *Webb v. Whiffin* (11), "it has been thought, and very naturally thought, important in the case of voluntary windings up to make specific provisions and to give specific directions as to matters which were supposed to be so plain and so necessarily consequential upon the general scheme of the Act, that in a winding-up under an order of the Court it was not thought necessary to give express directions upon these matters of detail." I cannot therefore agree with Lord Justice Cotton that sections 109 and 133 are to be read together, with the result that the more general language of section 109 is to neutralise or obscure the *prima facie* meaning of the more specific directions given in the case of a voluntary winding-up.

The consequences that are to ensue upon the voluntary winding-up of the company are to be found in section 133. It is there provided, "the property of the company shall be applied in satisfaction of its liabilities, *pari passu*, and, subject thereto, shall, unless it be otherwise pro-

vided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company." Then the section goes into details as to the powers of the liquidators, and ends by saying that "the liquidators shall pay the debts of the company, and adjust the rights of the contributories amongst themselves."

Now in the case of members of a company limited by shares, what are "their rights and interests in the company," in the absence of any special regulation; and what are the rights of the contributories amongst themselves which have to be adjusted in the winding-up?

Amongst the rights to be adjusted, the most important are those which arise when there is a difference between shareholders in the amount of calls paid in respect of their shares. Before winding up, no such rights exist; whatever has been paid by the shareholders of one issue in excess of the contributions of their fellow-shareholders of a different issue must have been paid in pursuance of calls duly made, or in accordance with the conditions under which the shares were held. While the company is a going concern no capital can be returned to the shareholders, except under the statutory provisions in that behalf. There is therefore during that period no ground for complaint—no room for equities arising out of unequal contributions. In the case of winding up, everything is changed. The assets have to be distributed. The rights arising from unequal contributions on shares of equal amounts must be adjusted, and the property of the company, including its uncalled capital not required to satisfy prior claims, must be applied for that purpose. But when those rights are adjusted, when the capital is equalised, what equity founded on inequality of contribution can possibly remain? The rights and interests of the contributories in the company must then be simply in proportion to their shares. This was the view of Mr. Justice Stirling in the case I have referred to. Your Lordships, however, were reminded more than once that "the Act does not say so." You were told that if that had been the meaning of the

(11) 42 Law J. Rep. Chanc. 161, 170; Law Rep. 5 H.L. 711, 735.

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Legislature nothing would have been more easy than to have said so in so many words. It is easy, no doubt, to make a slip. But I should have been rather surprised if the framers of this Act, which is a model of careful and accurate drafting, had forgotten that the provisions for voluntary liquidation apply to some companies which have not a capital divided into shares.

The ordinary shareholders say that the preference shareholders are entitled to a return of their capital, with five per cent. interest up to the day of payment, and to nothing more. That is treating them as if they were debenture-holders, liable to be paid off at a moment's notice. Then they say that at the utmost the preference shareholders are only entitled to the capital value of a perpetual annuity of five per cent. upon the amounts paid up by them. That is treating them as if they were holders of irredeemable debentures. But they are not debenture-holders at all. For some reason or other the company invited them to come in as shareholders, and they must be treated as having all the rights of shareholders, except so far as they renounced those rights on their admission to the company. There was an express bargain made as to their rights in respect of profits arising from the business of the company. But there was no bargain—no provision of any sort—affecting their rights as shareholders in the capital of the company.

Then the preference shareholders say to the ordinary shareholders, "We have paid up the whole of the amount due on our shares; you have paid but a fraction on yours. The prosperity of a company results from its paid-up capital; distribution must be in proportion to contribution. The surplus assets must be divided in proportion to the amounts paid up on the shares." That seems to me to be ignoring altogether the elementary principles applicable to joint-stock companies of this description. I think it rather leads to confusion to speak of the assets which are the subject of this application as "surplus assets," as if they were an accretion or addition to the capital of the company, capable of being distinguished

from it and open to different considerations. They are part and parcel of the property of the company—part and parcel of the joint-stock or common fund—which at the date of the winding-up represented the capital of the company. It is through their shares in the capital, and through their shares alone, that members of a company limited by shares become entitled to participate in the property of the company. The shares in this company were all of the same amount. Every contributory who held a preference share at the date of the winding-up must have taken that share, and must have held it on the terms of paying up all calls duly made upon him in respect thereof. In paying up his share in full he has done no more than he contracted to do; why should he have more than he bargained for? Every contributory who was the holder of an ordinary share at the date of the winding-up took his share and held it on similar terms. He has done all he contracted to do; why should he have less than his bargain? When the preference shareholders and the ordinary shareholders are once placed on exactly the same footing in regard to the amounts paid up upon their shares, what is there to alter rights which were the subject of express contract?

Observe how unreasonable this contention on the part of the preference shareholders is. They do not propose to unravel the accounts of the company, or to enquire how long the company had the benefit of the contributions from each of the two classes of shareholders, or what was the position of the company when those contributions were made. It may be that the founders of the company made a lucky hit at the outset. Good management may have had something to do with the success of the company. And after all, something may perhaps be put down to the fact that the Ship Canal Company was forced to buy a property which lay directly in the track of its undertaking. The preference shareholders discard all these considerations. They take the date of the winding-up as the date which governs the rights of the shareholders in the distribution of what they call surplus

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assets. They say, "Our payments then were in excess of the payments of the ordinary shareholders." But that is a mere accident. There was a time not very long ago when the contributions of the ordinary shareholders were in advance of those of the preference shareholders. If the company had gone on, they might soon have been on a level again. The prosperity of the company was not due to the contributions of the preference shareholders. They did not come on the scene till just before the last Act. It so happens that the very same directors' report which records their final payment calls attention to the ship canal as a practical project. When the preference shareholders were invited to come in, the prosperity of the company was assured. The business was flourishing; the shareholders were receiving dividends of eight per cent., with occasional bonuses, and the directors were in a position to borrow at four per cent. Instead of borrowing, the company resolved to issue these preference shares, on the condition that they should be fully paid up within a limited time. As the company chose to admit Mr. Rigby's clients as shareholders, they must have the rights of shareholders; but I cannot see why they should claim more.

Then it was said on behalf of the preference shareholders that the provision for payment of dividends in proportion to the amounts paid up on the shares leads to an inference that the distribution of surplus assets was to be made in the same proportion. I do not think that it leads to any inference of the kind. It is a very common provision nowadays, though it is not what you find in table A. And it is a very reasonable provision, because during the continuance of the company, and while it is a going concern, it prevents any sense of dissatisfaction on the part of those who have paid more on their shares than their fellow-shareholders of a different issue. But when it has come to an end I cannot see how it can be used to regulate or disturb rights with which it had nothing to do, even while it was in force.

I am therefore of opinion that the judgment of the Court of Appeal must be varied, and that it should be declared that, subject to the payment of the costs,

charges, and expenses of the winding-up, including the costs of all parties in this application here and in the Courts below, the assets of the company remaining undistributed, other than the reserve fund which is not the subject of this application, ought to be distributed among all the shareholders in proportion to their shares.

Order appealed from reversed, and order of North, J., varied by declaring that "the balance of the proceeds of sale of the said undertakings to the Manchester Ship Canal Company remaining after satisfaction of all the debts and liabilities of the Bridgewater Navigation Company, Limited, and after adjusting the rights of the shareholders inter se (other than their rights in respect of the purchase-money), and after payment of the costs of the liquidation and repayment to the shareholders (both ordinary and preference) of the capital respectively paid on their shares, ought to be divided amongst the holders of all the shares of the Bridgewater Navigation Company, Limited, in proportion to the shares held by them respectively"; subject to this variation the order of North, J., affirmed. Ordered that the costs of the liquidators and of the appellant and respondent Schofield in this House and in the Court below, as between solicitor and client upon the higher scale, may properly be retained and paid by the liquidators out of the assets of the Bridgewater Navigation Company, Limited; cause remitted to the Chancery Division.

Solicitors — Cunliffe & Davenport, agents for T. E. Sampson, Liverpool, for ordinary shareholders; Burgess & Cozens, agents for Arthur Buckley, Manchester, for preference shareholders; Cunliffe & Davenport, agents for Lingards, Manchester, for liquidators, respondents.

KAY, J. }
1889. }
Dec. 6, 7. } *In re* HUISH.
BRADSHAW v. HUISH.

Will—Debt of Testator—Legacy to Creditor—Direction to pay Debts only—Satisfaction.

When a testator directs debts to be paid, without mentioning legacies, the presumption of satisfaction of a debt by a legacy is rebutted.

*A lady gave a bond to her nephew for 1,000*l.*, to be paid within twelve calendar months of her death, if he should then be living or should have died leaving issue him surviving, but not otherwise, with interest at five per cent. from her death. The bond was given on his marriage, and assigned to the trustees of his marriage settlement. There was evidence that the aunt knew this. She was not in loco parentis to her nephew. By her will she bequeathed 3,000*l.* to this nephew. In a codicil she directed that "all just and lawful debts" should be paid at once:—Held, that there was no satisfaction of the bond by the legacy, but that both were payable.*

Edmunds v. Low (3 Kay & J. 318; 26 Law J. Rep. Chanc. 432) *disapproved.*

Originating summons.

On the 15th of March, 1878, Margaret Huish gave her nephew Marcus Bourne Huish—to whom she was not in loco parentis—a bond of which the condition was: "If the executors or administrators of the said Margaret Huish shall, within twelve calendar months next after her decease, pay to the said Marcus Bourne Huish, if he shall be then living, or to his executors, administrators, or assigns, in case he the said Marcus Bourne Huish shall have died leaving issue him surviving, but not otherwise, the sum of 1,000*l.*, together with interest for the same after the rate of five per cent. per annum from the day of the death of the said Margaret Huish," the bond should be void.

There was evidence that the bond was given on the occasion of M. B. Huish's marriage. It was assigned to the trustees of his marriage settlement, which was dated March, 1878, to the knowledge of Margaret Huish.

Margaret Huish made her will on the 11th of January, 1887, by which, after a

devise of freehold estate to M. B. Huish, she bequeathed to him a legacy of 3,000*l.*, and also left certain articles in trust for him to be settled as heirlooms. All legacies were directed to be paid duty free.

On the same day she made a codicil in which she said: "I wish all my funeral expenses and all my just and lawful debts that I may owe to be paid at once." She died on the 21st of March, 1889.

The question was whether the debt was satisfied by the legacy.

Cann, for the executors.

Methold, for two residuary legatees.—The debt is satisfied by the legacy. *Wathen v. Smith* (1) decided that not even a direction to pay both debts and legacies was sufficient to rebut the presumption of satisfaction. Although Lord Romilly, M.R., in *Cole v. Willard* (2) doubted the authority of this case, the Court of Appeal in *Montagu v. The Earl of Sandwich* (3) held that a devise of freehold estate to an eldest son, "subject to the charges and incumbrances thereon," was not enough to rebut the presumption of satisfaction of a covenant charging this freehold estate in favour of a second son, to whom legacies were bequeathed in excess of the sum secured by the covenant. In the present case there was no consideration for the bond. It constituted a purely voluntary debt. [KAY, J., referred to *Edmunds v. Low* (4).] In that case a direction to pay debts only was held insufficient.

Renshaw, Q.C., and *Grosvenor Woods*, for M. B. Huish.—There is no satisfaction. There are other gifts to M. B. Huish, and the legacy is not payable to the same persons as the bond, which, as the testatrix knew and intended, was vested in the trustees of the settlement. *Malins, V.C.*, in *Atkinson v. Littlewood* (5) disapproved *Wathen v. Smith* (1). The ground for the decision against satisfaction in *Lord Chichester v. Coventry* (6) was the direction to pay debts; no stress was laid

(1) 4 Madd. 325.

(2) 25 Beav. 568.

(3) 55 Law J. Rep. Chanc. 925; Law Rep. 32 Ch. D. 525.

(4) 3 Kay & J. 318; 26 Law J. Rep. Chanc. 432.

(5) Law Rep. 18 Eq. 595, 605.

(6) 36 Law J. Rep. Chanc. 673; Law Rep. 2 E. & I. App. 71.

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on the direction to pay legacies. This was the view of the case expressed in *Dawson v. Dawson* (7) and in *Atkinson v. Littlewood* (5). See also 2 *White and Tudor's Eq. Cases*, 408 (6th ed.), *Rowe v. Rowe* (8), *Hales v. Darell* (9), *Pinchin v. Simms* (10), *Charlton v. West* (11), *Paget v. Grenfell* (12), and *Carr v. Eastabrook* (13).

Marten, Q.C., and *Butcher*, for others not interested in this point.

Methold, in reply.

KAY, J.—I confess I think it is most expedient to abide by broad general rules in cases of this kind. If fine distinctions are to be made in each case, the law is left in a state of great embarrassment and doubt. Here is the case of a lady who in her lifetime gave a bond to Marcus Bourne Huish, which was made payable to him in certain events which have happened, and on her death which has also happened. After she had given the bond, she made a will by which she gave him different benefits—real estate, chattels, a specific legacy, and a legacy of 3,000*l*. She said nothing about the bond in her will. The bond was actually given to Mr. Huish on the occasion of his marriage, and was to be subject to the settlement then made, as it appears she knew. She made a codicil to her will in which she said that she wished her debts to be paid at once after her death. It was argued, rightly, that this is a direction to pay debts at once, and it singularly affects this particular debt, because by the terms of the bond the debt would not be payable within twelve calendar months after her death, and she may have had this very bond in her mind, and wished that it should be paid at once. However that may be, there is in the codicil what was not strictly necessary, a direction for the payment of debts. Now it has long been settled that in the case of a debt owing by a testator, if the testator afterwards makes a will, and gives a

legacy of the same or a greater amount to the creditor, and then in his will directs that his debts and legacies shall be paid, that direction rebuts the presumption of satisfaction of the debt by the legacy. Now what difference in the world is there between a direction to pay debts and legacies, and a direction to pay debts only? There is none, because the gift of a legacy is in itself a direction that the legacy shall be paid. Therefore, all that is material is that there should be a direction that debts shall be paid. If, after giving a legacy to his creditor, a testator says: "I direct my debts to be paid," that means, "Although I have given a legacy to my creditor, I direct that my debt to him shall be paid also." It seems to me to add nothing, for the testator to direct that his legacies shall be paid. Accordingly, I think that the case of *Edmunds v. Low* (4), which appears to have drawn a distinction between a direction to pay debts and legacies, and a direction to pay debts only, was not sufficiently considered, and I find that the balance of authority is against it. Indeed, the same learned Judge who decided that case, in a later decision of *Dawson v. Dawson* (7), after referring to several other decisions, seems to have come to the conclusion that a direction to pay debts only was sufficient to rebut the presumption of satisfaction. I think, therefore, on the whole, it is better to abide by that as a broad rule which is very easy to understand, and by which people can be guided in cases of this kind. It is not necessary in a will to give any direction to pay debts at all. If such a direction is inserted it may be assumed to be there for some purpose. It is very likely, if the testatrix knew anything about the law, as I am bound to presume that she did, she desired in this way to prevent the suggestion of the satisfaction of the debt which she owed by the legacy. I therefore hold that there is no satisfaction, and that the debt and legacy must both be paid.

(7) Law Rep. 4 Eq. 504, 510.

(8) 2 De Gex & S. 294; 17 Law J. Rep. Chanc. 357.

(9) 3 Beav. 324; 10 Law J. Rep. Chanc. 13.

(10) 30 Beav. 119.

(11) 30 Beav. 124.

(12) 37 Law J. Rep. Chanc. 833; Law Rep. Eq. 7.

(13) 13 Ves. 561.

Solicitors—F. Needham, agent for Hamilton Urry, Ventnor, for plaintiffs; Rowcliffe, Rawle & Co., agents for Holland & Rigby, Ashbourne; W. E. Tyer; and F. Needham, for defendants.

[IN THE CHANCERY DIVISION AND IN
THE COURT OF APPEAL.]

CHITTY, J.	} ALEXANDER v. SIMPSON.
1889.	
Nov. 8.	
BOWEN, L.J.	
FRY, L.J.	
Nov. 26.	

Company—Special Resolutions—General Meeting—Companies Act, 1862, s. 51, Table A, article 35.

A notice dated the 3rd of July, 1889, was issued to the shareholders of a company, to the effect that an extraordinary general meeting of the company would be held on the 12th of July, at a specified time and place, "for the purpose of considering, and, if deemed advisable, of passing the subjoined resolutions" (being special resolutions). The notice proceeded: "should such resolutions be duly passed, the same will be submitted for confirmation to a subsequent extraordinary general meeting of the company, which will be held on Monday the 29th of July, 1889, at the same time and place." The regulation contained in the articles of association of the company as to the notice to be given of every general meeting was in the same terms as article 35 of table A:—Held (affirming the decision of CHITTY, J.), that the notice of the second meeting, being, on its true construction, notice of a conditional meeting to be held only if the resolutions were duly passed at the first meeting, was not such a notice of such meeting as was required by section 51 of the Companies Act, 1862.

Appeal from an order of Chitty, J.

The plaintiff was a shareholder in, and the defendants were the managing director and secretary and two other directors of, the Lisbon-Berlyn Gold Fields, Limited.

The company carried on business under a memorandum and articles of association, the only article material for the purposes of this report being article 52.

52. "... Seven days' notice in writing, specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members before every general meeting, but the non-receipt

of such notice shall not invalidate the proceedings at any general meeting."

The directors, being desirous of effecting a reconstruction of the company under the provisions of section 161 of the Companies Act, 1862, directed their secretary to issue the statutory notices to the shareholders of meetings to consider certain resolutions for the voluntary winding-up of the company and a sale of its property to a new company.

The notice sent out was, as far as material, as follows:—

"The Lisbon-Berlyn Gold Fields, Limited.

"July 3, 1889.

"To the shareholders,—Notice is hereby given that an extraordinary general meeting of the above-named company will be held at the City Terminus Hotel, Cannon Street, on Friday, the 12th July, 1889, at two o'clock in the afternoon, for the purpose of considering, and, if deemed advisable, of passing the subjoined resolutions:

"Resolutions.

"That it is expedient to reconstruct the company, &c.

"That the liquidator be and he is hereby authorised in accordance with section 161 of the Companies Act, &c.

"A copy of the said scheme (of reconstruction) and draft agreement may be seen by any shareholder at, &c.

"Should such resolutions be duly passed the same will be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting of the company, which will be held on Monday, the 29th July, 1889, at the same time and place.—"By order of the Board,

"C. P. Simpson,

"Managing Director and Secretary."

A meeting was held on the 12th of July, 1889, and the resolutions were duly passed. The company sent a copy of the *Financial News* containing an account of the meeting to each shareholder. The plaintiff attended the meeting, and raised several objections with regard to the conduct of the meeting, but which for the purposes of this report are immaterial. A subsequent meeting was held on the 29th of July, which the plaintiff and others refused to attend, at which the resolutions purported to be confirmed. The plaintiff subsequently, on behalf of himself and all

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other shareholders of the company other than the defendants and the company, issued their writ in this action, asking for a declaration that these resolutions were not validly passed, and that any dealings with the company's undertaking, assets, and property in pursuance thereof were *ultra vires* against the company and void; and for an injunction to restrain the defendants, their servants, &c., from carrying such resolutions or any of them into effect, and from selling, handing over, or transferring the undertaking, assets, and property of the company, or any part thereof, to any new company in pursuance thereof, or to any persons other than the directors of the plaintiff company; and on the 8th of November, 1889, the plaintiffs moved before Chitty, J., for an injunction in the terms of the writ.

Romer, Q.C., and *Bramwell Davis*, for the plaintiffs.

Rigby, Q.C., and *Prior*, for the defendants.

CHITTY, J.—The case of the defendants is that the statutory special resolution has been duly passed. The statutory special resolution is the creature of the statute of 1862, and there are certain essentials that are required for the due passing of such a resolution. The plaintiffs attack the resolution on various grounds, but there is only one upon which I shall proceed to give judgment—that is, that due notice was not given of the meeting which in fact took place on the 29th of July.

The argument raises a question of general importance. There are some particular facts which apply to the case before me, but, as I gather from the defendants' argument, the question is whether a conditional notice can be good or not. Now, in my opinion, a conditional notice that a meeting will be held is not a good notice. The shareholders or members of the company who are entitled to have the notice must be told, not that a meeting will be held on a certain event, but that it will be held. Mr. Rigby has argued for the defendants that the notice of the 3rd of July was not a conditional notice, but an absolute notice, and it is necessary to refer to the document of that date in order to

see whether this argument can be maintained or not. The proposition, to put it generally, which was intended to be placed before the shareholders by the document of the 3rd of July was that there were to be two meetings held. The object was to pass a resolution, which required two statutory meetings, and the subject-matter of the proposed resolution was the winding-up of the company and the dealing with its assets in a particular way. Now the notice unquestionably was a good notice of the meeting that was in fact held on the 12th of July. [His Lordship read the material parts of the notice, and proceeded:] Now upon that the argument of the defendants is that that is notice itself that the meeting will be held on the 29th of July, and in order to come to that conclusion I am asked to reject the words "should such resolution be passed." I think that that argument cannot be maintained. I think those words with which the sentence commences do state a condition, and that the fair meaning and the substance of this notice is that, should the resolutions be passed—that is, in the event of their being passed—the meeting will be held; and the distinction sought to be established in argument, that these words "which will be held" are words absolutely to be dissociated from the earlier part of the sentence, is an argument that cannot be maintained. Then I read this notice of the 3rd of July, 1889, upon its true and its fair construction as a conditional notice of the second meeting, the meeting of the 29th of July; and on the point as to whether a conditional notice is good or not, I unhesitatingly express my opinion that it is not good.

My observations are not confined to this particular company. Shareholders may be living in all parts of the world, and they are entitled to have notice definite in order that they may make their arrangements definitely. They may be in Scotland, Ireland, or the Continent, or anywhere, and they have to make their arrangements to attend; and how is a shareholder to make arrangements to come to a meeting when he has notice that a meeting will or will not be held in a certain event only?

It is not necessary to pursue this matter further. Many illustrations could be given

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to shew that it might be a matter of the greatest detriment to shareholders in general if it could be said that a conditional notice was a good notice.

Now, that being so, the next point which arises is this. Have the company given notice to the shareholders that the resolution was passed at the first meeting? I have no hesitation in saying that if they had sent out a second notice to the effect that the resolution had been passed, and referring the member receiving it to the document of the 3rd of July, that that would have been sufficient—in other words, if they had said, “The resolution has been passed, and we refer you to our previous notice stating that a meeting will be held on the 29th of July.” But that is not the case I have to consider. The case that I have to consider is simply this, that the managing body, the directors and secretary, having before them a report in a financial paper of what had taken place at the meeting, send, according to the evidence, a copy of the newspaper to every member of the company, and it is contended that that was equivalent to informing every member that the resolution had been passed. Unquestionably, if the member receiving the newspaper had opened the newspaper and read the part that was marked (and marked, of course, for the purpose of calling his attention to it), he would have seen somewhere in the report of the proceedings that the resolution had been passed. But is that sufficient? In my opinion it is not.

This is a question really of fact, and here what I say applies more especially to the particular facts of this case. A member of a company who receives a notice from the company in accordance with its articles may throw it in the waste-paper basket if he chooses, but he does so at his own peril.

Under the articles before me the notice has to be duly given and duly certified, and the statute only refers to the service of the notice. If the notice is sent by a prepaid letter, and the posting be proved, then it is a misfortune in a case of this kind on the part of the member if he does not receive it in due time to attend the meeting. That is quite immaterial, but although he may disregard at his own peril notices sent by the company, the

notice which is to affect him must be something which emanates from the company itself. Mr. Rigby argued apparently that a casual conversation would be sufficient. I do not know how the 3,300 shareholders could all be told of this in casual conversation; but he argued that a conversation would be sufficient to draw the attention of the members of the company to the fact that a resolution had been passed. If every member had in fact known, possibly the defendants could have maintained their case; but a man receiving a financial newspaper receives nothing at his own peril. He is not bound to look at it; he may throw it at once into the waste-paper basket and disregard it, and it would be a remarkable thing to say that a notice could be duly given in that way. Suppose this had not been a question of the statutory condition having been complied with, but of sending out a notice convening a meeting, and nothing else, and the only thing done was that a copy of a financial newspaper was sent to every member, could it be maintained in fairness and honesty that that was a statutory notice? The newspaper contains many other things, and a shareholder or member receiving it is not bound to read it through, or to read it at all. He can do as he thinks fit, and he does not on its receipt act at his own peril; and, moreover, to apply my remarks more to the case actually before me, it is not sufficient to send a notice in that way. Even if the shareholder has read it, I am not prepared to say that it would be enough to say, “You read it in the newspaper,” because it is only a statement by the reporter at the meeting—and reporters do make mistakes, as is shewn in the case before me, when reporting what takes place. It is not the company who say anything, or tell the members that the conditions or the event has happened on which the meeting will take place. The utmost that is said is that there is a statement in the newspaper that this thing has occurred.

Perhaps I have considered the argument in greater detail than is necessary. I hold, as a matter of law, that a conditional notice is not sufficient, and then I hold that there was no notice shewing the condition had been performed, and that the

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meeting would as a matter of fact be held, and so I decide the motion in favour of the plaintiffs. It may be, of course, after all this discussion that the defendants, having a majority, may be able to put the thing right, so that my injunction, which is only a temporary one, may hereafter be stayed. I grant the injunction, of course, until judgment or further order, and I will give you liberty to apply, Mr. Rigby.

From this decision the defendants appealed.

Rigby, Q.C., and *Prior*, for the appellants, contended that on the true construction of the notice it was not a conditional notice of a meeting which might be held under certain circumstances, but of a meeting that would be certainly held; the time and place were definitely fixed, at which time and place certain resolutions, which each shareholder knew required confirmation, would, if passed at the former meeting, be submitted for such confirmation.

They also urged that the notice sent to each shareholder of the result of the former meeting, informing him that the resolution had been passed, made the subject-matter which was to be submitted to that meeting also definite.

Romer, Q.C., and *Bramwell Davis*, for the plaintiffs, were not called upon.

BOWEN, L.J.—It is impossible for us to give effect to this appeal, and I am of opinion that it must be dismissed, with the usual consequences.

The order appealed against is an order of Mr. Justice Chitty of the 8th of November, 1889, by which he granted an injunction, at the instance of the plaintiff, suing on behalf of himself and other members of the company, which is the Lisbon-Berlyn Gold Fields Company (Limited), to prevent the defendants, who are the managing director and secretary and two of his colleagues, from carrying into effect, or giving any further effect to, resolutions which were passed at two meetings of the company held on the 12th and 29th of July, 1889. The application for an injunction is based on the proposition that one, at all events, of these two

meetings has not been properly convened within the provisions of the articles of association of the company. The meetings in question were meetings which were governed generally by section 51 of the Act of 1862; but it is not necessary for us to discuss that question, because the real point in this case is whether the articles of association of the company, and in particular the 52nd article of association, has been complied with, so far as regards the summoning of these two meetings. No objection is taken here to the validity of the proceedings at the first meeting. We have, therefore, to consider whether the meeting of the 29th of July, 1889, which is the second of the extraordinary general meetings, which it was proposed to hold in order to ratify the resolutions that were passed at the first, was in fact properly convened by the notice which is before us. The 52nd article of association provides that "seven days' notice in writing specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members before every general meeting." Now the question which we have accordingly to determine is a question of construction. We have to construe the notice that was issued on the 3rd of July, 1889, and which is a compound notice, the former portion of which is directed to the notice of the first of the two extraordinary general meetings, and the second portion of which deals with the extraordinary general meeting of the 29th of July, the validity of which is the matter now to be decided. It is a question of construction, and Mr. Rigby has asked us to put what I suppose may be called a benevolent construction upon this notice, so as to give effect to matters which were honestly and *bona fide* transacted at the second meeting, and which it would be a pity, and perhaps injurious to the company, to disturb. It seems to me it is impossible for us to adopt the view that a benevolent construction ought to be put on commercial notices. What we have to consider is, not what in the result is to be the construction, but what was the meaning which persons of the character to whom this matter was addressed as reasonable

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men would attach to it at the time they received it.

It is hardly necessary to dilate upon the difficulty in which we should be placed if we were to consider that a document was capable of two constructions, one the proper construction to be put on it at the moment it is received, and another and subsequent construction of a more benevolent character, that might be placed upon the document in the result by a Court of law which was anxious not to disturb matters that had already passed.

The test is, what is the fair businesslike construction which business men in the position of shareholders would place on this document when they received it? And it is by applying that test that I propose to deliver my opinion.

Now, the paragraph to be discussed is as follows: "Should such resolutions be duly passed" (that is, the resolutions which it was proposed to bring before the first extraordinary general meeting), "the same will be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting of the company, which will be held on Monday the 29th of July, 1889, at the same time and place." If that paragraph is to be read as a notice that the subsequent extraordinary general meeting of the company would only be held on Monday the 29th of July, in the event of the passing of the former resolution, it is obvious that it would not be a good notice, because it would leave the shareholders who got the notice in ignorance whether or no the general meeting of the 29th of July was to be held. They would only know that it would be held in a particular contingency. They would not know whether that contingency would necessarily occur or not, and it could not be cured by subsequently acquiring information from the sources open to them that the resolutions had in fact been passed. The point is, not what the notice in time became, when it was perhaps too late for it to be valid under the articles, but what it was at the time when it was received by the shareholders, and while it was in time still to give proper notice. Mr. Rigby has argued that this paragraph is capable of another construction, which is

this, that an extraordinary general meeting would at all events be held, but that the words "should such resolutions be duly passed" are words which only applied to what was to be done at the subsequent extraordinary general meeting of the company when it took place. Of those two opposite constructions, which is the plain and businesslike one? Is this really a notice that an extraordinary general meeting would be held whether it was necessary to hold it or not, because that is what Mr. Rigby's construction comes to; or is it to be read in the more obvious way, that if the resolutions which required a subsequent extraordinary general meeting to be held were passed at the former meeting, then, and in that event only, the extraordinary general meeting would be held? It seems to me that a shareholder would consider that the extraordinary general meeting of the 29th of July was only to be held in the event of its being necessary—that is to say, in the event of the resolutions being passed at the former meeting—because, if he took any other view, he would have to conclude that the directors of the company were summoning a meeting, which in one contingency would bring the shareholders from all parts of London, or, for anything I know, from all parts of England, for no purpose at all, and when there was no business at all to be transacted. It does not seem to me to be businesslike or reasonable to suppose it was intended by this general notice that an extraordinary general meeting should be held on the 29th of July whether there was any business for it or not, when you find apt words are to be found in the paragraph which in their ordinary grammatical sense imply that the extraordinary general meeting of the 29th of July would only be held in case it was wanted.

I regret very much that our decision is a decision which will cause a great deal of trouble in the affairs of this company; but it is not a technical matter at all. The difficulty cannot be properly described as a technical one. The construction of a notice convening an extraordinary general meeting of a company is not a technical matter at all, and I agree entirely with what Mr. Justice Chitty has said as to

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the extreme importance that these notices should be so plain that those who run may read, and that they should be construed in a sense in which business men to whom they are addressed would understand them. Great as is the inconvenience, we are bound to put on this document the true construction which all the shareholders would put upon it at the time they received it, and to dismiss this appeal—and, in my opinion, it ought to be dismissed with costs—of course regretting that any business inconvenience may result from a flaw in the notice which has been sent.

FRY, L.J., concurred.

Solicitors—Powell & Burt, for appellants; Snell, Son & Greenip, for respondents.

[IN THE COURT OF APPEAL.]

COTTON, L.J.

BOWEN, L.J.

FRY, L.J.

1889.

Dec. 10.

STUART v. DIPLOCK
BROTHERS.

Covenant not to carry on Particular Business—Sale of certain Articles comprised therein—Overlapping Business.

The sale by a hosier in the ordinary course of his business of certain articles sold by a ladies' outfitter, is not a breach of a covenant not to carry on the business of a ladies' outfitter, even if the articles sold form a substantial part of the business of a ladies' outfitter.

Fielden v. Slater (38 Law J. Rep. Chanc. 379; Law Rep. 7 Ch. D. 523) distinguished.

Decision of KEKEWICH, J., reversed.

This was an appeal from a decision of Kekewich, J.

In 1879 Willicombe and Oakley granted to one Stuart a lease of a shop, No. 10 Mount Pleasant, Tunbridge Wells, for a term of twenty-one years. The lease contained a covenant by the lessors (who

were the owners of the adjoining dwelling-houses and shops known as Nos. 9, 11, and 12 Mount Pleasant) with the lessee that the lessors would not "permit or suffer to be carried on at or upon the adjoining dwelling-houses or shops known as Nos. 11 and 12 Mount Pleasant, the trade or business of ladies' outfitting, juvenile outfitting, or sale of baby-linen, nor give their consent to such trades or businesses being carried on at or upon the shop No. 9 Mount Pleasant. The shop No. 9 Mount Pleasant was then occupied by a wine-merchant.

Stuart carried on at No. 10 Mount Pleasant the businesses of ladies' outfitting, juvenile outfitting, and sale of baby-linen down to his death in August, 1886, and since then the same businesses have been carried on by Stuart's widow, the plaintiff in this action, who was his executrix and universal legatee.

Willicombe and Oakley subsequently sold their reversion in the leases of the shops to Andrews & Stone, who, in September, 1885, entered into an agreement for a lease to the defendants of No. 9 Mount Pleasant. It was admitted that the defendants took the shop with notice of the restrictive covenant by the lessors contained in the lease of 1879. In March, 1888, Andrews & Stone granted a lease of No. 9 to the defendants for twenty-one years. The lease contained a covenant by the defendants with Andrews & Stone not to carry on upon the premises the businesses of ladies' underclothing (except vests and stockings, which the trade term hosiery includes), juvenile outfitting (except vests and stockings), or sale of baby-linen, being the business carried on at the adjoining shop by Mrs. Stuart."

The defendants carried on the business of fancy-drapers and hosiers, and in the course of their business they sold certain articles of ladies' underclothing, such as vests, drawers, and combinations made of merino, wool, cotton, or Anglo-Indian (a mixture of silk and cotton), but not of linen.

The plaintiff brought this action against the defendants to restrain them from carrying on at No. 9 Mount Pleasant the trades or businesses of ladies' outfitting, juvenile outfitting, or sale of baby-linen. The

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only matter really in question between the parties was the business of a ladies' outfitter, and the plaintiff contended that the sale by the defendants of the above-mentioned articles was a breach of the restrictive covenant contained in the lease of No. 9 Mount Pleasant. The defendants contended that they sold the articles complained of in the ordinary course of their business, and that it was not carrying on the business of a ladies' outfitter.

From the evidence it appeared that the business of a ladies' outfitter included the sale of all articles of underclothing, and of hats, caps, and handkerchiefs. Kekewich, J., held that the articles complained of sold by the defendants in the course of their business were an essential part of the business of a ladies' outfitter, and that the defendants had committed a breach of the restrictive covenant, and granted an injunction.

The defendants appealed from this decision.

Everitt, Q.C., and *Dauney*, for the appellants.—The question is, whether a covenant not to carry on the business of a ladies' outfitter is broken by hosiery selling in the ordinary course of their business certain articles which are also sold by ladies' outfitters. The covenant is not to carry on the business of a ladies' outfitter, and does not in any way refer to the sale of any articles included in that business. In construing that covenant, the meaning must not be stretched beyond the ordinary meaning of the words—*German v. Chapman* (1) and *Holt v. Collyer* (2). If the plaintiff's contention is right, the sale by the defendants of a single article included in the business of a ladies' outfitter would be a breach of the covenant. The covenant, so far as it relates to No. 9 Mount Pleasant, is that the lessors will not consent to the business being carried on on the premises, and it is doubtful whether that covenant can be enforced against the defendants. We submit that the decision of Kekewich, J., cannot be sustained.

(1) 47 Law J. Rep. Chanc. 250; Law Rep. 7 Ch. D. 271.

(2) 50 Law J. Rep. Chanc. 311 Law Rep. 16 Ch. D. 718.

Chadwyck Healey (Warmington, Q.C., with him), for the respondent.—It is admitted that the defendants took the lease of their house with notice of the restrictive covenant, and it can, therefore, be enforced against them—*The Nottingham Patent Brick and Tile Company v. Butler* (3). The articles sold by the defendants form a substantial part of the business of a ladies' outfitter, and if a man sells articles which constitute a substantial part of a trade, that is a breach of a covenant not to carry on that trade. *Fielden v. Slater* (4) is very like the present case, and is a direct authority on the point.

COTTON, L.J.—This is a claim by a lady, who carries on the business of a ladies' outfitter at a house which she holds under a lease, to restrain the defendants from carrying on the trades or businesses of ladies' outfitting, juvenile outfitting, or sale of baby-linen, and she makes her claim on the ground that the defendants took the lease of their house with notice of a covenant entered into by their landlord with her predecessor in title, which, she says, prevents them carrying on the business which they are carrying on. The covenant, so far as it relates to the house occupied by the defendants, was that the landlords would not give "their consent to such trades or businesses being carried on at or upon the shop No. 9 Mount Pleasant." It has been suggested whether there is anything in that covenant which can be enforced against the defendants. The question whether a covenant which only bound the lessors "not to consent" to the carrying-on of certain businesses in the house occupied by the defendants can be enforced at all against the defendants, within the principle of *Tulk v. Moxhay* (5), is one of some importance. I do not intend to give any opinion, because it has not been seriously argued by the appellants.

But we are all of opinion that the defendants are not carrying on the business

(3) 54 Law J. Rep. Q.B. 545; 55 Law J. Rep. Q.B. 280; Law Rep. 15 Q.B. D. 261; *ibid.* 16 Q.B. D. 778.

(4) 38 Law J. Rep. Chanc. 379; Law Rep. 7 Chanc. 523.

(5) 2 Phil. 774; 18 Law J. Rep. Chanc. 88.

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of ladies' outfitters. The evidence shews that the business of a ladies' outfitter is to sell all articles of ladies' underclothing, and it appears that ladies' outfitters also sell other articles, such as hats, caps, and handkerchiefs. The defendants are carrying on a hosier's and draper's business, and are selling some articles which are often sold by drapers but are also sold by ladies' outfitters. Mr. Justice Kekewich came to the conclusion that the business of a ladies' outfitter could not be successfully carried on without the sale of these articles, and that, therefore, the defendants by selling the articles were carrying on the business of ladies' outfitters, and on this ground he granted the injunction. In my opinion that view is erroneous. If the articles sold by the defendants made up the business of a ladies' outfitter it would be a different thing; but the sale of one or two articles essential to the business of a ladies' outfitter is not enough to constitute a carrying-on of the business of a ladies' outfitter. For example, the sale of stays or corsets is part of the business of a ladies' outfitter; but could it be said that any one who was carrying on the business of making and selling stays or corsets was carrying on the business of a ladies' outfitter? As Lord Justice Bowen said in the course of the argument, if a man sells a number of articles which a ladies' outfitter does not sell, and does not sell a number of articles which a ladies' outfitter does sell, though he sells some of them, can it be said that he is carrying on the business of a ladies' outfitter? The sale of one or two articles essential to the business of a ladies' outfitter is not enough to make the vendor carry on the business of a ladies' outfitter. Here the defendants, who are drapers, are selling in the ordinary course of their business many articles which are not sold by ladies' outfitters; they are also selling in the ordinary course of their business the articles complained of which are sold by ladies' outfitters, and the question is whether they are carrying on the business of ladies' outfitters. The covenant does not restrain them from selling any of the articles sold by a ladies' outfitter. If there was a mere colourable omission of some of the articles sold by ladies' outfitters,

it would be a different matter. It is admitted, however, that there is no evidence of that kind here. Therefore, in my opinion, assuming the covenant restricts the defendants from carrying on the business of ladies' outfitters, there is nothing on the evidence to shew that they are carrying on the business of ladies' outfitters, though they sell some of the articles sold by ladies' outfitters. The respondent relied on the case of *Fielden v. Slater* (4); but in that case the covenant was not merely not to use or occupy, or permit to be used or occupied, a certain house "as an inn, public-house, or tap-room," but also not to use it for the sale of certain specified articles—namely, spirituous liquors, ale, or beer. In my opinion we ought not to hold that the defendants should be restrained from selling the articles complained of, and the appeal must be allowed.

BOWEN, L.J.—I am of the same opinion. I will assume that of which I am by no means convinced, that the defendants are under an obligation not to carry on the business of a ladies' outfitter. Assuming that to be so, it is not the same thing as an obligation not to carry on any part of the same business. The business of a ladies' outfitter is one business, the business of a hosier is another and distinct business. The two businesses touch each other in the sale of some four common articles. A man does not become a ladies' outfitter by his selling in the ordinary course of a wholly distinct business some of the articles which are sold by ladies' outfitters. In my opinion, the obligation is not broken by taking an essential part of the business of a ladies' outfitter, if that part was also an essential part of the business the defendants were *bona fide* carrying on; nor even by taking a substantial part of the former business, if that part was also a substantial part of another business which the defendants were not prohibited from carrying on. Of course, the case would be different if the defendants, under the colour of carrying on the business of hosiers, really carried on the business of ladies' outfitters. The appeal succeeds, and the action must be dismissed, with costs.

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FRY, L.J.—The plaintiff sues on the ground that the defendants took with notice of a covenant in the lease of 1879, by which, as to the houses Nos. 11 and 12, the lessors covenanted not to permit certain businesses to be carried on, but as to No. 9 they only covenanted not to consent to these businesses being carried on. I am not convinced that the defendants who occupy No. 9 could be restrained on the ground that they had notice of such a covenant. But, even if they could, the plaintiff must fail. The covenant is not to carry on three businesses mentioned; it does not relate to any parts of these businesses, or to the sale of any particular articles. A covenant of this sort must not be stretched beyond the ordinary meaning of the words. The business of a ladies' outfitter is principally confined to underclothing, and a ladies' outfitter sells some goods sold by hosiers, and some goods which are not sold by hosiers. The two businesses overlap as to the sale of some goods. Can it be said that a hosier is carrying on the business of a ladies' outfitter because in the course of his business he sells four articles which are sold by a ladies' outfitter? If that is so, the converse will be true in the case of a ladies' outfitter selling articles sold by a hosier, and the result will be that every hosier will be a ladies' outfitter, and every ladies' outfitter will be a hosier. I think, therefore, that the plaintiff has no cause of action, and the appeal must succeed.

Appeal allowed.

Solicitors — Edward Chester, for appellants;
Sole, Turner & Knight, agents for W. C.
Cripps, Tunbridge Wells, for respondent.

[IN THE COURT OF APPEAL.]

COTTON, L.J.	}	GRAY v. SMITH.
BOWEN, L.J.		
FRY, L.J.		
1889. Dec. 15.		

Specific Performance — Partnership — Agreement to retire — Interest in Land — Informal Agreement — Statute of Frauds — Right to use Name of retiring Partner.

G., S., & B. being engaged in a partnership which owned leaseholds, B. signed the following document, "Rough draft memorandum from Gray, Smith, & Bennett. This is to record that, in consideration of Gray or his executors paying Bennett or his assigns the sum of 100l. on the 1st of January, 1890, and the sum of 100l. on every 1st of January for the nine succeeding years, Bennett agrees to withdraw from the firm of Gray, Smith & Bennett":— Held, that there was a concluded agreement that Bennett should retire from the partnership, and that his withdrawal should be immediate; that as part of the partnership assets consisted of leaseholds, the agreement came within section 4 of the Statute of Frauds, but that it contained all the essential terms of the contract, and was a sufficient acknowledgment in writing by Bennett within the statute, and was enforceable against him.

Decision of KEKEWICH, J. (reported 58 Law J. Rep. Chanc. 863), affirmed.

This case came before the Court on an appeal by the defendant Bennett and a cross-appeal by the plaintiff from a decision of Kekewich, J., reported 58 Law J. Rep. Chanc. 803.

The plaintiff and the defendants Smith and Bennett carried on business in partnership as soap manufacturers under the firm of Gray, Smith & Bennett, and in May, 1888, they agreed that the defendant Bennett should retire and sell his share to the plaintiff.

On the 31st of May, 1888, Bennett signed the following memorandum, which was written on paper on which the name of the firm was stamped or printed: "Rough draft. Rockingham Soap Works, Wath-upon-Deane, May 31, 1880.—Memorandum from Gray, Smith & Bennett.

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This is to record that, in consideration of William Gray or his executors paying H. C. Bennett or his assigns the sum of 100*l.* on the 1st of January, 1890, and the sum of 100*l.* on every 1st of January for the nine succeeding years, H. C. Bennett agrees to withdraw from the firm of Gray, Smith & Bennett."

The plaintiff, on the faith of the arrangement, provided moneys to carry on the business, but two months after signing the memorandum the defendant Bennett repudiated the contract, and refused to execute an assignment of his share in the partnership to the plaintiff.

The plaintiff by the present action claimed specific performance of the agreement, and a declaration that the partnership had been thereby dissolved. The partnership property included certain leasehold premises which were vested in all three partners.

The defendant Bennett set up the defence that there was no enforceable contract, that the memorandum did not contain all the terms of the agreement, and that if there was any contract it was not sufficient to satisfy the Statute of Frauds, having regard to the fact that it involved a sale of an interest in land.

The defendant Smith did not deliver any statement of defence.

Kekewich, J., held that, as the agreement was to retire from a partnership the assets of which included an interest in land, and it was an essential term of the agreement that the retiring partner should assign his share in the assets, the contract was within the 4th section of the Statute of Frauds, and must be in writing, but that the memorandum contained all the essential terms of the contract, and was a sufficient acknowledgment in writing by Bennett, and enforceable against him within the statute; and made a declaration that the plaintiff, as against Bennett, was entitled to specific performance of the agreement, with consequential relief. He intimated that the plaintiff would not be entitled to use Bennett's name as part of the title of the new firm.

Bennett appealed from this decision so far as it declared that the plaintiff was entitled to specific performance, and the

plaintiff appealed so far as he was restrained from using Bennett's name.

H. Terrell, in support of Bennett's appeal.—The memorandum of the 31st of May, 1888, does not amount to an agreement between the plaintiff and the defendant Bennett which is capable of being enforced. It was not a concluded agreement, but a mere memorandum, and the intention of the parties was that the terms should be embodied in a subsequent contract, two of the terms being that the plaintiff should give Bennett an indemnity, and that a time for Bennett's withdrawal from the partnership should be stated. The memorandum was in fact only part of the negotiations which were taking place between the parties. With regard to this memorandum not mentioning the date for Bennett's withdrawal from the partnership, the principle to be applied is the same as in the case of an agreement for lease. If an agreement for a lease does not mention the date from which the lease is to commence, it cannot be enforced. So here the memorandum cannot be enforced, no date is inserted from which it is to operate, and there is nothing in the memorandum to shew that it is to operate forthwith. My first point, therefore, is that no concluded agreement was come to between the parties. But, assuming that there was a concluded agreement, I say that the agreement is an agreement within the 4th section of the Statute of Frauds as dealing with an interest in land, and that as it does not contain all the material terms of the agreement it does not satisfy the statute.

Crackanthorpe, Q.C., and *Upjohn*, for the plaintiff, were not called upon on Bennett's appeal, but were heard in support of the plaintiff's appeal.—The plaintiff is entitled to call himself successor to the late firm, and thus to use Bennett's name. The name of the old firm has been impressed on a large quantity of soap, and we want to use it on that soap. The agreement to withdraw from the partnership confers a right on the plaintiff to have an assignment of the property of the partnership; that includes the leasehold premises and the goodwill; and the assignment of the goodwill would carry the right to use

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the name of the old firm—*Levy v. Walker* (1).

[BOWEN, L.J., referred to *Lindley on Partnership* (last ed. p. 446).]

Banks v. Gibson (2) is an authority that the style of a firm is part of the assets of the firm, and that after a dissolution of the partnership, when no arrangement was come to as to the style, one partner could not restrain the other from using the style of the old firm.

H. Terrell, for the defendant Bennett, was not called upon.

G. Curtis Price, for the defendant Smith.

COTTON, L.J.—The first appeal before us is that of the defendant Bennett, and it has been contended on his behalf—first, that there was no concluded agreement between the plaintiff Gray and the defendant Bennett at the time the memorandum was signed. We have heard the evidence, and it does not support that contention, although no doubt the parties intended that the terms of the memorandum should be embodied in a document which was to be subject to the approval of their solicitors. But that means nothing more than that the solicitors were to consider the best way of carrying out the terms of the agreement already made. In my opinion there was a concluded agreement between Bennett and the plaintiff.

Then it was said that if the document of the 31st of May, 1888, amounted to an agreement at all, it was an agreement within the 4th section of the Statute of Frauds, and I think it is so. It was further said that this document did not contain a full statement of all the terms which ought to be stated in writing. But it is not necessary that there should be all the terms expressed in that document. The document is an executory agreement to be carried into effect by a deed to be afterwards drawn. It is said that an indemnity to Bennett was stipulated for, but was not included in the memorandum, though an indemnity was an essential part of the agreement. But when the agree-

ment is carried into effect by a formal deed, any experienced draughtsman in preparing the deed would, after the assignment of the leasehold property on which the partnership business was carried on, insert an indemnity to the assignee. There is an implied obligation upon the assignee, when the property is given up to him, to indemnify the assignor; and as there is no express contract as to the terms of the indemnity, the indemnity when expressed should be a full indemnity.

Another point has been urged upon us which does not impress me much—namely, that the memorandum does not contain any stipulation as to the time within which the withdrawal from the partnership by Bennett is to take place. In the absence of any fixed time, the withdrawal should take place forthwith—that is to say, within a reasonable time. That objection, therefore, also cannot be maintained, and Bennett's appeal fails.

With regard to the cross-appeal of the plaintiff as to his right to use Bennett's name, I do not think he is entitled to use it, except on stock existing at the date of the dissolution of the partnership, and I do not think Mr. Justice Kekewich could have intended to restrain the use of it in connection with existing stock. But it is said that the plaintiff is entitled to use Bennett's name because the effect of the agreement is that the property of the partnership should be assigned to the plaintiff, and that the property of the partnership includes the goodwill, and the goodwill includes the right to use the name of the firm. Looking at the terms of the contract, there is nothing to imply that there should be not only an assignment of the leasehold property on which the business was carried on, but also of the right to use the name of Bennett. I think the agreement implies that the plaintiff is to have an assignment of the leasehold property, but the statement in the agreement that Bennett is to withdraw from the firm is against the plaintiff having a right to use his name.

The case of *Levy v. Walker* (1) does not apply to the present case. There Levy could not have been subjected to any liability by the continued use of the name

(1) 48 Law J. Rep. Chanc. 273; Law Rep. 10 Ch. D. 436.

(2) 34 Beav. 566; 34 Law J. Rep. Chanc. 591.

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of the old firm—it did not include his name; moreover, there was in that case an assignment in express terms of the goodwill and business, whereas here the only agreement is that Bennett will withdraw from the partnership.

The plaintiff's appeal, therefore, also fails, and he is not entitled to use Bennett's name, except so far as is necessary to realise the assets of the old firm.

BOWEN, L.J., and FRY, L.J., concurred.

Both appeals dismissed.

Solicitors—Torr, Janeways, Gribble & Oddie, agents for Dibb & Clegg, Barnsley, for plaintiff; Pilgrim & Phillips, agents for Smith, Smith & Co., Sheffield, for defendant F. Smith; Indermaur & Brown, agents for F. W. Fisher, Doncaster, for defendant H. C. Bennett.

KEKEWICH, J. } *In re AN ARBITRATION BE-*
1889. } *TWEEN OLIVER'S EXECU-*
Nov. 16. } *TORS AND SCOTT.*

Arbitration—Motion to set aside Award—Time—Jurisdiction to enlarge Time—Practice—9 & 10 Will. 3. c. 15. s. 2—Judicature Act, 1873, section 26—Judicature Act, 1875, section 17—Rules of Court, Order LXIV. rules 7 and 14.

The enlargement of the time for applying to set aside an award under the Act 9 & 10 Will. 3. c. 15, is a matter of procedure in respect of which the Rule Committee had under the Judicature Act, 1875, section 17, jurisdiction to make regulations; and consequently the provisions of Order LXIV. rule 7, under which the Court or a Judge may enlarge the time appointed by the rules for taking any proceeding, are applicable to a motion to set aside an award after the expiration of the time limited by Order LXIV. rule 14.

By agreement dated the 24th of July, 1888, between the executors of Richard Oliver and Thomas B. Scott, it was agreed that the ascertaining of the capital and effects of a partnership formerly existing between Oliver and Scott should be re-

ferred to arbitration, and that the submission and award might, at the instance of either party, be made a rule or order of the High Court.

An award was published on the 11th of August, 1888, and on the 24th of October, 1889, the submission was made an order of Court.

Oliver's executors now applied by motion, that, notwithstanding the expiration of the time limited by statute for applying to set aside an award, they might be at liberty to move to set aside the award, upon the grounds of alleged fraud on the part of Scott, and of misconduct and irregularity on the part of the arbitrators.

By 9 & 10 Will. 3. c. 15. s. 2, it is provided that an application to set aside an award procured by corruption or undue means must be made before the last day of the term next after the arbitration.

By the Judicature Act, 1873, section 26, legal terms were abolished; but it was provided that they might be referred to in all cases in which they were used as a measure for determining the time at or within which any act was required to be done, unless provision should be otherwise made by any lawful authority.

By the Judicature Act, 1875, section 17, it was provided that the Rule Committee might make Rules of Court for regulating the pleading, practice, and procedure in the High Court, and generally for regulating any matters relating to practice and procedure.

By Order LXIV. rule 14, of the Rules of 1885, it was provided that an application may be made to set aside an award at any time before the last day of the sittings next after such award has been made and published.

By Order LXIV. rule 7, it was provided that the Court or a Judge may enlarge the time appointed by the rules for taking any proceeding, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.

Warmington, Q.C., and Astbury, for the motion.—Order LXIV. rules 14 and 7 apply. The matter is one of procedure, and in such a matter the rules prevail even

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against previous statutory provisions. Even under the previously existing law, alleged fraud was good ground for moving for leave to set aside the award after the prescribed time had expired—*Guadiano v. Brown* (1).

Henn Collins, Q.C., and Roby, for the respondent.—The time for making the application having been fixed by statute, the Rule Committee would have no power to enlarge it except under an express statutory enactment enabling them. The matter is not one of practice or procedure, but of statutory right. The cases cited do not apply to such an arbitration as that now in question, which was under the statute 9 & 10 Will. 3. c. 15.

Even though both parties consented, the Court cannot enlarge the time prescribed by statute—*In re An Arbitration between North British Railway and Trowsdale and others* (2).

The rule has been the same in law as in equity, and has been frequently recognised—*Moore v. Darley* (3), *The Corporation of Huddersfield and Jacob* (4), *Auriol v. Smith* (5), *Dawson v. Sadler* (6), and *Heming v. Simmerton* (7).

[*KEKEWICH, J.*—*In re An Arbitration between the Governors of the College of Christ and Martin* (8).]

KEKEWICH, J.—I have no doubt about this. I shall certainly not hold that this Act of Parliament, which limits the time, could be altered otherwise than by the authority which made the enactment—that is to say, by the Legislature itself. The Act of Parliament says that any motion to set aside an award must be made in a certain Court—I am not dealing with that part of the enactment—and must be made in the term next after the award has been made and published to the parties, and that applies to this par-

ticular award made under that Act. Unless I can find that that has been altered by Act of Parliament, I should have no hesitation in saying on this part of the case that the Court has no jurisdiction to set aside the award, the term next after the publication of the award having, as admitted on all hands, expired. Since that Act was passed, terms have ceased to be operative for many purposes—in truth, they are now observed only for certain purposes outside the Courts of Justice, and they have been abolished because the terms have been fused into the sittings before and after term. We in the Court of Chancery were familiar with both. We sometimes had sittings before term and sometimes sittings after term, and the year was made up quite as much of sittings out of term as of sittings in term. They were known as “sittings”; but that, of course, did not alter the Act. When the Judicature Act came in, this anomaly of certain business being done in term time, the term having ceased to have the importance which it had before, was noticed and provided for, and, by the 26th section of the Judicature Act of 1873, a provision was made for the alteration, and it was made in this way. Terms were to continue to be regarded where they were used as a measure determining the time at or within which an act was to be done, “unless and until provision is otherwise made by any lawful authority.” Now, before I proceed to discuss what authority was necessary, I wish to refer to this case which I mentioned just now—*In re An Arbitration between the Governors of the College of Christ and Martin* (8). There the application was made out of time according to the provision of the Act of Will. 3, no alteration having been made by any lawful authority, and Lord Justice Cockburn, with the concurrence of three other members of the Court of Appeal, held that, there having been no provision made by lawful authority, the Court was bound by the Act of Parliament, and that, hard as it might be, nothing could be done; and he pointed this out—he said: “This may lead to considerable conflict between the two modes of reckoning ‘terms’ and ‘sittings,’ and I hope something may be done to prevent hard-

(1) 2 Jur. N.S. 358.

(2) 35 Law J. Rep. C.P. 262; Law Rep. 1 C.P. 401.

(3) 1 Com. B. Rep. (o.s.) 445.

(4) 43 Law J. Rep. Chanc. 748; Law Rep. 17 Eq. 476.

(5) Turn. & B. 121.

(6) 1 Sim. & S. 537.

(7) 2 Phil. 79; 16 Law J. Rep. Chanc. 90.

(8) 46 Law J. Rep. Q.B. 591; Law Rep. 3 Q.B. D. 16.

In re An Arbitration between Oliver's Executors and Scott.

ship to suitors." The consequence was, a little later these rules were made which are called in question here—Order LXIV. rules 7 and 14. I think those are the only rules to which I need refer, and they make certainly an entirely different provision. I think I ought to read rule 14 first: "Application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties." That was really only putting into the form of a rule, with the word "sittings" substituted for "term," what was in the Act of Parliament. That alteration "term" into "sittings" is admittedly within the powers of the Judges who have to make the rules—at any rate, assuming, as I of course do for this purpose, that they were lawful. Then at the same time another rule was made (rule 7) which gives the Court or a Judge power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging the time for doing any act or taking any proceeding, on such terms as the justice of the case may require. Really the question is whether that was within the power of the Rule Committee who made the rules. For that purpose I must turn to section 17 of the Judicature Act, 1875, and without going through the section, concisely stated, it provided that any rules may be made relating to the practice and procedure of the Court. Is this a matter of "practice and procedure"? It seems to me that the time within which an application may be made is necessarily "procedure." In truth, certainly a large majority of the applications which are made to the Court, and which because of their dilatory character are often advanced and are called "procedure summonses" or "procedure applications," relate to the time within which a certain thing has to be done; therefore, that seems to me to be clearly procedure. Then it is said that, though the Rule Committee might alter the time in this sense, substituting sittings for terms, they cannot extend the sittings. I fail to comprehend that argument; that they might have shortened them seems to me perfectly clear. They might have said, "the sittings are very long, and the term is very

short; the sittings are rather more than justice requires for setting aside an award, and therefore we will say only a certain portion of the sittings." The rule, it seems to me, might have said "in the first three weeks of the sittings" or "in the first half of the sittings," or in any other way—and why not "in the next two or three sittings"? I find it difficult to state the argument that the Rule Committee can only substitute sittings for term when necessarily the sittings and term are not commensurate. It is difficult to see how one must be substituted for the other *simpliciter*, without any alteration. If that is so, I think the Judges could have done this. They might have said, "in the next sittings, or any enlargement thereof, any sittings or any time to which the business of those sittings may be postponed." We, in this Chancery Division, are in the habit of rising at the last day of the sittings; the Queen's Bench Judges are often detained on circuit, and so some days after the sittings. It might have been very easy to say "so long as the circuits continue," or any other arrangement of that kind. Instead of that, what they have done is this: they have said that sittings shall be substituted for the term, with a proviso that if the Court before which the matter comes sees fit to enlarge that time, then that shall be done on such terms as justice requires. I think that, given the power to alter the Act of Parliament at all, which is not denied and cannot be denied, there was power to alter it in the manner in which it has been done. Therefore, I am now competent to consider whether the justice of the case requires, on terms which are within my judicial discretion, that the enlargement should be ordered.

Solicitors—Pritchard, Englefield & Co., agents for Boot & Edgar, Manchester, for applicants; Bower, Cotton & Bower, agents for Allen, Prestage & Halkyard, Manchester, for respondent.

CHITTY, J. }
 1889. } DE FRANCESCO v. BARNUM.
 Nov. 22. }

Infant — Apprenticeship—Covenant to serve—Negative Covenant—Void Contract—Injunction.

An indenture of apprenticeship entered into between the plaintiff, a teacher of stage-dancing, and an infant and her mother, contained covenants that during the term of the apprenticeship the services of the apprentice should be at the plaintiff's disposal, that the apprentice should not enter into any professional engagement without the written consent of the plaintiff, and that the plaintiff should have the right to make professional engagements for the apprentice, and pay her for such services at rates mentioned. The infant having, without the plaintiff's consent, entered into a professional engagement, the plaintiff applied for an interim injunction:—Held, that the application must be refused, as no action at law could lie against an apprentice.

Gylbert v. Fletcher (Cro. Car. 179) followed.

Fellows v. Wood (59 Law Times, 513) explained.

This was a motion by the plaintiff, G. V. de Francesco, a teacher of stage-dancing, for an interim injunction to restrain the defendants P. T. Barnum and S. A. de Parravicini from inducing or allowing the defendants Ada Parnell and Helen M. Parnell, the infant daughters of the defendant Elizabeth Parnell, to perform as stage-dancers at Olympia in Kensington without the full written permission of the plaintiff, and also to restrain the defendants Ada Parnell and Helen M. Parnell from performing, and the defendant Elizabeth Parnell from allowing them to perform, at Olympia or otherwise, without the consent of the plaintiff, in violation of two indentures of apprenticeship of the 6th of December, 1886.

The defendants resisted the motion on the ground of the infancy of the defendants Ada and Helen M. Parnell.

By one of the indentures referred to, made between the defendant Ada Parnell, therein stated to be an infant, aged twelve

years, and thereafter called the said apprentice, of the first part, the defendant Elizabeth Parnell, widow, thereafter called the parent of the second part, and the plaintiff of the third part, after reciting an agreement for apprenticeship, it was witnessed "that in pursuance of the said agreement in this behalf, the said apprentice, by and with the consent of the parent, doth put herself apprentice to the said G. V. de Francesco, to learn his art, and with him (after the manner of an apprentice) to serve from the 6th day of December, 1886, until the full end and term of seven years from thence next following, and to be fully complete and ended, during which term the said apprentice her said master faithfully shall serve, his secrets keep, his lawful commands everywhere obey. She shall do no damage to her said master, nor see it to be done of others, but that she to the utmost of her power shall let or forthwith give warning to her said master of the same. She shall not waste the goods of her said master, nor lend them unlawfully to any. She shall not contract matrimony within the said term. She shall neither contract professional engagements, nor accept such, unless with the full written permission of her said master. She shall not absent herself from her said master's service unlawfully, but in all things as a faithful apprentice she shall behave herself toward her said master and all his during the said term. And the said G. V. de Francesco, in consideration of the faithful services of the said apprentice in the art of choreography, which he useth by the best means that he can, shall teach and instruct, or cause to be taught and instructed, his said apprentice during the said term, but subject in all respects to the stipulations hereinafter mentioned." The deed then contained covenants between the parent and the plaintiff that the plaintiff, in conjunction with qualified assistants, would instruct the said apprentice in the higher branches of the choreographic art for the term of seven years, and would pay to the said apprentice sums ranging from 6d. to 1s. per night or matinée for all choreographic engagements in London and the suburbs during the said term, with a right to engage the said apprentice for perform-

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ances in America or any colonial or foreign State, upon providing board and lodging and 5s. a week during such last-mentioned engagement; that "the services of the said apprentice shall be entirely at the disposal of the said G. V. de Francesco, and the said apprentice shall not during the said term of seven years enter into any professional engagements without the permission in writing" of the plaintiff. There were also covenants that the said apprentice should take and receive daily lessons, and conform to the rules of the theatre where she should be engaged; that the parent and the apprentice should conform to all the requirements of the Education Acts, and furnish the plaintiff each month with a certificate that the apprentice's scholastic obligations had been strictly adhered to. There was also a provision that in the event of the non-fulfilment by the parent of any of the terms of this deed, or if, amongst other things, the said apprentice should misconduct herself in or out of school, or decline the plaintiff's engagements, or should accept any engagement without having previously obtained the written consent of the plaintiff, or practice the art of stage-dancing under the direction of any other teacher, the plaintiff might, by notice in writing to the parent, determine the apprenticeship, and the parent should thereupon pay to the plaintiff the sum of 50*l.* as liquidated damages. The indenture was executed by the apprentice and the parent, and another indenture in identical terms was on the same day also executed by the defendant Helen Maude Parnell, then aged fourteen years.

The plaintiff received no premium in respect of either of the apprenticeships.

In August, 1889, the defendants Ada and Helen M. Parnell entered into arrangements with the defendant Paravicini, as the agent for the defendant Barnum, with a view to performing as stage-dancers at Olympia, for two performances per diem at a salary of 2*l.* a week each.

Evidence was produced shewing that the plaintiff's establishment enjoyed a high reputation; that it presented considerable advantages to its pupils; that its pupils were usually drawn from the poorer

classes, and when trained as the plaintiff's pupils were much sought after by theatrical managers; that the applications for admission to the plaintiff's school were very numerous; and that the only remuneration the plaintiff obtained for his instruction was the pay he received from theatrical managers for the services of his pupils during the term of their apprenticeship.

The notice of motion as originally framed did not ask any immediate relief against the infants, but it was amended by consent at the hearing, and the mother of the infants was at the same time appointed their guardian *ad litem*.

Romer, Q.C., and *Kalisch*, for the plaintiff.—A contract of this kind, if beneficial to an infant, will be enforced against him—*Fellows v. Wood* (1) and *Simpson on Infants* (p. 91).

[CHITTY, J.—"No action can be brought against an infant apprentice on his covenant to serve"—*Burn's Justice of Peace* (29th ed. vol. 1, p. 183, citing *Gylbert v. Fletcher* (2)). The passage in *Burn's Justice of Peace* continues: "Nor can he be sued in equity (1 *Eq. Ca. Abr.* 6), and though the statute 5 Eliz. c. 4. ss. 42 and 43 expressly enacts that the apprentice shall be bound as if he had been of full age, yet it has been held that this only subjects him to the jurisdiction of the magistrates in case of misbehaviour, &c., and not to an action for the breach of his covenant," again citing *Gylbert v. Fletcher* (2).]

The question seems to be, whether the contract sought to be enforced is or is not beneficial to the infant. If it is beneficial it is binding—*Wood v. Fenwick* (3) and *Leslie v. Fitzpatrick* (4). It is submitted that the contract here was plainly advantageous to the infant defendants.

[CHITTY, J.—"Though an apprenticeship deed is binding on an infant, the master cannot sue on the covenant to serve"—*Simpson on Infants* (p. 92), citing

(1) 29 Law Times Rep. 513.

(2) Cro. Car. 179.

(3) 10 Mee. & W. 195; 11 Law J. Rep. M.C. 127.

(4) 47 Law J. Rep. M.C. 22; Law Rep. 3 Q.B. D. 229.

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Gylbert v. Fletcher (2) and also *Lyll's Case* (5).]

The Court can at least sever the contract—*Pickering v. The Ilfracombe Railway Company* (6)—and will grant an injunction against the mother—*Gilbert v. Schwenck* (7)—and also against the defendant Barnum, who has properly been made a party—*Lumley v. Wagner* (8). No immediate relief is asked as against the defendant Parravicini.

Byrne, Q.C., Lemon, and T. L. Wilkinson, for the defendants, cited *Argles v. Heesman* (9), *Flight v. Bolland* (10), *Cooper v. Cooper* (11), and *Keane v. Boycott* (12). In *Fellows v. Wood* (1) the plaintiff appears to have been of full age when the action was brought. Looking at the deed as a whole, it can scarcely be said to be beneficial to the infants, or reasonable, for there is nothing in it which compels the plaintiff to support or find employment for them. Such a deed, if not beneficial to the infants, is inequitable and void—*The Queen v. Lord* (13).

[*Cornwall v. Hawkins* (14) was also referred to.]

CHITTY, J., after stating the facts, continued:—As the two deeds are identical, for the purposes of my decision I need only refer to one of them. The deed is on the face of it an instrument of apprenticeship. In form it is separable into two parts. The first part contains the contract on the part of the master with the apprentice, and the apprentice with the master; and the second part contains an agreement between the master and the mother, who was at its date the legal guardian of the children, she being the only parent living at the time.

(5) 7 Mod. 15.

(6) 37 Law J. Rep. C.P. 118; Law Rep. 3 C.P. 235.

(7) 14 Mee. & W. 488; 14 Law J. Rep. Exch. 317.

(8) 1 De Gex, M. & G. 604; 5 De Gex & S. 485; 21 Law J. Rep. Chanc. 898.

(9) 1 Atk. 518.

(10) 4 Russ. 298.

(11) Law Rep. 13 App. Cas. 88.

(12) 2 H. Black. 511.

(13) 12 Q.B. Rep. 757; 17 Law J. Rep. M.C. 181.

(14) 41 Law J. Rep. Chanc. 435.

Now this deed is an apprenticeship deed; and it was decided in the time of Charles I. that no action would lie on an apprenticeship deed against the apprentice himself. The statement in the case *Gylbert v. Fletcher* (2) is this: "Covenant against an apprentice for departing from his service without licence within the time of his apprenticeship. The defendant pleaded at the time of making the indenture he was within age; and thereupon it was demurred. It was argued at the bar that this indenture should bind the infant, because it was for his advantage to be bound apprentice to be instructed in his trade. He is also compellable, it is said, by the 5 Eliz. c. 4 to be bound out an apprentice. But all the Court resolved that though an infant may voluntarily bind himself apprentice, and if he continue apprentice for seven years may have the benefit to use his trade, yet neither at the common law nor by any words of the 5 Eliz. c. 4 shall the covenant or obligation of an infant for his apprenticeship bind him. But if he misbehave himself, the master may correct him in his service, or complain to a Justice of the peace and have him punished according to the statute. But no remedy lieth against an infant upon such a covenant, therefore it was adjudged for the defendant." There were sitting in the King's Bench when that case was decided Sir Nicholas Hyde (Chief Justice), Sir William Jones, Sir James Whitelock, and Sir George Croke.

That case has never been questioned from that time to this, and it is cited in the various text-books as an authority. It is cited in *Simpson on Infants*, and it is in *Burn's Justice* (I refer to the 29th edition of 1845), and in both it is treated as an unquestionable authority. Other cases are cited in *Burn's Justice* as being to the same effect. So that ever since the time of Charles I. it has been established that you cannot sue an infant even upon the covenants which he purports to enter into during his infancy in an apprenticeship deed.

Now the covenant on which the plaintiff is relying for the present purpose is a covenant on the part of the infants that they, during the apprenticeship, which is for a term of seven years, shall neither

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"contract professional engagements, nor accept such, unless with the full written permission of her said master." That is, therefore, on the face of it, a covenant on the part of the apprentice during the apprenticeship; that is the part of the indenture purporting to bind the infants, to which I will now refer; and it follows from what I have read, unless *Gylbert v. Fletcher* (2) can be overruled, that the infants, apart from any question whether the contract is for their benefit or not, cannot be sued. That being so, if they cannot be sued on the covenant, how can they be sued for an injunction? The right to an injunction depends upon the legal right to sue, and if there is no legal right to sue, which appears to be the result of the authority which I have cited, there can be no right to an injunction. Injunction in cases of this kind, to restrain a breach of a negative clause in a contract for service, is granted because, first, it is a negative clause, and, secondly, because damages are not an adequate remedy; and it is considered right in cases of that kind to interfere directly by preventing a breach, which the person has bound himself not to make. Therefore, as there is no right to sue for damages, there can be no right to an injunction.

That is the case, therefore, against the infants. A great many points have been raised, points which turn upon a critical examination of this instrument, as to whether the instrument is really for the benefit of the infants or not. I propose not to say anything about those points on the present occasion. I think it is safer on this part of the case to rest it on the ground on which I have already put it—namely, that up to this time I cannot find that any such action has been allowed to proceed against an infant. It may be, when the various statutes—the statute of Elizabeth and the subsequent statutes—with regard to apprenticeship have been all examined, that there may be some explanation given of that authority; but at present, as that authority has never been impeached, and has stood the test of centuries, it would be wrong for me, on an application for an interim injunction, even to throw any doubt upon it; and certainly, after listening to the elaborate

arguments I have heard on both sides, I cannot see any present escape from that particular authority.

But the case with regard to the infants does not rest there for the purposes of this injunction, for, without criticising the terms of this instrument, the present state of things appears to be this. The plaintiff is not under any obligation to provide employment, or wages, or remuneration for the infants; and it may be—for I see nothing whatever to affect the good faith of the plaintiff in this case—that between this and the hearing of this action he will provide some employment for these young women; but at the present moment he has not done so, and they have come to that age when their services (very likely from the training that they have received from him) are of value, and at the present moment they have this engagement with Mr. Barnum, under which they will receive their 21s. a week; therefore, exercising a discretion, as I am entitled to do, with regard to an interlocutory injunction, I think it would not be fitting to grant an injunction which might leave these two young women until the trial without any remuneration or without any employment whatever. I think, on the balance of convenience and inconvenience, it would be wrong to act adversely to the infants at present. Therefore, leaving the various questions as to the reasonableness or the unreasonableness of the terms of some parts of this apprenticeship indenture open, I think that I ought not to grant, and I decline to grant, any injunction against these young women.

That being so, for similar reasons I ought not to interfere with Mr. Barnum. I ought not, for the reasons that I have last given on the question of convenience, to interfere as against Mr. Barnum, because if I restrain Mr. Barnum from employing the young women they will be just in the same position as if I restrained them from going on with their performances at Olympia.

Then it would be idle, as I refuse the injunction against the infants, to restrain the mother.

I ought to say one word about the case of *Fellows v. Wood* (1), which was cited as an authority for granting an injunction

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against an infant, where the infant had entered into a contract. On carefully reading the report I am persuaded that the defendant in that case was not an infant at the time when the injunction was granted; and it was not a contract of apprenticeship, it was a mere contract of service. There is ground also for thinking that, after the infancy had terminated, the defendant did continue to serve; and then, although he might have vacated the employment at a fortnight's notice, what he did was to go away; and then, in breach of an article to be found in the contract of employment, he served the plaintiff's customers for his own benefit. That is what he was doing, and that is what he was restrained from doing. Having given that case considerable attention, I think as a fact that the injunction was not granted against an infant, but it was granted against a man of age who, to a certain extent, appears to have acted upon the contract—whether he adopted it or ratified it afterwards, I cannot say—after the infancy had terminated. But that was a contract of service, whereas what I have decided on the present motion was upon the footing of it, the contract being in an apprenticeship deed. In the case of *Fellows v. Wood* (1) there could have been no ground for avoiding the contract not to serve the plaintiff's customers as being an unlawful restraint of trade; whereas, apart from the present contract being in an apprenticeship deed, there would be some ground for saying that this general stipulation not to contract any professional engagements whatever without the licence of the plaintiff was in restraint of trade, seeing that there is not a continuous employment on the part of the plaintiff. I have only added this that there may be no mistake as to the grounds on which I have proceeded.

Solicitors—Brandon & Nicholson, for plaintiff;
H. Levy, for defendant Parravicini; Campbell,
Reeves & Hooper, for the other defendants.

CHITTY, J. } *In re* THE LONDON AND WEST-
1890. } MINSTER BREAD COMPANY
Jan. 11. } (LIMITED).

Company—Voluntary Winding-up—Transfer or Sale of Business—Dissentient Member—Notice of Dissent—Continuing Notice—Companies Act, 1862, ss. 51 and 161.

After the passing of resolutions by a company for voluntary liquidation, the transfer of its business, and the appointment of the company's secretary as liquidator, but before the subsequent confirmation of such resolutions, a shareholder served notice of dissent on the secretary of the company. The notice was not objected to until one month after the confirmation of the resolutions, and was not returned:—Held, that the notice was a valid notice of dissent within section 161 of the Companies Act, 1862.

The question in this case was whether a notice of dissent given by a shareholder of a company, after the passing of resolutions for the voluntary liquidation of the company and the transfer of its business, but before the statutory confirmation of such resolutions by the subsequent general meeting, was a valid notice of dissent within section 161 of the Companies Act, 1862, which provides that "if any member of the company being wound up, who has not voted in favour of the special resolution passed by the company of which he is a member, at either of the meetings held for passing the same, expresses his dissent from any such special resolution in writing, addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators" either to abstain from carrying the resolution into effect or to purchase his interest.

On the 29th of August, 1889, and the 16th of September, 1889, special resolutions were passed, and confirmed by extraordinary general meetings of the London and Westminster Bread Company (Limited), under section 51 of the Companies Act, for the voluntary liquidation of the company,

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and for its amalgamation with the Bread Union (Limited), and for the appointment of Mr. A. Upright, who was secretary of the bread company, as liquidator.

On the 31st of August, 1889, the Rev. C. R. Knight, a shareholder of the bread company, sent to Upright notice of dissent under section 161. Knight had not voted at either of the meetings, and on the 16th of October, 1889, Knight's solicitors wrote to Upright, asking what offer was proposed to be made to Knight for his shares; and on the 19th of October, 1889, Upright replied by a letter, in which he stated that the matter was still under the consideration of the Bread Union. The letter was signed by Upright on behalf of the London and Westminster Bread Company and as liquidator.

On the 23rd of October, 1889, Upright's solicitors wrote to Knight's solicitors, stating that Knight's notice of the 31st of August was informal, and could not be noticed by Upright as liquidator. The notice was not returned to Knight.

On the 15th of November, 1889, Knight gave to Upright notice of the appointment by him of an arbitrator under section 162 of the Companies Act, 1862, to settle the price to be paid to him for the purchase of his interest in the company.

Upright, as liquidator of the company, now moved to restrain Knight from proceeding with such arbitration.

Byrne, Q.C., and *Dunham*, for the liquidator, in support of the motion.—The notice is premature. Section 161 contemplates a notice given after the winding-up has commenced. It speaks of the notice being given to the "liquidator." Until the confirmatory resolution is passed there is no liquidator—*In re The India Zoedone Company* (1). Moreover, the notice is to be given by a member who has not voted at either meeting, and, therefore, by implication cannot be given until after this condition has been complied with.

Kenyon Parker, for the respondent.

CHITTY, J., after stating the facts, continued:—The notice of dissent was served,

according to the provisions of section 161, at the offices of the company, and there remained, and was never returned; nor does it appear that there was any question raised as to its invalidity until a month after the special resolutions had been confirmed. It is quite plain from the letter of the 19th of October that the notice had come to the hands of the liquidator, and had also been present to his mind after the confirmation of the resolutions. The notice may, I think, therefore be treated as a continuing notice, and I think there has been a compliance with the Act of Parliament. Probably a notice sent before any resolution had been passed would not be good, but it is not necessary to consider that question. Of course, if Mr. Knight had voted at the confirmatory meeting in favour of the resolution, his notice would have been rescinded. But he did not do so. As the notice came to the hands of the liquidator, and was kept by him, it appears to me that the notice was good. Moreover, there is a distinction between section 161 and section 51. By section 51 it is enacted that the confirmatory meeting is to be held at an interval of not less than fourteen days, nor more than one month, from the date of the meeting at which the resolution was first passed. Section 51, therefore, gives both the time during which the meeting may be held and also the time after which it may not be held; but section 161 only says that the notice of dissent must be given not later than seven days after the date of the meeting, but is silent as to the time during which the notice may be given—or, in other words, says nothing as to when notice may first be given. According to the language of section 161, the notice here was left not later than seven days after the date of the meeting. The construction contended for by the liquidator, that section 161 implies that the notice is to be given after the resolution has been completely passed, is too narrow. The objection is purely a technical one. The object of the provision is to prevent inconvenience to the liquidator and the company, and not to allow the members of the company to speculate on the possibility of the assets of the company becoming more or less valuable,

(1) 53 Law J. Rep. Chanc. 468; Law Rep. 26 Ch. D. 70.

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but to decide quickly whether they will come in or remain out. The construction I put on the notice does not lead to a possibility contrary to the intention of the Act. The motion fails, and is dismissed with costs.

Solicitors—Watson & Co., for company; Downing, Holman & Co., agents for Downing & Handcock, Cardiff, for Knight.

KEKEWICH, J. }
1889.
Nov. 16. }

In re JONES.

Practice—Trustee—Appointment of new Trustee—Vesting Order—Jurisdiction—Trustee Act, 1850, ss. 35 and 43—Rules of Court, Order LV. rule 13a, Rules of December, 1888.

Proceedings instituted by originating summons under the Rules of December, 1888, Order LV. rule 13a, for the appointment of a new trustee, constitute a "matter" within the meaning of the Trustee Act, 1850, s. 43, and the Court obtained under that rule jurisdiction to make a vesting order upon a motion in such matter.

In May, 1889, an order was made by the Judge in chambers appointing a new trustee of a will in the place of a trustee who was permanently resident out of the jurisdiction, and vesting the trust property, which comprised Government stock, in the new trustee jointly with the continuing trustee. The order was made upon a summons under Order LV. rule 13 (Rules of December, 1888), which provides that "in all cases in which the Court has jurisdiction to appoint new trustees upon petition, an application may be made to a Judge in chambers by summons and new trustees appointed"; and in making the order the Judge in chambers followed *In re Morris* (1).

An objection was raised by the Bank of England as to the effect of the order before it had been completed, and consequently a motion was, in June, 1889, made in Court, upon which the new

trustee was re-appointed and the vesting order made. The Rules of June, 1889, were not then in force, and the bank still declined to act upon the order, upon the ground that there was no jurisdiction to make a vesting order upon a motion in a matter originated by summons.

An application was now made by motion for a direction to the bank to comply with the order.

Neville, Q.C., and P. O. Lawrence, for the motion.—The matter was properly originated by summons under the Rules of December, 1888, and the Court had jurisdiction to make the vesting order under the Trustee Act, 1850, s. 43, which gives the jurisdiction in "any cause or matter." There is no question of the power to make the vesting order in open Court—*In re Tweedy* (2). Under the new rules the matter is in the same position as if it had been commenced by petition.

Farwell, for parties in the same interest.

Latham, Q.C., and T. Howard Wright, for the Bank of England.—The order of December, 1888, did not authorise the making of a vesting order on a summons. If that had been the case, there would have been no necessity for rule 13a of Order LV. of June, 1889. As the order could not before that rule be made upon a summons, it could not be made upon a motion in a matter commenced by summons. The order to be made under section 43 of the Trustee Act, 1850, must be an order made on petition or motion in a matter commenced in the mode which was recognised at the passing of that Act. The Rule Committee had no power to make the rule relied upon, which is *ultra vires*. The matter is not one of "pleading, practice, or procedure." The general provisions of the Judicature Act, 1875, s. 17, do not override the express provisions of the Trustee Act. They do so neither by express reference nor necessary implication—*Garnett v. Bradley* (3).

KEKEWICH, J.—I certainly shall treat the Order LV. rule 13a of December,

(2) 54 Law J. Rep. Chanc. 331; Law Rep. 28 Ch. D. 529.

(3) 48 Law J. Rep. Exch. 186; Law Rep. 3 App. Cas. 944.

(1) 37 W. R. 317.

In re Jones.

1888, which was in force when the order in question was made—as also I should be prepared to treat the present rule 13a of June, 1889—as properly made. I think that would be my duty, unless perhaps it could be shewn that some slip had occurred, or some formality of a substantial character, and provided by some Act of Parliament binding on the Court, had not been complied with. I am bound to say, as the point has been raised, that to my mind this is strictly a question of procedure, or, as it is expressed in the 17th section of the Judicature Act of 1875, of “practice and procedure.” The objection urged in *Frodsham v. Frodsham* (4), and upheld in the Court of Appeal, was that you could not make a vesting order on a summons, it being a proceeding in chambers, but you must do it by petition, which would be dealt with in Court. The whole objection to the order in *Frodsham v. Frodsham* (4)—and I venture to speak, knowing something about it—was that it had not been made upon a right proceeding. The question discussed was one of procedure, and a substantial question, as this is. It being a question of procedure, it seems to me it comes directly within the Judicature Act, and that it was fully competent to the Rule Committee to make an order altering the procedure. Having expressed that view, I shall not follow Mr. Latham in the argument, which was of a general character, supported by *Garnett v. Bradley* (3), and so forth, because, if these matters are to be discussed, he himself practically admitted they must be discussed in a higher Court. It is sufficient for me to say that I think it is “procedure,” and that the rule on that ground is good. Taking the rule as good, what do I find? I find a rule made that when, as heretofore, new trustees may be appointed on petition, henceforth they may be appointed on a summons in chambers. That is the short effect of rule 13a of December, 1888. That, as I have said, I hold to be good. Then, starting with that, I turn to the Trustee Act, 1850, and I find in section 35 that whenever the Court can make an order for the appointment of new trustees, it can, by the same or any subsequent

(4) 50 Law J. Rep. Chanc. 233; Law Rep. 15 Ch. D. 317.

order, make a vesting order with regard to stock or lands. Therefore, reading the two together, I have this: that the Court may henceforth make an order on a summons in chambers for the appointment of new trustees, and, on the summons, may make an order for the vesting of the stock. Then I must correct that, of course, by the rule in the 43rd section, so far as that has not been modified by the General Rules. And the 43rd section does not say that the vesting order may be made on summons. The 43rd section says that “it shall be lawful for the said Court, either upon the hearing of the said cause, or of any petition or motion in the said cause or matter,” to do so-and-so; and it has been held that, without any further rule, a vesting order may be made on summons. It is unnecessary to discuss that, because a motion was made in this case; but probably the safer construction of the Act would be to say, that as rule 13a did not state that a vesting order might be made on summons, you must read the 35th and the 43rd sections together, and you must find the vesting order to have been made in some way pointed out by the 43rd section. Whether this should be regarded as a “cause” or not, I need not determine. My impression is that, notwithstanding the general rule that an originating summons commences an action, this particular summons is not a cause; but beyond that I will not say, because it may require further investigation. There was no petition presented, and therefore I will not consider that possible alternative; but there was a motion made, not in a cause, as I consider, but in a matter—the matter in which the new trustees were appointed, or were to be appointed; so that I have, at any rate in terms, the Act complied with. I have a proper application for the appointment of new trustees; I have a motion in the matter; and I have an order made on the motion appointing new trustees and making a vesting order. It is difficult to see, if rule 13a of December, 1888, is good, why the order in question is bad. It seems to me that if they wish to dispute the validity of such an order as this, the bank must argue, as they have done and intended to do, that the orders signed by the Rule Committee,

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and now in the General Orders of the Court, are *ultra vires*. If they succeed in that, the whole thing falls to the ground; but, so long as rule 13a is upheld as good, it seems to me I have exactly the course pursued which ought to be pursued, according to sections 35 and 43 of the Trustee Act, 1850, and Order LV. rule 13a, and a motion for a vesting order may be made. The only objection to that is this. It is said that if the order could not have been made on the summons, it could not have been made on a motion in the matter in which the summons was entitled, and that that is the proper construction; and it is argued that if under rule 13a the order could not have been made on the summons, so it could not be made in any motion in the matter. I am far from disregarding that argument; I think it is entitled to much attention; but I put to Mr. Latham this: Supposing an order had been made under the old practice for the appointment of new trustees, on a petition asking only for the appointment of new trustees, would it not be possible to say that you could move in that matter for a vesting order, separately and independently, and after the petition to that extent had been exhausted? He was obliged to admit that it was possible. If it was possible where there was a petition, why is it not possible where there is a summons? A petition for the appointment of new trustees is, if I am right as regards the validity of the order, now displaced in favour of a summons for the appointment of new trustees. The matter is initiated by summons instead of by petition; and if it is properly initiated in that way you have "the matter"; in that matter you can move, and on that motion, it seems to me, the Court can make the order for vesting the stock.

[His Lordship therefore made an order directing the Bank of England to act upon the order made on motion in June, 1889.]

Solicitors—Venn & Co., agents for H. W. Collins, Robinson & Co., Liverpool, for applicants; Freshfields & Williams, for the Bank; Pritchard, Englefield & Co., agents for A. S. Mather, Liverpool, for other respondents.

KEKEWICH, J. }
1889. } *In re METCALFE.*
Nov. 21, 22, 23. } *METCALFE v. METCALFE.*
Dec. 4. }

Will—Construction—Forfeiture Clause—Repugnancy—Absolute Interest—Life Interest—Contingent Life Interest—Bankruptcy at Death of Testator—Annulment of Bankruptcy.

The time for determining whether a forfeiture clause is or is not applicable to a gift under a will, is the time when, independently of all accidental or extraneous causes of postponement of payment or delivery, receipt of the gift by the legatee becomes possible in fact.

A testator gave to a class of beneficiaries—first, absolute interests; secondly, immediate life interests; and thirdly, contingent life interests, in certain property, and he declared that if by any operation of law the interest of any of the beneficiaries should be aliened whereby the same would but for that clause vest in any other person, a certain gift over in respect of that interest should take effect. One of the beneficiaries was a bankrupt at the death of the testator, and the bankruptcy was not annulled until the third year afterwards. The contingent life interest of that beneficiary fell into possession within a year after the testator's death:—Held, that the forfeiture clause was void for repugnancy to the gift of the absolute interest, but operated upon the immediate life interest. Held also, that the forfeiture clause was inapplicable to the contingent life interest.

Semble, if the beneficiary had been in a position to claim annulment of the bankruptcy before the immediate life interest became payable, the forfeiture would not have operated.

Thomas Metcalfe, who died on the 7th of February, 1884, by his will dated the 10th of May, 1864, bequeathed two third parts of certain personalty equally between his children living at his decease who should attain twenty-one years or be married. He also gave certain real and personal property upon trust to permit his wife to receive one third of the rents and profits during her life and widow-

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hood, and to pay the remaining two thirds of such rents and profits to his children living at his decease for their respective lives and the lives or life of the survivors or survivor of them, such payments to commence at the age of twenty-one years or marriage; and he declared that, on the death or second marriage of his wife, the said children should share equally between them the rents and profits during their lives and the lives or life of the survivors or survivor of them.

The testator provided for the forfeiture of shares in certain events by the following clause:—

“Provided also, that if by any act or default, or by operation of law, the part or share, parts or shares, or the whole of the said rents and profits or any other sums of money or interests, limited or bequeathed by this my will in trust for my said wife and children or child, grandchildren or grandchild, or any of them, shall be aliened, charged, or disposed of, either in part or as to the whole of the said several and respective shares and interests, whereby the same respectively would but for this provision vest in or become payable to some other person or persons, other than my said wife, children or child, grandchildren or grandchild, or either of them, then my said trustees or trustee shall, upon such act or default, or upon such operation of law as aforesaid, pay or apply the share or shares, interest or interests, so aliened, charged, or disposed of, or attempted to be so dealt with, as and in manner aforesaid, to and among the others or other of the persons or the person who would have been entitled to the same by survivorship, in remainder or otherwise, under the aforesaid trusts, as in the case of the death or deaths of the person or persons so aliening, charging, or disposing of his, her, or their respective shares and interests, or attempting the same as and in manner aforesaid.”

The testator left him surviving five children, all of whom had at the time of his death attained the age of twenty-one years. The plaintiff, Georgiana Metcalfe, was one of them, and she had been adjudicated bankrupt on the 16th of March, 1882. Another of these children died on

the 17th of January, 1885. After the testator's death, the trustee in the plaintiff's bankruptcy was informed by the testator's executors that the plaintiff's interests were forfeited, and he took nothing in her right under the will. In the year 1885, certain property accrued to the plaintiff from another estate, and that was realised in February, 1887, and the proceeds being sufficient to pay all the creditors in full, the bankruptcy was annulled on the 10th of June, 1887. The present action was instituted by the plaintiff for the administration of the testator's estate, and in order to obtain a decision as to the effect under the circumstances of the forfeiture clause.

Warmington, Q.C., and *T. Bateman Napier*, for the plaintiff.—The forfeiture clause was void for repugnancy, so far as concerned the absolute interests—*Bradley v. Peixoto* (1), *Holmes v. Goodson* (2), *In re Rosher*; *Rosher v. Rosher* (3), and *In re Dugdale*; *Dugdale v. Dugdale* (4).

By the annulment of the bankruptcy, the plaintiff was restored to the position she occupied before the bankruptcy—*Bailey v. Johnson* (5); Bankruptcy Act, 1869, s. 81.

Within one year from testator's death the plaintiff became entitled to sufficient property to pay all her debts in full. The object of the testator in making a gift over was to meet the event of the primary object of the gift being defeated, which, according to our contention, has not happened in respect either of the absolute interest or the life interest—*Lloyd v. Lloyd* (6), *White v. Chitty* (7), *Robertson v. Robertson* (8), and *Ancona v. Waddell* (9).

The forfeiture clause cannot apply

(1) 3 Ves. jun. 323.

(2) 8 De Gex, M. & G. 152; 25 Law J. Rep. Chanc. 317.

(3) 52 Law J. Rep. Chanc. 722; Law Rep. 26 Ch. D. 801.

(4) 57 Law J. Rep. Chanc. 634; Law Rep. 38 Ch. D. 176.

(5) 41 Law J. Rep. Exch. 211; Law Rep. 7 Exch. 263.

(6) Law Rep. 2 Eq. 722.

(7) 35 Law J. Rep. Chanc. 343; Law Rep. 1 Eq. 372.

(8) 55 Law J. Rep. Chanc. 275; Law Rep. 30 Ch. D. 623.

(9) 48 Law J. Rep. Chanc. 115; Law Rep. 10 Ch. D. 167.

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to the contingent life interest, because that did not become vested or payable at the death of the testator. The bankruptcy had been annulled before those interests vested in possession—*Samuel v. Samuel* (10) and *In re Parnham's Trusts* (11).

Neville, Q.C., and *Gaselee*, for the defendants.—The forfeiture clause operated upon all the various interests of the plaintiff. It is not a question of repugnancy, but of limiting a life interest by means of a forfeiture clause. That can be done, and the same principle applies to an absolute interest—*Brandon v. Robinson* (12), *per James, L.J.*, *In re Stringer's Estate*; *Shaw v. Jones Ford* (13). The absolute interest in this case was never *de facto* vested in the plaintiff.

The period for payment or distribution is the point of time at which the applicability of the forfeiture clause is to be tested. That was in this case within a year from the testator's death, more than two years before the bankruptcy was annulled. The forfeiture clause applied then once for all, and to every interest of the plaintiff under the will—*Dorsett v. Dorsett* (14). Upon the forfeiture coming into operation, the gift over took effect, and could not be displaced by a subsequent annulment of the bankruptcy.

Warrington, Q.C., replied.

Cur. adv. vult.

KEKEWICH, J.—Judgment was reserved in this case for the sake of an opportunity of looking more carefully into some of the many authorities cited. That the object of the clause in question is to secure personal enjoyment by the legatee, or rather to provide against the benefits given to him by the will being enjoyed otherwise than by him personally, is common ground to plaintiff and defendants, and is in accordance with all decisions touching the point of construction; but the general

principle admitted, there is some difficulty in applying it to particular circumstances. That difficulty does not arise in this case from the language of the clause, which lends itself readily to such a construction as I have mentioned; nor yet so much from the rest of the will, as from the dates and other facts which have been brought into consideration. I dismissed at the trial the suggestion that some of the benefits given to the plaintiff were not limited or bequeathed "in trust," within the meaning of the clause; and also the argument that the words "shall be" point only to a future bankruptcy or other alienation, and do not cover the actual event of a bankruptcy, which occurred in the testator's lifetime. As thus read, the words would not be consistent with the general principle above stated, and I do not think that either grammatical construction or authority constrains me in that direction. Indeed, the authorities are the other way. *Trappes v. Meredith* (15) and *Gibbons v. Gibbons* (16). The other points argued deserve somewhat more elaborate treatment. It is conceded that the forfeiture clause must be read distributively—that is, as if repeated after each gift in favour of the plaintiff, and made applicable to that gift alone. Thus read, the proviso is incorporated into the gift, which takes a conditional or restricted form, so that what but for it would be a simple bequest, now becomes a bequest determinable on the happening of any one of the events specified. The operation of the proviso on two different sets of gifts is disputed, on the ground, as regards one, that such operation is legally impossible, and as regards the other, that no specified event has occurred. There are unquestionably gifts to the plaintiff of an absolute character—gifts, that is, which, if concerned with land, would create an estate in fee; and the plaintiff says, that to put the forfeiture clause in operation as regards these would be to defeat the original gift by a condition repugnant to it, and therefore void. You cannot limit an estate to a man and his heirs until he

(10) 47 Law J. Rep. Chanc. 716; Law Rep. 12 Ch. D. 152.

(11) 46 Law J. Rep. Chanc. 80.

(12) 18 Ves. 429.

(13) 46 Law J. Rep. Chanc. 633; Law Rep. 6 Ch. D. 1.

(14) 30 Beav. 256; 31 Law J. Rep. Chanc. 122.

(15) 41 Law J. Rep. Chanc. 237; Law Rep. 7 Chanc. 248.

(16) 50 Law J. Rep. P.C. 45; Law Rep. 6 App. Cas. 471.

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shall convey the land to a stranger, because it is of the essence of an estate in fee that it confers free power of alienation, and it has long been settled that the same principle is applicable to gifts of personalty. In favour of the will, which must be read and construed as a whole, you can allow such a proviso to defeat any particular estate, not as operating to take away that which has already been given, but as restricting the quantity of the original gift; but an estate in fee, or its equivalent, an absolute gift of personalty, does not admit of such treatment. There is no occasion to refer to the cases establishing these propositions, many of which were cited in argument. The subject was fully treated in *Holmes v. Goodson* (2), where mention of earlier authorities will be found. As regards, therefore, these gifts, which, according to the terms of the will, independently of the forfeiture clause, vested absolutely, whether in possession or in remainder, on the testator's death—I hold them to be unaffected by the forfeiture clause, not because the language of the clause is inapplicable to them, but because the defeasance is repugnant to the original gifts, and therefore void. In considering the point last treated I have grouped together, as governed by the same rule, estates in possession and in remainder, but when one comes to consider a property given otherwise than absolutely, as for life, a distinction must be taken between these two classes. The distinction is justified by the principle of construction above mentioned, and is the logical outcome of it. The intention of the testator that the legatee shall partake of his bounty, provided only that personal enjoyment be secured, would be defeated if an alienation, whether by act of the party or operation of law, were cancelled before enjoyment becomes possible, and yet that enjoyment were prohibited by the forfeiture clause. It has been held in many cases, to some of which I shall presently refer, that if a bankruptcy, which, if continuing, would have brought a forfeiture clause into operation, has been annulled before any money becomes payable to the legatee, the clause does not come into operation, because the personal enjoyment

does not, in the events which have happened, require to be secured, and this rule is directly applicable to reversionary interests, whether taking effect as remainders or as executory gifts. This is consonant with the decision of the late Master of the Rolls in *Parnham's Trusts* (11), about which it is to be observed that, though he there simply follows other decisions, it was recognised by himself in *Samuel v. Samuel* (10) as based on principle. It is true, as urged on behalf of the defendant, that here the bankruptcy was subsisting at the date of the testator's death, and therefore whatever had been given, whether in possession or in remainder or contingently to the legatee, was immediately transferred to the trustee in bankruptcy, and might have been realised by him for the benefit of the creditors; and it is argued that, therefore, personal enjoyment was without doubt interfered with, so as to bring the forfeiture clause into operation. To yield to this argument would, I think, be inconsistent with the principle on which I have relied. Personal enjoyment points not to vesting in law, notwithstanding that the term "vest" is used as it is in this will, but to enjoyment in fact—that enjoyment which if not interfered with would be accompanied by receipt or payment; and a gift, which according to the terms of the will cannot yet be thus enjoyed, remains for the time in suspense. The moment for determining whether the forfeiture clause is applicable to it or not is the moment when receipt or payment becomes possible in fact. The only other question is one of some practical importance, and respecting which the authorities are, I take leave to say, somewhat perplexing. It is this. What amounts to a cesser of alienation so as to exclude the operation of the forfeiture clause? I have used the word "alienation" as extending to assignments by the act of the party as well as by operation of law, for the same rule must apply to both; but in this case, as in others, we have general alienation by bankruptcy, and it will be convenient to deal with that only. I have no doubt that the period of distribution—that is, the time when payment to the legatee becomes due in law—is the

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time when the enquiry whether a legatee is in a position to receive—that is, himself give a receipt for his legacy, or whether it is payable to his trustee in bankruptcy—must be made and answered. So thought the Master of the Rolls in *Samuel v. Samuel* (10), and Mr. Justice Pearson in *Robertson v. Robertson* (8), and I conceive the decision of Vice-Chancellor Hall in *Ancona v. Waddell* (9) to be in nowise inconsistent. The postponement of payment by some accident, as the difficulty of proving some devolution of title, or the lunacy or death or absence from this country of a trustee, or any other like cause, ought not, I think, to affect the result, and this I understand to have been in substance held by the Judges quoted, as well as by others whose decisions were before them. There may occur difficulties in applying this general rule to some class of cases, but they will be difficulties occasioned by the peculiar circumstances of those cases, not disturbing the rule itself. In this instance the testator died on the 7th of February, 1884, and such gifts as took effect in possession at the testator's death became payable then, or, at least, at the expiration of one year from that date. It matters not which date is taken for the purposes of this case, as the bankruptcy subsisted for more than two years after the death. It is said, however, on behalf of the plaintiff that, although from accidental circumstances, and particularly the failure of the trustee in bankruptcy, the proceedings in bankruptcy were unduly prolonged, yet the estate was solvent, and there was enough to pay the creditors in full: so that whatever was coming to the legatee under the will was really her own, notwithstanding that it could not have been paid without the concurrence of the trustee in bankruptcy. If that had been substantially true, I should certainly have been disposed to hold that the forfeiture clause did not come into operation. Applying, again, the principle which must be applied to find a solution of all these questions, I think that the merely nominal interposition of a trustee in bankruptcy could not be held to defeat personal enjoyment. If, that is, money were payable to a trustee in bankruptcy under such circumstances

that he thereupon, without the happening of any event other than some declaratory or other order claimable by the legatee, became a trustee of that money for the legatee, I should certainly, as at present advised, hold that the money would be personally enjoyed by the legatee just as much as if he had authorised an attorney to receive it on his behalf—in other words, annulment of bankruptcy need not have been formally made so as to prevent the operation of the forfeiture clause, provided there exist the circumstances which entitle the legatee to claim annulment as a matter of right, and that although some account may have to be taken, or some payments to creditors or others have to be made, before annulment can be perfected. That I apprehend to be the meaning of the Vice-Chancellor's decision in *Ancona v. Waddell* (9); nor do I understand Mr. Justice Pearson to have dissented from that view in *Robertson v. Robertson* (8), which he distinguished in its circumstances from that case, as well as from *White v. Chitty* (7). I cannot, however, give the plaintiff the benefit of any such ruling here. The bankruptcy was not annulled until the 10th of June, 1887, and the assets sufficient to procure that result were not realised until February, 1887. Nay more, those assets, which consisted of a reversionary share under another will, did not fall in until January, 1885; and, having regard to the small eventual margin, I cannot even surmise that they were then sufficient to pay the creditors in full and the costs of liquidation. I hold, therefore, that any interests to which the plaintiff was entitled under the will at the date of the testator's death, and which according to my ruling on other points fall within the operation of the forfeiture clause, were not excluded from that operation by the annulment of his bankruptcy. A point was raised on the 81st section of the Bankruptcy Act, 1869 (the Act applying to this particular case), the language of which is for this purpose the same as the 2nd sub-section of section 35 of the Bankruptcy Act, 1883. It is provided that the property of a bankrupt shall on annulment vest in such person as the Court may appoint, or, in default of such appoint-

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ment, revert to the debtor for all his estate and interest therein. It was said that the effect of this provision is in some way to conflict with such a forfeiture clause as is found in this will, and to give back to the debtor, as his own, all that he would have been entitled to had there never been any bankruptcy. Such a construction would, to my mind, be altogether unreasonable, and it is not justified by the language of the Act. I think that that clause was intended to operate only as between the debtor on the one hand and the trustee or other persons claiming title under the bankruptcy on the other, and it confers on the debtor, as from the date of annulment, a good title to his property, so that he may convey or give a good discharge for the same without the concurrence of the trustee in bankruptcy; but it was not intended to affect the title of other persons claiming independently, as under such a forfeiture clause as we have here. Having regard to the way in which the case was presented to the Court, and to the absence of any suggestion that the plaintiff cannot obtain from the trustees or others that to which she may be in law entitled, notwithstanding that there may have been partial distribution of the testator's estate, I have thought it more convenient to deal with the question raised generally, and not to point their application to the particular properties disposed of by the will. Probably it will be sufficient to embody my ruling in declarations, and to give liberty to apply.

Solicitors—Harper & Battcock, for plaintiff;
Thompson & Groom, for defendants.

[IN THE CHANCERY DIVISION AND IN
THE COURT OF APPEAL.]

KEKEWICH, J.

1889.

April 4, 10.

COTTON, L.J.

BOWEN, L.J.

FRY, L.J.

Dec. 7, 9, 10.

TOMLINE v. LUCE.

Mortgage—Sale under Power—Misdescription—Compensation to Purchaser—Liability of Mortgagee.

A mortgagee who, in the exercise of his power of sale, personally or by his agent commits a mistake, such as a misdescription of the property, whereby a material diminution is caused in the price realised, is liable to the parties interested in the equity of redemption for the loss so occasioned; but the amount of that diminution is not necessarily the measure of the compensation payable by the mortgagee.

*So, where mortgaged property was sold for 20,800*l.*, and, in consequence of a misstatement in the particulars by the auctioneer employed by the mortgagee, a compromise was come to between the purchaser and mortgagee, which the Court held to be a reasonable one, whereby 895*l.* was allowed to the purchaser out of the purchase-money,—Held, by the Court of Appeal (reversing the decision of KEKEWICH, J.), that that sum was not necessarily to be taken as the measure of compensation to be allowed as between the mortgagee and the owners of the equity of redemption, and an enquiry was directed whether the property would have sold for any, and (if any) what sum in excess of 19,905*l.* (the original purchase-money less the sum allowed to the purchaser), in case the property had been sold without the misstatement in the particulars.*

The plaintiffs, as second mortgagees of a building estate, claimed an account against the defendants, the first mortgagees, on the footing of wilful default, and asserted that they were entitled to charge the defendants with a sum of 895*l.*, which they ought to have received upon a sale of the mortgaged property under the power contained in their security. The

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defendants sold the property by auction in February, 1886, and the auctioneers who prepared the particulars inserted therein a statement that "all the roads on the property are constructed in the best possible manner, are kerbed and sewered, and there is perfect main drainage."

The statement as to the roads was after the sale found to be erroneous, and the purchasers refused to complete without compensation. A compromise was made, which was held by the Court, in a preliminary judgment on the present trial, to be a proper compromise to be made by the vendors as between themselves and the purchasers, and whereby the purchasers were allowed 895*l.* as compensation.

Neville, Q.C., and *Charles Browne*, for the plaintiffs.—The defendants are liable for the error in the particulars, and for the loss in price which resulted from it. A mortgagee, although not a trustee of his power of sale, is trustee of the price of the property sold under the power. In this case there was a binding contract for the amount actually received, *plus* the 895*l.*, and the defendants were responsible for the carrying out of that contract.

They cited *Marriott v. The Anchor Reversionary Society* (1).

Warmington, Q.C., and *G. Harris Lea*, for the defendants.—There is no such liability as claimed. The defendants have been guilty neither of fraud nor of gross negligence. There is no negligence in allowing compensation. A mortgagee selling is not bound to be more accurate in the description of property than any other vendor. Here the defendants acted without negligence, and reasonably, having regard to their legal rights under the circumstances—*In re Terry and White's Contract* (2). The compromise was reasonable, so that the true value of the property was in fact realised.

Neville, Q.C., in reply.

Cur. adv. vult.

(1) 3 De Gex, F. & J. 177; 30 Law J. Rep. Chanc. 571.

(2) 55 Law J. Rep. Chanc. 345; Law Rep. 32 Ch. D. 14.

KEKEWICH, J. (April 10).—The relations of mortgagor and mortgagee are not easily defined. A mortgagee is not in any proper technical sense a trustee of his power of sale, or any like powers, for the mortgagor; and to say that he occupies a fiduciary position towards the mortgagor is, if true, wanting in precision. A power of sale is given to a mortgagee in order to enable him to realise his security, and he necessarily exercises it to that end. But he is not the owner of the estate, and therefore cannot sell, as an absolute owner might, regardless of all other persons than himself. He owes a duty to the person entitled to the equity of redemption, or, as expressed by Lord Justice Lindley in a pregnant passage of the judgment of the Court of Appeal in the recent case of *Farrar v. Farrars & Co. (Limited)* (3), he is under obligations to him. What restriction does this duty place on his actions? What is the limit of this obligation? Granted that all conditions calling the power of sale into operation have been fulfilled, a mortgagee is entitled to select his own time and mode of sale, and the Court will not interfere with his discretion except under circumstances which could be relied on to prove oppression, or otherwise impeach the honesty of the transaction. He is entitled to employ agents. He may instruct a solicitor, and through him, if practising in the country, a London agent. He may, through that solicitor or directly, instruct surveyors, auctioneers, and others, whose services are reasonably required for the proper conduct of the sale. He may, through the solicitor, instruct counsel to settle the conditions of sale. Whatever is done by him through an agent must be taken to be done by himself, and, as between him and the mortgagor, he must be responsible for it. But he does not guarantee the efficiency of his agents, and so long as he selects agents presumably competent he cannot be made liable for errors in judgment. Nor do I think he can be made liable for error in matters of detail not seriously affecting the success of the sale or the price realised.

(3) 58 Law J. Rep. Chanc. 185; Law Rep. 40 Ch. D. 410.

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On the other hand, I think that if the mortgagee is guilty, directly or indirectly, of a serious blunder, inducing a failure to sell or a large diminution of the price realised, the mortgagor can hold him responsible for that; and it is no answer for him to say that the blunder was no fault of his own, but was that of an agent in whom he properly placed implicit confidence. The mortgagee must in such a case be left to his remedy against his agent. This being what I understand to be the law applicable to such a case as this, it remains to apply it, and in doing so I must be careful not to cast blame on any person in particular. I decide the case only as between mortgagor and mortgagee, leaving any subordinate responsibility out of the question. The mortgaged property, being building land, was put up for sale by auction in lots, and in the particulars there is this statement: "All the roads on the property are constructed in the best possible manner, are kerbed and sewered, and there is perfect main drainage." It turns out that to some extent this was an erroneous statement, and that the roads were not completely kerbed. Obviously the error was one of some importance, and having regard to the extent of the property and the price paid, the error was, in fact, equivalent to a considerable sum. I have already held that the mortgagees compromised the purchasers' claim prudently, and that no blame can attach to them or those acting on their behalf for having allowed the sum of 895*l.* as a deduction from the purchase-money in respect of this misstatement; and, that being so, it follows that, as against the mortgagees, the value of the misstatement must be taken to be this 895*l.* It was a statement of a matter of fact, and the real fact could have been without difficulty, and ought to have been, ascertained. There is no question of error in judgment; nor can it be said that this is a small matter, as regards which the mortgagor is not entitled to expect anxious accuracy, but must be content if the care of a reasonably prudent man is observed. It is often difficult to draw the line separating defaults of that class from those of a more serious character, but the present case

seems to me to fall distinctly within the latter category, and the mortgagees must be held responsible for the error to him who, as standing in the shoes of the mortgagor, is most directly affected by it—that is, the plaintiff as second mortgagee. Therefore, in taking the accounts between the first and second mortgagees, the first mortgagees must be charged with this 895*l.* as part of the purchase-money which they have, or rather ought to have, received.

From this decision the defendants appealed.

Warmington, Q.C., and *G. Harris Lea*, for the appellants, urged that the defendants had acted *bona fide*, and that, therefore, the compensation made to the purchaser should not be charged against them. The mistake had not, in fact, caused any loss, the only result having been that a higher price was obtained than otherwise would have been.

Neville, Q.C., and *Charles Browne*, for the plaintiff.—The Judge below only decided that the appellants were liable for the misstatement of their agent. The question of the actual amount payable for damages was never argued; it was assumed that it was either that sum of 895*l.*, or nothing. The onus lay on the appellants to shew that a smaller sum should be allowed; but the plaintiff does not object to an enquiry being directed as to what was the actual loss occasioned by the mistake.

In addition to the cases cited below, they cited *In re Chifferiel*; *Chifferiel v. Watson* (4).

G. Harris Lea, in reply, consented to the suggested enquiry.

COTTON, L.J.—This is an appeal by the defendants against a judgment of Mr. Justice Kekewich, and the defendants are appealing as to the exercise of a power of sale contained in their mortgage. They got for the property a bid, and a contract was made for a sum of 20,800*l.* Unfortunately, the conditions of sale contained

(4) 58 Law J. Rep. Chanc. 263; Law Rep. 40 Ch. D. 48.

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a statement by the auctioneers of importance. It was this—that it being building land, and to a certain extent prepared for building, “the roads on the property are constructed in the best possible manner, are kerbed and sewered, and there is perfect drainage.” The purchaser found out that that was not correct, and he contended that he was entitled to rescind unless some allowance was made for the misstatement, and after some negotiation between the parties a sum of 895*l.* was allowed to be deducted from the purchase-money. The defendants, therefore, did not get the whole of that sum, but only 19,905*l.*, and the plaintiffs, who are second mortgagees—whom, therefore, we may treat as owners of the equity of redemption—said that that ought not to be allowed; that that 895*l.* ought to be struck out and disallowed; and they put it in this way by their pleadings, and I suppose by their argument—that the defendants, the first mortgagees, were answerable for that 895*l.* on this ground—that they were answerable for what they received, or what but for their wilful default they might have received. The Judge has found that that sum was a sum reasonably and properly allowed by the first mortgagees, in order to avoid any contest with the purchaser. I do not see how on that footing, and on the contention of the plaintiffs, that sum of 895*l.* could be disallowed to the first mortgagees, as, in fact, it has been disallowed by Mr. Justice Kekewich by the judgment which he gave—on what exact ground he disallowed it I cannot understand. Probably he was led to that judgment by the contention on the one side and on the other, because the defence seems really to have been very much, if not entirely, directed to this—that the mortgagees selling under their power employed a competent auctioneer, and were not answerable for any blunder which the auctioneer committed. There they were wrong, and that point I think was not argued before us; but I think probably that in Mr. Justice Kekewich’s judgment, he was led in that matter by the two grounds or cases which are taken on both sides—on both the plaintiffs’ and defendants’ sides, but cer-

tainly we cannot agree with that judgment as being a correct statement of the law. What we think is this, that the mortgagees when they sold, there being that blunder made by the auctioneer, were answerable for any loss which was occasioned by that blunder. It may be that there was none. It may be that there was considerable loss occasioned by it, because of course, as Mr. Justice Kekewich says—and I think rightly—in an estate like this the question whether the roads were properly made throughout, and whether the things stated to have been done had been done, was an important matter, and he finds as against the mortgagees the value of the misstatement to be 895*l.* I think the value of the misstatement was this—What would have been given by a purchaser for the property if it had been properly described—that is to say, if the fact that the roads had not been kerbed and sewered had been stated? In other words, the difference between 20,800*l.*, and that which would have been given if the property had been properly described. The loss occasioned is a matter of fact, and in my opinion, therefore, the judgment is not right in treating the defendants—the mortgagees—as answerable for this 895*l.* as a sum which, but for their wilful default, they might have received. That being so, we must disaffirm the judgment.

The plaintiff, when he found that we intimated our opinion against the view taken by Mr. Justice Kekewich, asked for an enquiry as to what the damages were, and this was not objected to on the other side. What ought to be done we think is to direct an enquiry, and Lord Justice Fry has prepared and will read the terms of the order which we are prepared to make. We must ascertain what really was the loss occasioned by this misstatement. In our opinion the mortgagee exercising the power of sale is answerable for that loss. Lord Justice Fry has also prepared minutes dealing with the costs. The view taken in those minutes is, I think, a correct one. The first mortgagees have their costs up to and including the trial; then this enquiry will be directed and his Lordship has framed the minutes in such a way that it will not be necessary

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for the matter to come back to us, but in accordance with the result of the enquiry the costs of the enquiry will be borne.

[FRY, L.J., read the minutes, which are appended below.]

BOWEN, L.J.—I am of the same opinion as Lord Justice Cotton. I agree with the order as framed by Lord Justice Fry. I do not agree with the judgment of the Court below, or with the reasoning of it. I do not think that reasoning is the proper line of reasoning to apply to the facts of this case; and as the case below has been reported as an authority with respect to the measure of compensation, I think that that case, and the reasoning of it, must be taken to be overruled, and to be no longer an authority so far as it stands upon the records of the Court. But, on the other hand, we must recollect that this action has got into a tangle, owing, I think, to the way in which it was presented to Mr. Justice Kekewich at the trial, and by which he was led to adopt the line of reasoning which turns out really not to be applicable to the case. I agree that the true measure of damages—or the true measure of allowance, I ought to say—is that which has been stated by the Lord Justice and embodied in the order. The only point upon which I have some hesitation is this: I am not certain, if I had been sitting by my own unaided—I will not say light—but twilight, that I should have come to the same conclusion as to the costs of the trial below. It is a matter with which my brothers are so infinitely better fitted to deal with than I am, that I willingly yield my view on this point to theirs.

FRY, L.J.—I am of the same opinion. It does not appear to me that the reasoning of Mr. Justice Kekewich can be maintained; I am not able myself to follow it. I think the learned counsel who appeared for the respondents are quite right in the course which they took in not insisting upon maintaining the judgment as it stands. Then arises the question of enquiry, and as to this we were relieved of much difficulty by the appellants' counsel not objecting to that

enquiry. The case was evidently in a very tangled condition, partly by reason of the way in which it had been conducted in the Court below, and partly by reason of the admissions which seem to have been made on both sides; but, under the circumstances of the case, I think the minutes of the judgment, which I have already read, are right ones for this Court to pronounce.

With regard to the question of costs in the Court below, I agree with Lord Justice Cotton—and for this reason. It appears to me that the plaintiffs came with an entirely false view of their case, their pleadings stating a claim to 895*l.* as a specific disallowance, and they claimed to have an account taken as against the first mortgagees upon the footing of wilful default. They not only put that forward in their pleadings, but they seem to me to have put that as a case before the learned Judge, and I think they were entirely wrong in this case until the moment when Mr. Neville asked for the enquiry in lieu of the disallowance of 895*l.* I think, therefore, that they were absolutely wrong at the hearing before the learned Judge, and ought to pay the costs up to and including that hearing. The subsequent costs caused by the enquiry we deal with by making them follow the event. Under the circumstances, no costs of the appeal.

Order.—The plaintiff, by counsel, admitting that the disallowance of 895*l.* cannot be maintained, and asking in lieu thereof for the enquiry hereinafter directed—the defendants not objecting to such enquiry—vary the judgment of Mr. Justice Kekewich, and, as varied, let the judgment stand as follows:—This Court doth order that the following enquiry and accounts may be taken—that is to say: First, an enquiry whether the lots 2, 3, and 4 would have sold for any and (if any) what sum in excess of the sum of 19,905*l.* (being the sum of 20,800*l.*, less 895*l.*), in case the same had been sold without the misstatement contained in the particulars in the pleadings mentioned. Secondly, an account of what on the 5th of May, 1887, was due to the defendants under and by virtue of the

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indentures of mortgage dated the 26th of October, 1883. Thirdly, an account of the defendants' costs of this action up to and including the hearing before Mr. Justice Kekewich. Fourthly, an account of the proceeds of sale of the hereditaments comprised in the said indentures of mortgage received by the defendants, or by any other person or persons to the order and use of the defendants. And this Court doth declare that in case it shall appear upon the enquiry No. 1 that the said lots would have sold for any sum in excess of the sum of 19,905*l.*, then the costs of the said enquiry are to be borne by the defendants; but if it shall appear that the lots would not have sold for any sum exceeding the sum of 19,905*l.*, then the said costs are to be borne by the plaintiff. Let the smaller of the two following sums be deducted from the larger one, and the balance thereof certified—that is to say, first, the amount of the proceeds of sale, and certified on account No. 4, together with the sum, if any, which may be certified in answer to enquiry No. 1; and, secondly, the sum due on the indenture of mortgage as certified in answer to account No. 2. Let interest be computed upon the said balance at five per cent. per annum from the 3rd of May, 1887, and certified accordingly, and let the plaintiff be charged with the amount of the account No. 2 (that is, the costs up to and including the hearing); and to or from the said balance and interest let the costs of the said enquiry be added or deducted as the case may require, and let the ultimate balance, according to all the said declarations and directions, be certified. Liberty to apply in chambers for payment of such balance, and in respect of any costs not dealt with by this order. No costs of the appeal.

Solicitors — Thairlwall, for plaintiffs; Lane, Monro & Soutter, for defendants.

NORTH, J. }
1889. }
Oct. 26. }

In re HARRISON.
TOWNSON *v.* HARRISON.

Administration—Covenant by Testator to pay Annuity—Personal Estate insufficient—Adjustment of Accounts between Tenant for Life of Real Estate and Remaindermen.

*A testator devised all his real estate (except two specified estates) to trustees, upon trust for his son for life, with remainder in strict settlement, and he devised the two specified estates upon similar trusts in favour of his two daughters respectively for life, with remainders to their respective issue. By a deed executed on the marriage of his son, the testator covenanted to pay to the son or his wife during their joint lives an annuity of 700*l.* The testator's personal estate proved insufficient to provide for the annuity:—Held, that the three real estates ought to contribute towards payment of the annuity rateably according to their respective values; and that each tenant for life would have a charge upon the corpus of the estate in respect of the proportion of the annuity paid by him or her, but would have to keep down the interest on the amount so charged.*

Adjourned summons.

Isaack Harrison, by his will dated the 3rd of July, 1871, after appointing the plaintiff and two other persons trustees and executors of his will, and bequeathing some pecuniary legacies and annuities (which he charged on his real estate), devised all his real estate (except his estate at Gaddesby, and the Gilsoes) unto and to the use of his trustees in fee, upon the trusts therein declared—namely, upon trust, out of the rents and profits of the said real estate, to pay the several annuities thereinbefore charged thereon, and then upon trust to pay certain quarterly sums thereafter specified for the benefit of his son Isaac Henry Harrison; and, subject thereto, his said real estate was to be held in trust for his said son during his life, with remainder in trust for his first and other sons successively in tail male, with divers remainders over. And the testator devised all his real estates situate at Gaddesby unto and to the use of his trustees in fee, in trust for his daughter

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In re Harrison.

Beatrice Mary during her life, with remainder in trust for her first and other daughters successively in tail male, with divers remainders over. And the testator devised all his real estate at or near Gilsoes and Leicester Frith, and known as his Gilsoes estate, unto and to the use of his trustees, upon trust for his daughter Catherine Maria during her life, with remainder in trust for her first and other sons successively in tail male, with divers remainders over. And the testator bequeathed the residue of his personal estate upon trust for his son and his two daughters.

By a deed dated the 20th of November, 1882, executed shortly before the marriage of the testator's son Isaac Henry Harrison with Mary Marfitt, the testator, in consideration of the then intended marriage, for himself, his heirs, executors, and administrators, covenanted with the son, his executors and administrators, that, if the intended marriage should take place, he, the testator, his heirs, executors, or administrators, would during the joint lives of the son and Mary Marfitt, or until the son should become bankrupt, &c., pay unto such one of them the son or Mary Marfitt as the testator, his heirs, executors, or administrators, should in his or their discretion think fit, the annual sum of 700*l.*, at the times and in the manner as therein mentioned. The deed also contained a covenant by the testator with his son to pay him an annuity of 700*l.* a year during his life or until he should become bankrupt, &c., if he survived Mary Marfitt and there should be any issue of the intended marriage; and also a covenant to pay Mary Marfitt an annuity of 500*l.* during her widowhood if she survived the son and there should be any issue of the intended marriage.

The annuities were to be substitutional, and not cumulative.

The testator died on the 6th of June, 1887, and his will was proved by the plaintiff alone, the two other trustees and executors having renounced probate of the will and disclaimed the trusts thereof.

This was an originating summons taken out by the sole acting trustee and executor, as plaintiff, against the testator's son, Isaac Henry Harrison, and his wife; Isaac

Harrison, an infant, their eldest son; and the testator's two daughters, Beatrice Mary and Catherine Maria, as defendants.

The summons asked for the determination of (among others) the following questions:—

Whether the several annuities respectively covenanted to be paid by the testator by the deed of the 20th of November, 1882, ought to be valued, and upon what principle, and how? How and in what manner the amounts at which the annuities shall be valued respectively ought to be raised, and out of what part or parts of the testator's estate, and in what proportions, and how?

Nothing had been paid in respect of the annuity of 700*l.* since the testator's death. The last payment in respect of such annuity was made on the 20th of May, 1887.

There was evidence that, after providing for the testator's debts and other liabilities, there would only remain the sum of 1,500*l.*, representing personal estate, with which to satisfy the annuitant's claim.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the plaintiff.—These annuities are debts due from the testator's estate, and ought to be paid, like any other debt, out of the testator's estate, according to the rule laid down in *Allhusen v. Whittell* (1). The personal estate being insufficient, the annuities are payable out of the real estate; but, as between the tenant for life and the remaindermen, the liability must be apportioned.

They referred to *In re Muffett; Jones v. Mason* (2), *Gates v. Gates* (3), and *Cranley v. Dixon* (4).

Everitt, Q.C., and *Ingle Joyce*, for the son and his wife.—The tenant for life in this case is tenant for life of a specifically devised estate, and is entitled to the income of the whole estate, except so much as has to be resorted to for the

(1) 36 Law J. Rep. Chanc. 929; Law Rep. 4 Eq. 295.

(2) 57 Law J. Rep. Chanc. 1017; Law Rep. 39 Ch. D. 534.

(3) 28 Beav. 639; 29 Law J. Rep. Chanc. 87.

(4) 23 Beav. 512; 26 Law J. Rep. Chanc. 529.

In re Harrison.

payment of the testator's debts; and if these are paid out of income, the tenant for life is entitled to a charge on the *corpus* for the amount so paid. There is no necessity for a valuation. In *Gates v. Gates* (5) there was no valuation.

Napier-Higgins, Q.C., and *Woodroffe*, for the daughter Beatrice.—The question is, what ought to be the charge on the *corpus* when the tenant for life pays the annuity, having regard to the fact that he ought only to pay what ought not to be borne by *corpus*. He ought only to lose the interest upon the capital sum which is charged. The proper course to adopt would be to give the tenant for life a charge upon the *corpus*, with four per cent. in respect of each payment that is made by him.

B. B. Swan, for the daughter Catherine. *Cozens-Hardy, Q.C.*, replied.

NORTH, J.—I think the proper course to adopt is this. The tenant for life is tenant for life of the estate, and is entitled as such to the whole income of it; but there are certain contingent debts of the testator, created by deed in his lifetime in the shape of life annuities which may become payable. Some payments have become due since the testator's death; the annuitants are still alive, and other payments may have to be made to them. It seems to me that each payment of these annuities was a debt of the testator, and a debt payable by his estate. It ought to be paid first out of his personal estate; but, his personal estate being insufficient, the deficiency must be borne by the three real estates which he has left, and there being nothing to throw the burthen upon one of those estates rather than upon another, all of them being equally real estate of the testator, the three estates must contribute towards payment of the annuities rateably, according to their respective values. That, of course, does not bind the annuitant; he is entitled to be paid out of the real estate of the testator—not out of the capital or the income, but out of the estate. Probably he would have to resort to the capital if he had to take legal proceedings, because though he might possibly ask for a receiver of the rents, he would not be likely to get

a receiver appointed against the tenant for life unless he were also taking steps to realise the capital. But his legal claim is against the whole estate, not distinguishing between capital and income.

In what proportions, then, are the persons who are interested in the estate as tenants for life and remaindermen respectively, to pay? The principle to be applied will be the same *qua* each tenant for life, as if there were only one tenant for life of the whole estate, and it will be more simple to state it with reference to such a case. The tenant for life is entitled to the income of the estate for his life, and, so long as there is nothing to intercept it, it ought to be paid to him. But at the end of the year a payment of the annuity will become due. It will become payable to the annuitant out of the estate. If the rights of the parties were worked out strictly, it might be necessary to sell a sufficient part of the estate and to apply the proceeds in paying the annuity, leaving the estate diminished by the part thus sold, and the tenant for life in receipt for the future of the income of the diminished estate. The same thing in principle would have to be done at the end of each year, so long as the annuitant was living to receive his annuity. But I do not think the tenant for life is entitled to have the estate sold bit by bit in that way. I think, however, that he would, if he paid the annuity, be entitled to stand in the place of the person whom he paid as against the estate, and to have a charge upon the estate in respect of the sums which he so paid. Therefore, for the first year after the testator's death (assuming, for convenience, that the annuity is under the deed payable at the end of each year), the tenant for life would receive the whole income of the estate (I am assuming that all the other debts of the testator and his testamentary expenses have been provided for out of his personal estate); at the end of that year 700*l.* would have to be provided for paying the annuitant, and the tenant for life would pay it, and he would then be entitled to stand in the place of the annuitant. He would have a charge upon the estate in respect of a sum which he had thus paid. As tenant for life he would still be entitled to receive the whole income of the

In re Harrison.

estate; but as tenant for life he would have to pay out of the income to himself, as incumbrancer, interest upon the sum which he had thus provided. In other words, he would pay the 700*l.*, which would then become a charge upon the estate; but he, during his life, would have to keep down the interest upon it. At the end of the second year the same thing would be done again, and the charge of 700*l.* would become a charge of 1,400*l.* The tenant for life would have a charge of 1,400*l.*, and at the end of the next year he would have paid two years' interest on half of it, and one year's interest on the other half, and so on, so long as the annuity lasted. That, as it seems to me, is the principle on which the matter should be worked out. The decision in *Allhusen v. Whittell* (1) does not furnish me with much assistance in the present case, for it was based on the principle that the tenant for life of the residue of the testator's estate is not tenant for life of the whole estate, but of the whole estate *minus* something, and that something must be ascertained before it can be said of what he is tenant for life. He is not tenant for life of the whole estate, and he is not entitled to receive the whole income, and the rule in *Allhusen v. Whittell* (1) was adopted as a convenient and fair rule—for ascertaining the share of the estate which really represented residue, and of which the tenant for life was entitled to receive income, as distinguished from the entire estate. That rule, in my opinion, does not apply to a case like the present.

Solicitors—Kingsford, Dorman & Co., agents for Freer, Blunt & Co., Leicester, for plaintiff; Robinson, Preston & Stow, agents for Berridge & Milcs, Leicester, for defendants.

KAY, J. }
1889.
July 29. }

In re WALL.
POMEROY v. WILLWAY.

Charity—Gift to Persons “not under Fifty Years of Age”—“Aged”—“Deserving”—43 Eliz. c. 4.

A gift of the interest of a fund to be divided among an equal number of men and women not under fifty years of age attending a particular place of worship—“a tablet to be placed in the chapel to give information of gift: otherwise how should the deserving know of it?”—Held, a good charitable gift for the benefit of “aged” persons within 43 Eliz. c. 4.

Originating summons.

Thomas Phillipps Wall, who died on the 28th of April, 1888, by his will dated the 4th of June, 1886, gave the following direction with respect to a sum of 2,500*l.*, which he desired should be invested in Consols:—

“I desire the interest of this 2,500*l.* absolutely and for ever to be divided into annuities of 10*l.* each, and to be paid half-yearly to an equal number of men and women, not under fifty years of age, Unitarians, and who attend Lewin's Mead Unitarian Chapel or Chapels in Bristol; a tablet to be placed in Lewin's Mead to give them information of gift: otherwise how should the deserving know of it?”

The question was whether or not the above gift was charitable, and the executor took out this summons to determine this among other questions.

Christopher James, for the executors.

Ingle Joyce, for the Attorney-General.—

This is a good charitable gift to persons who, within the terms of 43 Eliz. c. 4, are “aged.” A gift to “widows and orphans” was held to be good in *The Attorney-General v. Comber* (1). There is no need to use the word “poor” or an equivalent—*Thompson v. Corby* (2). See also *Collinson v. Pater* (3). The Court prefers to give an effectual meaning to the words rather than let the money go to the next-of-kin. [He was stopped by the Court.]

(1) 2 S. & S. 93.

(2) 27 Beav. 649.

(3) 2 Russ. & M. 344; 9 Law J. Rep. Chanc. (O.S.) 158.

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O. Leigh Clare, for the widow.—There must be some element of charity in the gift. Mere general benevolence will not support a gift as charitable—*Morice v. The Bishop of Durham* (4). There is all the difference between “charitable or deserving objects” and “charitable and deserving.” Pearson, J., in *In re Sutton* (5) thought the term “deserving” was too vague. And here that word is not used in the gift itself, but only in subsequent words referring to the gift. In *Thompson v. Corby* (1) the word “aged” is used. In *Collinson v. Pater* (3) there was really no judgment on the question at all; and in *Morice v. The Bishop of Durham* (4) it is distinctly laid down that it is not sufficient for a general benevolent intention to be expressed, but that the gift must be strictly charitable.

Ryland, for the next-of-kin, supported *Clare*.—In *Kendall v. Granger* (6) it was laid down that there must be no option in the trustees except to apply the fund to strictly charitable purposes.

Ingle Joyce, in reply.—The only effect of *Kendall v. Granger* (6) is that the term “general utility” is too vague; and in *In re Sutton* (5) the only point to be gathered is that “deserving” need not necessarily imply a charitable gift.

KAY, J.—I confess I think that this is a matter of some difficulty; but, looking at the words of the statute, which expressly mentions “aged” people, I do not see how I can avoid the conclusion that this is a charitable gift.

No doubt it is perfectly well settled that mere benevolence is not charity. In order to constitute a benevolent gift a charitable one also, you must find that it contemplates some of the objects mentioned in the statute, or other analogous objects, which have by a long series of decisions been determined to be charitable. This is a gift to persons not under fifty years of age, who are Unitarians, and attend Lewin’s Mead Unitarian Chapel or Chapels in Bristol. I confess to having the strongest possible reluctance to establish the gift,

and it is because I had to struggle against that feeling that I heard the arguments on both sides. Here is a man who on the face of his will shews that he has a wife, but gives her nothing—not a farthing—either by his will or codicil, but gives practically all he has, except his wife’s clothes, in what he calls charity. If I had the power of legislation I would not allow such a will to take effect. But I have nothing to do but to construe this will. I find in the statute of Elizabeth that one of the classes of persons who are objects of charitable gifts are “aged persons.” Well, without straining the words exceedingly, when there is a gift to persons who are not under fifty years of age, I cannot say that these persons are not “aged” within the statute; and therefore I think there is enough in this will to indicate that the objects of the gift are to be aged persons, members of one or other of these congregations, and in dealing with such a trust I conceive that the duty of the trustees would be to give the benefit of it to the deserving of that class; and although “deserving” of itself would not indicate that the people were to be poor, yet when I couple all these facts together—that they are to be over fifty, and deserving members of this congregation of Unitarians, and that the annuities are only 10*l.* each—I cannot help thinking that the true construction of these words must be that poor members of this congregation who have passed that age, and are less able to provide for themselves in life than they would be if they were younger, are intended to be benefited. I hold, therefore, that the gift is charitable and good, so far as the pure personal estate of the testator is concerned. So far as relates to the impure personalty, the gift will, of course, fail, and go to the next-of-kin.

Solicitors—Clarke, Woodcock & Ryland; Hare & Co., agents for Solicitors to the Treasury
Meredith, Roberts & Mills, agents for Vassall, Parr, Osborne & Ward, Bristol.

(4) 9 Ves. 399.

(5) 54 Law J. Rep. Chanc. 613; Law Rep. 28 Ch. D. 464.

(6) 5 Beav. 300; 11 Law J. Rep. Chanc. 405.

KAY, J. }
1890. }
Jan. 14. }

FIELD v. HOPKINS.

Mortgage — Solicitor — Future Costs — Construction — Professional Charges by Mortgagee — Special Contract — Collateral Advantage — Redemption.

By an indenture made in 1885 between two mortgagors and two mortgagees, of whom one was an auctioneer and the other a solicitor (after reciting an agreement that the mortgagees should be entitled to make the same charges and receive the same remuneration respectively for all business done by them respectively "in or about these presents" as they would have been entitled to make and receive if they had not been mortgagees), the mortgagors covenanted to pay to the mortgagees the principal moneys advanced, and every other sum which might thereafter be advanced or paid by the mortgagees or either of them to, "or become owing to them or him by, the mortgagors or either of them"; and the mortgagors thereby charged the lands comprised in the mortgage with payment of these sums and interest. The solicitor mortgagee in foreclosure proceedings claimed to add to the principal moneys certain costs owing to him by the mortgagors respectively for business done after the date of the mortgage-deed and not in connection therewith. He also claimed to be allowed remuneration paid to the auctioneer mortgagee for a report and valuation of the property made on the occasion and for the purpose of the mortgage:—Held, that the solicitor's future costs were not included in the security. Held also, that the remuneration paid to the auctioneer mortgagee must be disallowed, notwithstanding the special contract contained in the recital.

Adjourned summons.

By an indenture dated the 11th of September, 1885, and made between Mary Ann Hopkins, widow, and Elizabeth Andrews, widow (thereinafter called the mortgagors), of the first part, and John Mark Leeder, an auctioneer, and Henry Harrison Field, a solicitor (thereinafter called the mortgagees), of the other part, after reciting two existing mortgages,

and the transfer of these mortgages to the mortgagees; and after reciting that the mortgagees took over both transfers of the said mortgages at the request of the mortgagors, and on the terms that they should advance the money necessary therefor at the rate of 4l. 10s. per cent. per annum, to be paid quarterly, and that on the other hand they should be entitled to make the same charges and to receive the same remuneration respectively "for all business done by them respectively in or about these presents" as they would have been entitled to make and receive if they had not been mortgagees; and after reciting that it was part of the arrangement that the mortgagees should lend the further sum of 282l. to the mortgagors, it was witnessed that in consideration of the payment of the two mortgage debts and the further advance (out of moneys belonging to the mortgagees on a joint account), the mortgagors did, and as a separate covenant each of them did, thereby covenant with the mortgagees, that they the mortgagors, or their respective executors, administrators, or assigns, or some or one of them, would on the 1st day of November next pay to the mortgagees, their executors, administrators, or assigns, the said several sums, amounting in the aggregate to 1,300l., with interest at the rate of 4l. 10s. per cent. per annum; and would on such 1st day of February, 1st day of May, 1st day of August, and 1st day of November as should happen next after the same respectively should be advanced or paid or become owing, pay to the mortgagees, their executors, administrators, or assigns, every other sum which might thereafter be advanced or paid by the mortgagees, or either of them, to, "or become owing to them or him by, the mortgagors or either of them," with interest thereon, after the rate aforesaid, from the time of the same being advanced or paid or becoming owing; and the mortgagors, as beneficial owners, thereby declared that the hereditaments and premises comprised in the recited mortgages should be a security for and stand charged with the payment to the mortgagees, their executors, administrators, and assigns, of the said principal sum of 1,300l. and in-

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terest, and any other sum which might thereafter be advanced, or paid, or become owing as aforesaid, and the interest thereof, and should not be redeemable until payment to them of all the same sums and the interest thereon.

The deed bore a stamp covering a sum of 100*l.* in addition to the advance.

Mrs. Andrews was absolutely entitled to one third of the property, and was tenant for life of the other two thirds, to which Mrs. Hopkins was entitled in remainder. Both ladies died in 1888.

The deed was prepared by Mr. Field, who acted as solicitor for both mortgagors.

The mortgagees had gone into possession of the rents of the property. The mortgage was now vested in the said Henry Harrison Field and one W. H. M. Tucker, who took out a foreclosure summons against the persons entitled to the equity of redemption, on which the usual order had been made. On taking the accounts Mr. Field sought to add to the principal moneys secured by the mortgage three items of costs owing to him—namely, 13*l.* 16*s.* 1*d.*, 17*l.* 3*s.* 5*d.*, and 14*l.* 17*s.* 3*d.*, incurred as to the first and second items by Mrs. Andrews, and as to the third item by Mrs. Hopkins, after the date of the indenture of further charge. The first item was for the business of appointing trustees under the Settled Land Act, 1882, for the purpose of leasing part of the mortgaged property, and the other two items were also for business which was not done in connection with the mortgage-deed. He also brought in an item of 5*l.* 5*s.*, remuneration paid in September, 1885, to Mr. Leeder, the auctioneer mortgagee, for making a report on and valuation of the mortgaged property, which were made by Mr. Leeder on the instructions of Mr. Field on the occasion and for the purpose of the advance.

The chief clerk disallowed all these items, and this summons was taken out by the mortgagees to vary his certificate in this respect.

Renshaw, Q.C., and *Williamson*, for the summons.—As to the first three items,

they are included in the security as sums "owing to" the solicitor, who was entitled to take a mortgage from his clients for any future costs—33 & 34 Vict. c. 28. s. 16. As to the 5*l.* 5*s.*, an auctioneer, being mortgagee, may charge profit costs against the mortgagor in respect of the mortgage security.

[KAY, J.—I decided in *In re Roberts* (1) that a solicitor mortgagee could not charge his client profit costs for the preparation of the mortgage to himself, where he did the work himself.]

There is an express stipulation in the recital entitling such charges to be made.

[KAY, J.—That is a contract to give a mortgagee something more than he would be entitled to as mortgagee. Is not that an attempt to give the mortgagee a collateral advantage or to clog the equity of redemption?—His Lordship referred to *James v. Kerr* (2).]

In *Mainland v. Upjohn* (3) commission was allowed to a mortgagee.

[KAY, J.—That was deducted or paid at the time of the advance.]

Cradock v. Piper (4) and *Broughton v. Broughton* (5) were also cited.

Ashton Cross, for the defendants.—The security was not intended to include costs subsequently incurred to the solicitor in matters not connected with the preparation or execution of the mortgage-deed. These items, therefore, were properly disallowed on this ground. As to the other item, the auctioneer's report and valuation were made on his own behalf or that of his *cestui que trust*, and this payment cannot be charged against the mortgagors—*Gregg v. Slater* (6) and *Nicholson v. Tutin* (7).

Renshaw, Q.C., in reply.

(1) *Ante*, p. 25; Law Rep. 43 Ch. D. 52.

(2) 58 Law J. Rep. Chanc. 355; Law Rep. 40 Ch. D. 449.

(3) 58 Law J. Rep. Chanc. 361; Law Rep. 41 Ch. D. 126.

(4) 1 M. & G. 664; 19 Law J. Rep. Chanc. 107.

(5) 5 De Gex, M. & G. 180; 25 Law J. Rep. Chanc. 250.

(6) 22 Beav. 314; 25 Law J. Rep. Chanc. 440.

(7) 3 Kay & J. 159.

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KAY, J.—Although the amount involved in this case is not large, the principle involved appears to me to be very important. A mortgage was made to two persons, who were trustees for a lady for whom they advanced the money, and, as stated on the face of the mortgage, one of the mortgagees was an auctioneer, and the other a solicitor, and the mortgage is in this form. [His Lordship read the recitals and covenant set out above, and continued:] The question—and it is an important one—is, what is the meaning, or rather the construction, of this deed? The solicitor claims under the accounts directed to add to the mortgage-money costs incurred by one of the mortgagors, who was tenant for life of the property, in matters which have nothing to do with this mortgage at all, and which were incurred after the date of the mortgage. He says that these costs are “owing to him” within the meaning of that covenant. The law used to be that a solicitor could not take a mortgage for his future costs. That was altered by the Solicitors Act, 1870, section 16, and he may now do so; but if he means to do so, he should make it very clear that he does mean to do so. The only words here that would cover these costs are “every other sum which may hereafter be advanced or paid by the mortgagees or either of them to, or become owing to them or him by, the mortgagors or either of them.” It is said that that included future costs incurred to one of the mortgagees who happens to be a solicitor. I should be very reluctant to come to that conclusion in the absence of authority. I think, where a solicitor mortgagee intends that his mortgage shall cover future costs, he is bound to say so, and certainly none the less where he is the man who prepares the mortgage. I do not agree that these words have any such meaning. The real object of the covenant was to secure further advances, and the only costs intended to be included were those referred to in the recital, that the mortgagees might make against the mortgagors the same charges and receive the same remuneration for business done by them respectively “in or about these presents” as if they had not been mortga-

gees. “These presents” mean not the property, but “this deed,” and the meaning was to include any charge of that kind which the mortgagees were entitled, according to the contract mentioned in the recital, to make against the mortgagors. The covenant taken by itself is certainly ambiguous, and we are entitled to look at the recital to see what is meant, and, taking the recital and covenant together, I take it to have only the meaning that I have stated. There is no limit to the amount to become due under this mortgage, except such as may be implied by the stamp, which I am told is for the amount advanced and 100% more. Therefore we may conclude that the intention was that the further advances and these expenses were not to exceed 100%. I think, therefore, that the chief clerk was quite right in disallowing under this covenant these costs which were incurred by one of the mortgagors to one of the mortgagees, and which had nothing to do with this mortgage in any way. That applies to all the three first items in question.

Another item is that of 5% *5s.*, claimed by the solicitor mortgagee as having been paid to his co-mortgagee, the auctioneer, for a valuation made on behalf of their *cestui que trust*, and for the purpose of the mortgage; and the question is, can a mortgagee stipulate for more than principal, interest, and costs—it being clear that this remuneration would not have been payable but for the recital? That was decided by Lord Romilly in *Gregg v. Slater* (6), and by myself in the recent case of *In re Roberts* (1), which decide that where a solicitor mortgagee tries to charge against the mortgagor costs connected with the preparation of the mortgage, such a charge must be disallowed, because he is not claiming costs paid to another person, but he is claiming them for himself; and as the mortgagor is only liable to pay outgoings, he is not bound to pay anything charged by the mortgagee for his own benefit. Therefore this sum, which was charged by the auctioneer as incidental to the preparation of this mortgage, is not a proper charge, unless it is made so by the recital which I have read. Then the question is, can a mortgagee contract for

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payment to himself of a profit to which, but for such a contract, he would not be entitled? This is a question which has been considered in many cases. It is only necessary for me to refer to my own judgment in *James v. Kerr* (2), where I quote the language of the Master of the Rolls in *Jennings v. Ward* (8), that "a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." That decision has since been followed in many cases without a single exception, and I go on in my judgment to state that "in *Broad v. Selfe* (9), Lord Romilly decided that this rule was not affected by the repeal of the usury laws, and he disallowed a commission for which the mortgagee had stipulated in addition to his principal and interest." Until those decisions are reversed I shall feel bound to follow them. Accordingly the 5l. 5s. charged by the auctioneer mortgagee, which he could not possibly have claimed without a special contract, could not be the subject of a valid mortgage contract. According to the law of mortgage recognised in this country a mortgagee cannot make such a contract—cannot contract to get anything beyond his principal, interest, and costs; and, therefore, remuneration for his services, which he would not otherwise be entitled to be paid for, stands on the same footing as commission, which he clearly cannot charge. Accordingly the chief clerk was quite right on this point also. The summons must be refused, with costs.

Solicitors—Williamson, Hill & Co., agents for J. H. Field, Cardiff, for mortgagees; Richard White, agent for J. A. Thomas, Swansea, for defendants.

[IN THE COURT OF APPEAL.]

COTTON, L.J.	} PHILLIPS v. CAYLEY.
BOWEN, L.J.	
FRY, L.J.	
1889. Dec. 20.	

Power—To appoint in any manner—*General Bequest*—Wills Act (1 Vict. c. 26), ss. 10 and 27.

There is nothing in the Wills Act which prevents the creator of a power of appointment from imposing conditions upon the exercise of that power by will, not being conditions as to the form of execution, which are invalid under section 10. Consequently, a power to appoint property by a will expressly referring to the power itself—or to the settlement creating the power—is not exercised by a general bequest contained in the will of the donee of the power. The words in section 27, "power to appoint in any manner he may think proper," do not mean "any power to appoint," nor "power to appoint by any will in any manner he may think proper," but mean "power to appoint by the will in question."

Decision of KEKEWICH, J. (58 Law J. Rep. Chanc. 569), affirmed.

Appeal from a decision of Kekewich, J. The case below is reported at length, 58 Law J. Rep. Chanc. 569.

By a settlement dated the 4th of June, 1884, it was declared that a sum of 7,060*l.* railway stock should be held "in trust for such person or persons and in such manner as H. R. Phillips shall at any time or times, or from time to time by writing under his hand (not being a will or codicil), or by will or codicil expressly referring to this power, appoint," and in default of appointment on certain other trusts.

H. R. Phillips died in 1886, not having exercised his power of appointment by deed. By his will dated in 1879 he made certain specific and pecuniary bequests, and, without making any reference to the power, bequeathed all his residuary personal estate to trustees upon certain trusts.

The persons claiming the fund in default of appointment took out an originating summons, asking a declaration that the will did not operate as an exercise of the

(8) 2 Vern. 520.
(9) 11 W.R. 1036.

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power, and Kekewich, J., made a declaration to that effect.

The trustees of the will appealed.

Byrne, Q.C., and *Allen*, for the appellant.—We submit that the general bequest in this will operated as an exercise of the power of appointment contained in the settlement. The question turns entirely on section 27 of the Wills Act. We must look at the will, and if we find a general bequest, and there is nothing in the will itself to shew a contrary intention, it follows that the general power of appointment has been exercised. We admit that a power to appoint by deed only does not authorise an appointment by will; but, once given a power to appoint in any manner by will, if only the will be a good will under the Act, that power is exercised by a general bequest. The power in this case is a general power—that is, general as to the objects to take—"and consequently a power to appoint" in any manner within the meaning of the section. The words "in any manner" point to the devolution of the property.

Warmington, Q.C., and *Warrington*, for the respondent.—To support the view of the appellant, one ought to find in the statute a prohibition to create a power like this. But that is not the case; with the exception contained in section 10 as to the form of execution, there is nothing in the statute to prevent the creator of a power from imposing any restrictions or conditions as to its exercise. Here the creator of the power says that if it be exercised by will, it is to be by a will of a particular nature. The object of the settlor is that the power shall not be exercised *per incuriam*. It is not any will that will satisfy section 27; it must be a will answering the description of the will referred to in the power.

Allen, in reply.

In addition to the authorities cited below, *Hawthorn v. Shedden* (1), *In re Powell's Trusts* (2), and *In re Tarrant's Trusts* (3) were referred to.

COTTON, L.J.—This is an appeal on a

- (1) 3 Sm. & G. 293; 25 Law J. Rep. Chanc. 833.
- (2) 39 Law J. Rep. Chanc. 188.
- (3) 58 Law J. Rep. Chanc. 780.

point upon which we have conflicting opinions of Judges; but I think that the decision that has been appealed from is right. The question is, whether the will of the testator is a good exercise of a power contained in a settlement which was executed by him in 1884. I quite agree with what has been urged, that we cannot look for a contrary intention, within the meaning of section 27 of the Wills Act, except to the will itself; but then there is something more than that—the question is, whether there is a power which enables this will to operate. So far as intention goes, intention is presumed unless a contrary intention appears on the will. But still we have to consider this: will this be a good exercise of the power over property which the testator had "power to appoint in any manner he may think proper"?

It has been conceded that if the power only authorised an appointment by deed, a general bequest in a will would not operate as an exercise of that power, even though there was no limitation as to the objects in favour of whom the power was to be exercised—and that, I think, is reasonable enough. This is a statute dealing with wills, and enabling persons to appoint by will, and giving effect to their wills where there is a power to appoint in any manner the testator thinks fit, and where the will does not expressly shew an intention to execute that power. That does not go quite far enough. Although a power to appoint by will is sufficient, yet when we come to see whether the testator's will has exercised that power, we must look first to see whether on the will there is a contrary intention. That is out of the question here. But then we must next see whether the will that has been made is such a will as is within the power, and, in my opinion, if any condition or limitation, is imposed by the settlement which creates the power, which the Act of Parliament does not prevent effect being given to, we cannot say that a will not complying with these conditions or limitations is a good exercise of the power. If there be any condition or limitation as to the mode of execution, section 10 of the Act applies in express terms. [His Lordship read the section, and proceeded:] That condition the Act of Parliament prohibits, and if

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there be any such condition in the settlement, a will not complying with it will, if there be nothing else, be a valid execution of the power.

But the settlor in this case has said, the settlement may be put an end to, and the property may be disposed of, not in the way provided by the settlement, by a will expressly referring to the power. Any other will, a will not expressly referring to the power, is not within that power of appointment; and as there is nothing to prohibit a settlor from imposing such a condition, I cannot see how under section 27 a will not complying with that condition can be said to be a good execution of that power. The decision is right.

BOWEN, L.J.—I am of the same opinion. The scope of the two sections, 10 and 27, is totally distinct. Section 10 provides that appointments by will shall be executed in manner pointed out in a previous portion of the statute, and shall be valid although the formalities or forms of execution required by the settlement have not been observed. Section 27 has nothing to do with forms of execution or other solemnities. It provides that general gifts under a will are to include property over which the testator has a general power of appointment.

Here we have to construe the words in the second branch of section 27, which provides that a bequest of the personal estate of a testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper." The first thing that is clear is that the words "he may have power to appoint in any manner he may think proper" are equivalent to the words "he may have power to appoint by will in any manner he may think proper"; and the second thing clear is that these words "he may have power to appoint" mean more than "appoint by will," and extend and are equivalent to "appoint by the will in question," and we obtain that colour from the context. The section only deals with wills, therefore we are not doing

anything to this section by reading those words in here.

In my opinion, as soon as you find that is the true construction of these words, it is obvious in this case that the will does not answer to the description of the power, and that that is a fatal reason why section 27 does not apply. The statute is not intended to cure dissimilarities between wills and powers, except so far as section 10 applies. But that is not this case. This, however, is a dissimilarity between a will and a power which goes directly to the form of the will itself.

It has been argued that it is not right to allow a man to escape by a particular expression of words from the intention of the statute; but section 27 is not a prohibitory, but an enabling section, and I cannot see why a man should not so frame his settlement as to exclude from the operation of that section all kinds of wills which may afterwards be made.

Why may not a man impose upon the will the condition that the will shall expressly name the source of the power? Suppose that a man were to go a little further than the settlor does here, and to say that the property is only to be appointed by a will, in which the testator shall *nominatim* refer to the settlement and to the parties to the settlement. If he chooses to make rather a strange condition like that he surely may do so, and you cannot escape from the obligation of that condition by neglecting altogether reference to the matters which he insisted upon as necessary to mention before the will is to be an exercise of the power.

It therefore seems to me that when the matter is argued out it is clear, and I agree with the view expressed by Lord Justice Cotton.

FRY, L.J.—I am of the same opinion. The words we have to construe are that the will referred to shall extend to any property "which he may have power to appoint in any manner he may think proper." Does that mean "any power to appoint in any manner he may think proper"?

It does not; because, if it did, it would enable a donee of a power to exercise by will a power of appointment confined to

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deed. It cannot therefore mean "any power." Does it mean "by any will"? In my opinion it does not, and for this reason, that if it did, it would frustrate, or might frustrate, the intention of the person who created the power. For instance, suppose a father on the 1st of June were to give his son power to appoint by will to any person whom he might think fit, in any manner he may think fit, provided that the will was executed after the 1st of January next—and on the 2nd of June the son made his will and died on the 3rd of June. According to the argument of the appellants that will would have executed the power, and the fetter which the father had a right to impose upon the power he was creating would be frustrated. Of course, if the Legislature had said that no such fetter should be imposed by the person who created such power the Court would of course be bound by it; but we are not to invent fetters upon the powers of disposition of property. In the first place I entirely agree with the observation of Lord Justice Bowen that this statute is not intended to deal with any relation between the power and the instrument executed. It is intended to deal only with the exercise of the power by the will. In the second place, the expressions contained in section 10—which do put a fetter upon the condition which may be required in exercise of the power—seem to me strong to shew that where that section does not apply, any fetter created by the creator of the power would still be valid.

I think, therefore, that the true meaning of the words "may have power" is "may have power by the will in question"; consequently the appeal fails.

Appeal dismissed, with costs.

Solicitors—Allen & Son, for appellants; Potter Sandford & Kilvington, for respondents.

KAY, J. }
1889.
Dec. 19. }

In re DALE AND PLANT
(LIMITED).

Company—Winding-up—Proof—Managing Director—Claim for Salary—Competition with outside Creditors—Money due in character of Member—Companies Act, 1862, s. 38, sub-s. 7.

Salary due to a managing director of a company of which the directors were obliged to be shareholders, and damages claimed by such director for breach of a contract to pay him such salary for a number of years, are not debts due to such director in his character of member of the company within the terms of sub-section 7, section 38, of the Companies Act, 1862, and may be proved in competition with the outside creditors in the winding-up of the company.

Adjourned summons.

This company was formed in October, 1886, for the purpose of acquiring and carrying on the business of drysalts, &c., formerly carried on by James Dales (known as Dale) and Samuel Allen Plant, of Birmingham; and an agreement was entered into between Dales and Plant and the company, whereby the business was sold to the company in consideration of cash and fully paid-up shares, and Dales and Plant were for the term of ten years from the 31st of March, 1886, to remain as managing directors of the company, and each of them was to be remunerated at the rate of 300*l.* per annum.

By the articles of association (article 104) Dales and Plant were appointed the first managing directors upon the terms contained in the agreement; (article 106) the qualification of every director was to be the holding in his own right of not less than ten shares; (article 107) the directors were to be paid for their services out of the funds of the company the remuneration following—namely, Dales and Plant each 300*l.* per annum, and each of the other directors such sum as the company in general meeting should from time to time determine; (article 110) every director was to vacate his office if he ceased to

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be a holder of at least ten shares; (article 119) Dales and Plant were to be styled managing directors, and to remain on the board so long as they continued in the employment of the company under the agreement, or any extension thereof; and the determination of the agreement, or any extension thereof, was not to invalidate their appointment as directors.

The company was in course of winding-up, and in the liquidation Plant claimed to rank as a creditor for (first) 274*l.* 18*s.* 10*d.*, balance of purchase-money under the agreement; (secondly) 118*l.* 13*s.* 4*d.*, arrears of salary as managing director; and (thirdly) damages for breach of the agreement to employ him as manager for ten years at a salary of 300*l.* a year.

The chief clerk had assessed the damages at 1,500*l.* if the claim to damages should be sustained.

It was arranged that the entire claim should be admitted at the sum of 1,650*l.*, subject to the question whether Plant was entitled to prove in competition with the other creditors of the company, and the matter was adjourned into Court for the determination of this question.

Section 38, sub-section 7, of the Companies Act, 1862, provides: "No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributors amongst themselves."

Chadwyck Healey, for Plant.—In *In re The Leicester Club and County Racecourse Company*; *ex parte Cannon* (1) it was held that a director's unpaid fees, in a company where directors were obliged to be members, were due to him in his character of member; and in *Dunston v. The Imperial Gaslight Company* (2), which was the case

of a company incorporated by Act of Parliament, it was held that directors could not claim, as servants, remuneration for their labour according to its value. But the present claim is not made by the applicant in his character of member. When a man gives up his whole time to the company, he stands on a different footing from an ordinary director. In this case the company have made this claim a debt.

[KAY, J.—Is not sub-section 7 of section 38 intended to enable a managing director to claim his salary?]

Chadwyck Healey.—Yes; because the money is not due to him in his character as member.

Renshaw, Q.C., and *Levett*, for the liquidator.—*Cannon's Case* (1) is quite conclusive against this claim; and we rely also upon the words of the sub-section, "or otherwise," which exclude all claims of every kind made by a member of a company. It is not confined to a claim made in the character of member.

KAY, J.—I do not agree with the argument which has been addressed to me on behalf of the liquidator. This is a very simple point, and, to my mind, a very clear one. Here is a man appointed managing director. He was so appointed, as appears clearly enough, because he had special knowledge of the business which this company was going to carry on; and by the articles of association he was to receive certain remuneration for the management of the business of the company. Now, it is quite true that a director was the only person who could be so appointed, and it is true also—or I assume it to be the fact—that no one could be director who was not a shareholder. It is said that all remuneration agreed to be paid to the claimant for his special skill and attention in managing the business of the company is paid to him in his character of member of the company. I do not agree with that contention. Let me try it by the same analogy which I put to counsel in the course of the argument. Suppose this was the case of a solicitor who had a special training in a peculiar branch of law which was of great import-

(1) 55 Law J. Rep. Chanc. 206; Law Rep. 30 Ch. D. 629.

(2) 3 B. & Ad. 125; 1 Law J. Rep. K.B. 49.

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ance to the company, and that such solicitor happened to be a member of the company, and sent in his bill of costs for business done for the company—in the winding-up of the company could it be said that the solicitor should not be paid in competition with the other creditors because he was a shareholder? Obviously that proposition could not be maintained for a moment. It was so admitted in the argument. But it is said that if the articles of association provided that no one should be a solicitor to the company unless he was also a shareholder, then the payment made to him would be a payment to him in his character of member. I do not follow that, and cannot agree with it. The payment to him in respect of his bill of costs cannot be payment to him in his character of member, whether the articles of association do or do not contain such a provision. The payment in each case is to him in his character of solicitor, and not in his character of member. Take another case. Suppose a company bought a million of bricks from a man who was a brick-maker. If he happened to be a shareholder, no one could doubt that that circumstance would not prevent him from proving in competition with the other creditors. But suppose that the articles of association contained provisions that no bricks should be bought of any person who was not a shareholder in the company. Is, then, the money paid as the price of the bricks money due to the vendor of them in his character of member? Certainly not. It is not money due to him in his character of member, but money due to him in his character of brick-maker or brick-seller; and the fact that the articles said that you should not buy of any one who was not a member would not make the price of the bricks money due to him in his character of member, any more than it would be if there were no such article.

Then it is said—and this, to my mind, is the strongest part of the argument—that section 38, sub-section 7, of the Companies Act, 1862, is introduced into the Act of Parliament by analogy to the partnership law. A debt due to a partner could not be proved in competition with

outside creditors where the partnership was dissolved. That is quite true. But the answer is that a shareholder is not a partner, and this section does not introduce all the partnership law with respect to every shareholder. It only introduces—I dare say it may be by analogy to the law of partnership—the particular provision which has now to be construed. [His Lordship read the sub-section above set out.] What does “character of member” mean? The intervening words seem to me to shew that clearly: “by way of dividends”—that is, on his shares—“profits”—that, again, is in respect of his shares—“or otherwise.” The words “or otherwise” must mean something analogous to dividends or profits on his shares. That shews the meaning. Dividends are due to him in his character of member; profits are due to him in his character of member; there may be something else equally due to him in his character of member which this clause was intended to include. To my mind it is clear that the clause does not include money due for goods which a member has supplied to the company; otherwise the section would say so. Nor can it include payment for particular work which he has special skill in doing, and which he has done for the company. I am of opinion that this money, which ought to have been paid to this claimant solely as managing director, is money for which he may prove in competition with other creditors. The only case cited is that of *In re The Leicester Club and County Race-course Company; ex parte Cannon* (1), where a director claimed for fees, and the articles of association provided that “the remuneration of directors for their services shall be such sum as the company in general meeting may from time to time determine, which shall be divided amongst the directors in such manner as they shall from time to time think fit.” It was held in that case that the remuneration came within the words “money due to him in his character of member.” I say nothing about that case, except that it is not the case now before me, and it seems to me very plain that this is not money due to the claimant in his character of a member

In re Dale & Plant.

of this company, and that he is entitled to prove for it in the winding-up in competition with the other creditors.

Solicitors—Belfrage & Co., agents for Reece, Harris & Harris, Birmingham, for Plant; Ellis, Munday & Co., for liquidator.

[IN THE COURT OF APPEAL.]

LORD ESHER, M.R.
COTTON, L.J.
FRY, L.J.
1889.
June 6.

In re THE BLACK-
BURN AND DISTRICT
BENEFIT BUILDING
SOCIETY; *ex parte*
GRAHAM.

Company — Winding-up — Rentcharge — Liability on the Terre-Tenant — Possession of Land subject to Rentcharge — Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 158 and 203.

The B. Society, an unregistered company, were in possession, as mortgagees, of land subject to a rentcharge, which was also secured by covenant. The society was ordered to be wound up, and an order was made in February, 1882, under section 203 of the Companies Act, vesting in the official liquidators the legal estate in the land which was then vested in the trustees of the society. The liquidators paid the rentcharge down to May, 1885, when, the income from the land being less than the rentcharge, they obtained, on the 17th of June, 1885, an order to assign or quit possession of the land on such terms as they should deem advisable. They thereupon gave notice to the owner of the rentcharge and to the tenant of the land that they renounced possession and all interest, but did not actually convey it away till the 8th of September, 1887. The owners of the rentcharge claimed to prove in the winding-up, under section 158 of the Companies Act, for arrears which had accrued from the date of repudiation down to the 8th of September, 1887:—Held (affirming BRISTOWE, V.C.), that as there were no arrears due at the commencement of the winding-up, there was no claim which could have been valued under section 158—that section relating only to obligations existing at the

commencement of the winding-up—the liability for the payment of the rentcharge not being a debt, but only a liability binding on the company so long as it remained in possession; and that as, on the evidence, the liquidators could not be said to have been in possession of the land for the purposes of the liquidation subsequent to the date of repudiation, there was no liability on the society subsequent to the winding-up, and consequently the claim must be disallowed.

Thomas v. Sylvester (42 Law J. Rep. Q.B. 237; Law Rep. 8 Q.B. 368) *explained and approved.*

Appeal from a decision of Bristowe, V.C., of the County Palatine of Lancaster, disallowing a claim brought in by the appellants in the winding up of the above-named society, to prove for arrears of a rentcharge issuing out of land formerly in the possession of the company.

The rentcharge was created by the Rev. P. Graham, who by an indenture dated the 20th of June, 1872, conveyed a piece of land at Over Darwen to the use that an annual rentcharge of 59*l.* 2*s.* 9*d.* should be paid thereout to him, his heirs and assigns, by equal half-yearly payments, with power of distress and entry in default of payment, and, subject thereto, to the use of Joshua Leach and John Leach in equal shares as tenants in common in fee, and Joshua and John Leach covenanted by the deed, for themselves, their heirs and assigns, for punctual payment of the rentcharge.

The Messrs. Leach subsequently conveyed the land to the Cotton Hall Brick and Pipe Company, subject to the rentcharge, and the company, on the 25th of March, 1875, mortgaged it in fee to the above-named building society. The Cotton Hall Company was wound up in 1878 and the liquidator disclaimed all interest in the equity of redemption.

The building society, who were in possession of the land as mortgagees, leased it on the 1st of May, 1880, to Wray for five years, who underlet it to Grimes.

The society was subsequently ordered to be wound up as an unregistered company, and on the 21st of February, 1882, an order was made in the winding-up, vesting all the assets of the society in the

In re Blackburn &c. Building Soc.; ex parte Graham, App.

official liquidators. The liquidators received from Grimes rent up to May, 1885, when Wray's lease expired, and paid the rentcharge till the same date.

On the 17th of June, 1885, an order was made, on the application of the liquidators, who had found that the income of the property was less than the amount of the rentcharge, authorising them to assign the plot of ground to any person for any or no consideration, or to quit possession upon such terms as they should deem advisable.

They accordingly gave notice to Grimes and to Mr. Graham that they renounced the possession and all interest in the land, and entered into negotiations for the reconveyance of it to Mr. Graham, which he agreed verbally to accept; but the agreement was not reduced into writing, and he dying on the 7th of May, 1887, before any conveyance was made, the liquidators, on the 8th of September, 1887, conveyed the land for a nominal consideration to a person named Clough.

On the 26th of September, 1887, the executors of Mr. Graham's will recovered by distress on the land 50*l.*, then due on account of the rentcharge, and in January, 1888, brought an action against the liquidators personally for the balance of the rentcharge; but the action was stayed—see *Graham v. Edge* (1).

The executors thereupon carried in a claim in the winding-up of the company for the balance of the rentcharge from the 1st of November, 1885, to the 8th of September, 1887, amounting to 89*l.* 10*s.* The Registrar disallowed the claim, and the Vice-Chancellor, on the 24th of January, 1889, affirmed his holding.

The executors appealed.

Buckley, Q.C., and *T. Clarkson*, for the appellants, contended that the company were liable at the date of the commencement of the winding-up for the rentcharge, and must so continue until they had actually conveyed the land subject to the charge to some one else; and that subsequently to the winding-up the liquidators had enjoyed the possession of the land. The land, having been vested in them by

section 203 of the Act of 1862, remained in them until actually conveyed away; and they, having the enjoyment of the land, must bear the burden. A mere notice to the owner of the rentcharge that they repudiated the land was not enough to discharge the liability of the liquidators—*Thomas v. Sylvester* (2), *Whitaker v. Forbes* (3), *Lillingston's Case* (4), *Macfarlane's Claim*; *in re The Northern Counties of England Insurance Company* (5). The company being liable at the commencement of the winding-up, the appellants were entitled to claim for the future payments of the rentcharge, under section 158 of the Act—*In re The Haytor Granite Company* (6), *Horsey's Claim* (7), *In re The Gartness Iron Company* (8), and *Gooch v. The London Banking Association* (9). They also urged that the covenant to pay the rentcharge ran with the land; but that if it did not there was a privity of estate between the landowner and the owner of the rentcharge which would support an action so long as the landowner was in possession—*Austerberry v. The Corporation of Oldham* (10).

Neville, Q.C., and *Snow*, for the liquidators, were not called upon.

LORD ESHER, M.R.—In this case there is an appeal from a refusal by the Vice-Chancellor of the Palatine Court to admit a claim for proof for arrears of rentcharge due to the claimants. The claim to prove was made, not at the commencement of the winding-up of the company, but at a much later period; the arrears of rentcharge having become due during the winding-up. I cannot help thinking they brought it as a claim which was not due at the commencement of the liquidation,

(2) 42 Law J. Rep. Q.B. 237; Law Rep. 8 Q.B. 368.

(3) 44 Law J. Rep. C.P. 332; 45 *ibid.* 140; Law Rep. 10 C.P. 583; 1 C.P. D. 51.

(4) 7 Rep. 38*a*.

(5) 50 Law J. Rep. Chanc. 273; Law Rep. 17 Ch. D. 337.

(6) 35 Law J. Rep. Chanc. 154; Law Rep. 1 Chanc. App. 77.

(7) 37 Law J. Rep. Chanc. 393; Law Rep. 5 Eq. 561.

(8) 39 Law J. Rep. Chanc. 884; Law Rep. 10 Eq. 412.

(9) Law Rep. 32 Ch. D. 41.

(10) Law Rep. 29 Ch. D. 750.

(1) 57 Law J. Rep. Q.B. 231, 406; Law Rep. 20 Q.B. D. 538, 683.

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but had become due during the liquidation. But, both here and before the Vice-Chancellor, they have put it either in that view, or in the alternative—namely, that there was a claim existing at the commencement of the winding-up which could have been valued at that time.

We must first consider what the claim was for. It was for a rentcharge reserved on the conveyance of freehold property. As a matter of fact, at the commencement of the winding-up, all the rentcharge then payable had been paid, and there was none in arrear. But it is said that there was then a claim against the assets of the building society in respect of these arrears within the meaning of the Companies Act. That depends upon what is meant by a claim. It must, of course, mean a legal claim, resting on something in the nature of a liability or obligation. Therefore the question resolves itself into this—was there any liability or obligation with regard to the rentcharge at the time of the commencement of the winding-up? It was contended, on the authority of *Thomas v. Sylvester* (2), that the claim could be made because the liability for the rentcharge was a debt. But that case did not decide anything of the sort. All that was decided in that case was that it was a claim arising out of an interest which a tenant had in the possession of land and in the profits of the land at the time when the rentcharge became due. It was so far a right in respect of the enjoyment of the land, that before the passing of the Common Law Procedure Act it was the subject of a real action which was not brought on contract, but on a right arising out of the land, and it was held that when real actions were abolished, another remedy—namely, an action of debt—was left, otherwise the owner of the rentcharge would be left without any legal remedy. But the Court did not say that the rentcharge itself was a debt; for an action of debt was not confined to what was properly a debt, but might be brought for anything that had become payable from a person before action brought, as in the case of an action for a penalty under an Act of Parliament. In the case to which I have referred Mr. Justice Quain says: "If a man comes into possession of

land as tenant in fee, he is the pignor of the profits of the land, and was liable to a real action for the non-payment of a rentcharge created by a former tenant in fee; if this be so, since real actions are abolished, an action of debt will lie." Therefore, they say it is an action arising out of the possession of land, and that any pignor of the profits was liable to an action. In that case the rentcharge had become due while the defendant was in possession as tenant in fee.

In *Whitaker v. Forbes* (3) the same question was considered. There the action was brought for a rentcharge due when the action was brought, but it was out of land in Australia. It was contended that the action would not lie because the venue was not here, but in Australia, where the land was. If the liability was on contract the venue would be transitory; therefore the question was whether the liability arose out of the possession of the land or out of contract. It was held that the liability arose out of the possession of the land, and that the action could not lie in England. I said in that case: "In an action of debt the venue is *prima facie* transitory; but I think that, though that is so, we are bound by the authority of the decisions cited in the note to *Thursby v. Plant* in *Wms. Saunders* (Sir E. V. Williams' ed. p. 308), to hold that in some actions of debt the venue is not transitory, as, for instance, in actions for penalties. There the statute makes the venue local, but the note is also authority for saying that where there is no contract or covenant, but the debt only arises by reason of privity of estate—that is to say, when the liability depends on the defendants being in possession of the estate charged, not on privity of contract—then the venue is local, and the action must be brought in the locality where the land is situated." And so it was held by the Court. Therefore that case is our authority for saying that a claim to recover a rentcharge arises not out of contract but out of privity of estate. There are authorities for saying that if a person who did not create the rentcharge and had not contracted to pay it was in possession of the land out of which it issues, he is liable for breach of duty in not paying it while he is in possession of

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the land ; but, unless he was in possession while the rentcharge became due, there is no claim against him. If, therefore, at the commencement of the winding-up there was no rentcharge due, the company are not guilty of any breach of duty in respect of such rentcharge. They had not covenanted to pay it, and there was no obligation on their part to pay anything towards it. Their only liability was if they were in possession of the land when the rentcharge became due. I have no doubt, therefore, that there was no claim on the company at the commencement of the winding up within the meaning of section 158 of the Act. The claim under that section must be a claim arising out of a liability recognised by the law.

Then was there any liability on the liquidators after the commencement of the winding-up ? It was said that they had taken possession of the estate for the benefit of the liquidation, and that as they had taken the benefit of the estate they must be bound by its burdens. In one sense they may be said to have taken the estate because they could not help taking it ; but they went to the Court to ask for its direction to get rid of it, and the Court gave them leave to get rid of it. Then they went to the owner of the rentcharge and told him that they did not mean to keep the land because it was worth nothing. It was contended that the liquidators were in possession of the land through their tenant ; but they went to him and told him that he was no longer their tenant. They could not have done more to shew their intention of giving up possession, and they received no profit from it. The Vice-Chancellor has found as a fact that they had given up possession. He says : "How can I find that they kept possession of the estate, and were in receipt of the profits, when they did all they could to get rid of it ?" I agree with his conclusion. The consequence is, that there being no liability at the commencement of the winding-up, and no liability established by what was subsequently done by the liquidators, it is impossible for the appellants to prove for the arrears in the winding-up. The Vice-Chancellor was therefore right, and his order must be affirmed. I may add, with respect to the case before Vice-Chancellor Bacon, that it

depended on Scotch law and does not govern this case.

COTTON, L.J.—This is an appeal from a decision of Vice-Chancellor Bristowe, refusing to vary the certificate of his Registrar disallowing a claim for arrears of a rentcharge brought by the appellants in the winding-up of this company. The land which is subject to the rentcharge was originally conveyed to two persons named Leach, who covenanted to pay the rentcharge to Graham, his heirs and assigns, and, subject thereto, was conveyed ultimately to the company now being wound up. The company is not liable on contract. Its liability depends upon the possession of the land, although, of course, the Messrs. Leach may be still liable on their covenant to the appellants ; but with that we have now nothing to do.

By an order made in the winding-up, the land, which at the beginning of the winding-up was vested in trustees for the building society, became vested in the liquidators. The representatives of Mr. Graham brought an action against the liquidators personally ; but that was stayed by the Court of Appeal, without prejudice to a proof being brought in under the winding-up. The only question now is whether the owners of the rentcharge can prove against the company ; but, as it has been argued, we ought to allude to another question—namely, whether the appellants can make any claim against the liquidators for a sum of 89*l.* 10*s.*, as expenses properly incurred on account of their having held and enjoyed the property since the commencement of the winding-up. The circumstances appear to me to prevent any claim upon the liquidators. They obtained an order to dispose of the property at any time. They went to Grimes, and then to Graham, and told them that they would have nothing more to do with it, and wished to reconvey it.

Then we come to the next question—whether there was any debt due at the commencement of the winding-up. This is a claim made for rentcharge unpaid down to the 8th of September, 1887, for a time during which the legal estate of the property was vested in the liquidators. It is a claim on an insolvent company, in consequence of the legal estate subject to the

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rentcharge being vested in the liquidators. Undoubtedly an action for debt may be brought against the terre-tenant for a rentcharge issuing out of the land. That was decided—and, in my opinion, correctly decided—in *Thomas v. Sylvester* (2), not as establishing an obligation by way of contract on the part of the person holding the land, but only that when the land subject to the rentcharge is vested in a person he contracts a liability to pay the rentcharge which accrues while he holds the land. Here, no doubt, the liquidators were in possession of the estate; but the question is whether there was any beneficial holding. It was contended that it comes within section 158. But that section only relates to such obligations as are existing at the commencement of the winding-up. Cases were cited to shew that this is not the true construction of the section, and that this was such a claim as could be proved under the section.

It is only necessary to refer to two cases. The case of *In re The Haytor Granite Company* (6) was the case of a lessee who had covenanted to pay rent during the term. There there was an obligation by contract existing at the commencement of the winding-up. There was a liability under the covenant then existing, although it could only be ascertained by events subsequent to the winding-up what the actual liability was that was existing at and before the winding-up commenced. The other case was *In re The Gartness Iron Company* (8), before Vice-Chancellor Bacon. There the claim was made by the superior of land in Scotland against the company, who were transferees of a contract under which their predecessors had contracted to pay certain feu duties. I take that as a decision based upon the opinion of a Scotch lawyer which was admissible to prove Scotch law, that the company had by contract, under the circumstances of the case, contracted to pay the feu duties to the superior. If so, it adds nothing to *The Haytor Granite Company* (6), and other cases which followed it, and that case has no bearing on the present. The Vice-Chancellor appears to have held that contractual relations then existed between the parties. If that is not the true explanation of the decision, I do not think this Court is bound to follow it. I do not

think that any of the cases cited justify the Court in the present case in admitting this claim, where at the time of the commencement of the winding-up there was no obligation on the part of the building society to pay anything in respect of this rentcharge.

It has been argued here that the covenant to pay the rentcharge was one running with the land. The decision of *Thomas v. Sylvester* (2) is against that contention, because, although the point seems to have been argued, the Judges evidently did not think that the covenant ran with the land, for they treated the question as being whether the terre-tenant—the person actually holding the land subject to the rentcharge, although not the original grantee—could be sued in an action of debt.

In my opinion there is no reason for differing from the Vice-Chancellor, and the appeal must be dismissed.

Fry, L.J.—I am of the same opinion. The appellants have relied on two points. They say either that there was a debt or obligation on the company to them at the date of the commencement of the winding-up; or that the society, by its liquidators, since the commencement of the winding-up, have enjoyed the benefit of the land, and must take the burden of the rentcharge payable out of it. As to the first point, the contention is entirely unfounded. There was no contract between the company and the owner of the rentcharge. The only right which the appellant could have against the company must have arisen out of the pernanacy of the profits by the company when the rentcharge accrued due. At the date of the winding-up there was no liability to pay this rentcharge. Then it was said that the covenant for payment of the rentcharge was one which ran with the land. I agree with what was said by Lord Justice Cotton, that persons who are assignees of the land incur liability for the rentcharge while in possession of the land, but not otherwise. Therefore the first ground fails.

As to the second ground—namely, that the company, by its liquidators, entered into the beneficial enjoyment of the land—the facts of the case exclude this argument. They did not enjoy the land, and the liqui-

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dators did all they could to get rid of that portion of the land. This ground also fails. The appeal must be dismissed.

Solicitors—Pritchard, Englefield & Co., agents for C. Costeker, Over Darwen, for appellant; Frith Needham, agent for Danger & Neville, Liverpool, for liquidator.

KAY, J.
1889.
Dec. 10, 11, 19. } MACKENZIE v. CHILDERS.

Covenant—Building Estate—Deed-poll—Restrictive Covenants by Purchasers—Power of Vendors to depart from—Implied Agreement.

The plaintiffs, in 1867, bought part of a building estate from trustees for sale, subject to certain restrictive conditions as to building, which provided that all the plots were sold subject to the general stipulations contained in a deed-poll which had been, or was intended to be, executed by the trustees, and would be executed by each of the purchasers. The deed-poll was executed by the trustees, and the plaintiffs, and some sixty-six purchasers in all from time to time down to 1889. It recited that it was intended to be a part of all future contracts for sale, that the purchasers respectively should execute the deed and should thereby be severally bound by the stipulations thereof, and it witnessed that each of the purchasers covenanted with the other purchasers and the trustees to build only one house or two semi-detached houses on each lot. The trustees had recently divided fifteen lots remaining unsold into 101 lots, and offered them for sale for the erection of continuous rows of artisans' cottages, and the plaintiffs brought this action to restrain them from so doing:—Held, that the trustees were bound, either by actual covenant or by implied agreement, not to deal with the land in violation of the scheme; and an injunction was granted restraining them from authorising any purchaser from them to build more than one house or two semi-detached houses, contrary to the terms of the scheme.

This was an action by the plaintiffs, who in 1867 purchased from trustees for

sale part of certain land comprised in a building scheme on certain restrictive building conditions, to restrain the defendants, who were the present trustees and successors in title to the vendors, from authorising any purchaser from them to build upon any part of the land comprised in the building scheme contrary to the terms of the building scheme.

The facts of the case were thus stated by Kay, J., in his written judgment:—

"In 1867 the then trustees of the will of Sir Culling Eardley, with the assistance of Mr. Habershon, an architect, and Strickland, a builder, in the words of Mr. Habershon's affidavit, 'adopted' a scheme which the builder and architect had 'elaborated,' for the laying out portions of the trust property called 'Belvedere Estate,' for the purpose of building. The scheme 'so elaborated,' says Mr. Habershon, was for the first time 'delineated and shewn in its entirety' on the plan annexed to certain particulars of sale, proposed for the purpose of the sale by auction of the land shewn on such plan, which took place on the 3rd of June, 1867. At this sale only a few of the lots were sold. Those particulars and conditions are exhibited to the affidavit. They contain a large plan of the estate as laid out in building plots. The land is coloured green. The plots are marked out with lines and numbered, and the sites of the houses intended to be erected, one upon each plot, are clearly shewn.

"The particulars state that the property has been laid out with the greatest care; that no purchaser was to erect more than one single or two semi-detached villas on his or their lots, nor of a less value than 500*l.* for single ones, and 750*l.* for a pair, with certain specified exceptions; that no public-house should be erected or opened on any part of the estate, with many other regulations obviously intended to insure that the property should only be used for a superior class of villa residences.

"The 12th condition ran thus: 'All the lots are sold subject to the general stipulations on the particulars, and to certain covenants for regulating the building upon, fencing, and mode of using the land, the repair of roads, construction of cesspools, and for avoiding nuisances, contained in a deed-poll of mutual covenants, which has

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been, or is intended to be, executed by the vendors, and shall be executed by each of the purchasers. No objection or requisition shall be made to or in respect of such deed or anything therein contained. Copies of the said deed-poll (without the plan and signatures and attestations) having been printed, it shall not be included in the abstract, but one of such copies shall be delivered to each purchaser, and in the meantime a copy thereof may be inspected on application to the auctioneer, the solicitors, or at the estate office, Belvedere.'

"A short memorandum or notice of such deed having been executed by the purchaser shall be indorsed on the conveyance to each purchaser, and shall be signed by him or her at the time of the completion of his or her purchase.'

"The deed-poll referred to is dated the 13th of February, 1868. It was executed by the vendors and by fifteen purchasers in 1868, four in 1869, two in 1870, one in 1871, one in 1872, two in 1873, one in 1874, three in 1875, two in 1876, two in 1877, two in 1878, one in 1879, one in 1880, three in 1882, three in 1883, one in 1886, seven in 1888, and fifteen in 1889—in all, sixty-six purchasers of different portions of the estate.

"The deed had upon it a plan which was practically identical with the plan in the particulars of sale. It recited that the vendors had laid out the property for building purposes, and divided it into building plots, and formed roads, which plots and roads were delineated in plans thereto annexed and coloured green and brown; and it contained these further recitals, 'and whereas the said vendors propose to sell the said building plots or parcels of land, and have already sold some of them, and it is intended that the respective purchasers shall set and subscribe their respective names and seals to this deed, and that the distinctive numbers of the building plots or parcels of land so purchased by such persons respectively as numbered on the said plan shall be set opposite the respective signatures and seals to this deed of such purchasers respectively, after the said several plots or parcels so purchased by them respectively have or shall have been conveyed to them respectively in fee :

"And whereas it was a part of the various contracts, and it is intended to be a part of all future contracts, for sale of the said plots or parcels of land respectively, that the several purchasers respectively should execute this deed, and should thereby be severally and respectively bound by all the stipulations hereinafter contained :'

"The deed then witnesses that, 'in consideration of the premises,' each purchaser, for himself, his heirs, executors, administrators, and assigns, as to his particular plot, covenants and grants with and to each of the other purchasers, his heirs and assigns, and with and to the several other persons, including the vendors, who at the time of his executing should be entitled to any part of the land coloured green on the plan, their respective heirs and assigns (amongst various stipulations for carrying out the building scheme), not to build any house or other building, except appurtenant offices, the cost of which should not amount to the sum mentioned in the succeeding conditions, nor to do anything in breach of, violation of, or contrary to the fair meaning of such conditions. The 6th of these conditions is that, with certain exceptions not now material, no more than one single or two semi-detached houses should be erected on any one plot.

"This deed was executed by the vendors, and, although called a deed-poll, it was admitted in argument that it must be treated as a deed *inter partes*. It is dated, as I have said, eight months after the sale by auction. Many of the persons who have purchased have spent very large sums of money in building upon their land upon the faith of this building scheme, which has always been observed and acted upon down to the month of September in the present year—that is, for more than twenty years since the date of the deed-poll.

"It seems that some change has taken place in the trustees of the will, and that recently the trustees and their architect, finding that part of the land included in the building scheme could not easily be disposed of on the terms of that scheme, but that it might be sold differently allotted for the building of cottages for artisans employed in factories in the neighbourhood of the estate, on the 4th

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of September last put up this part of the land for sale by auction in different lots, and under conditions which would be a breach of the original building scheme, by allowing the erection of more than one of such cottage-dwellings upon each of the plots on the original building plan.

"The plaintiffs, who are purchasers of plots under the first building scheme, and have built at considerable expense upon their respective plots upon the faith of it, have brought this action to restrain the trustees from authorising the new purchasers to depart from that scheme.

"Some correspondence has passed, in which the plaintiffs required to be furnished with the names of such recent purchasers, that they might add them if necessary as defendants to the action.

"The answer was, in substance, that it was not necessary to supply them, as the trustees were only desirous to have their rights determined. If any objection were taken on the ground that none of such purchasers was a party, I have intimated that, after that correspondence, I should think it my duty to allow the case to stand over to add the purchasers or some of them as parties; but the defendants have agreed that the case should be treated for the purpose of this action as though the purchasers of some of them were defendants to the action.

"Notice of the building scheme was given at the auction last September. The contracts then made are, I am informed, in a form which enables the vendors to rescind them if the objection now raised should be maintained."

To these facts it may be added that (except so far as stated) the deed-poll contained no covenant in express terms by the vendors, and that the conditions of sale expressly provided that the vendors would not enter into any covenant except that they had done no act to incumber.

The trustees had divided 15 lots remaining unsold into 101 lots, and offered them for sale for the erection of continuous rows of artisans' cottages.

Miller, Q.C., and *Kenyon Parker (Sir H. Davey, Q.C.)*, with them), for the plaintiff.—The deed-poll and conditions under which this property was sold amounted to a general building scheme or law imposed

on the whole of the property, calculated and intended to increase the value of the property, and from which the vendors are not entitled to depart themselves, or to authorise other purchasers to depart—*Spicer v. Martin* (1), approving the judgment of Hall, V.C., in *Renals v. Cowlishaw* (2). With or without any express covenants, the plaintiffs would be entitled to restrain any purchaser with notice from violating the scheme—*Whatman v. Gibson* (3), *Keates v. Lyon* (4); and, *a fortiori*, must be entitled to restrain the vendors from violating it themselves or authorising any purchaser from them to violate it. We also submit that the recital in the deed-poll amounts to an actual covenant by the vendors in the terms of the recital.

Renshaw, Q.C., and *Onslow*, for the defendants.—The only representation made was a representation of a future intention. There is, therefore, no estoppel, and in the absence of contract the plaintiffs are not entitled to relief—*Jordan v. Money* (5) and *Maddison v. Alderson* (6). There is no express covenant or contract by the vendors, and the Court will not imply a covenant or contract in a case like this, where the parties have executed a formal and elaborate deed containing covenants by the purchasers, but without expressing any covenants by the vendors—*In re The Railway and Electric Appliances Company* (7), *Aspden v. Austin* (8), and *German v. Chapman* (9). The vendors in this case were trustees for sale, and the Court will not impute to them an intention to bind themselves in perpetuity not to build except in a certain way, which, it is submitted, would amount to a breach of trust. The conditions of sale, too, in this case

(1) 58 Law J. Rep. Chanc. 309; Law Rep. 14 App. Cas. 12.

(2) 48 Law J. Rep. Chanc. 33; Law Rep. 9 Ch. D. 125; aff. on app. 48 Law J. Rep. Chanc. 830; Law Rep. 11 Ch. D. 867.

(3) 9 Sim. 196; 7 Law J. Rep. Chanc. 160.

(4) 38 Law J. Rep. Chanc. 557; Law Rep. 4 Chanc. 218.

(5) 5 H.L. Cas. 185; 23 Law J. Rep. Chanc. 865.

(6) 52 Law J. Rep. Q.B. 737; Law Rep. 7 App. Cas. 467.

(7) 57 Law J. Rep. Chanc. 1027; Law Rep. 38 Ch. D. 597.

(8) 5 Q.B. Rep. 688; 13 Law J. Rep. Q.B. 155.

(9) 47 Law J. Rep. Chanc. 250; Law Rep. 7 Ch. D. 271.

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expressly provided that the vendors would not enter into any covenant except that they had done no act to incumber. Admitting, therefore, that the deed-poll must be treated as if made *inter partes*, we still submit that, looking to all the circumstances, the vendors are in no way bound, either by express or implied contract, not to sell the lots for the time being unsold to other purchasers on different terms.

They also contended that such a covenant, binding on the unsold lots for all time, would be void as tending to a perpetuity—*Maclean v. Mackay* (10) and *The London and South Western Railway Company v. Gomm* (11).

Millar, Q.C., in reply, cited *Western v. MacDermott* (12) and *Piggott v. Stratton* (13).

Cur. adv. vult.

KAY, J. (on Dec. 19).—The question in this case is simply whether the vendors of land laid out upon a building scheme have covenanted or agreed expressly or by implication with the plaintiffs, who are purchasers of part of the land under that scheme, not to authorise other purchasers to use the rest of the land in violation of the building scheme.

If they have so contracted, either by negative words, or by affirmative words which imply a negative, there is no doubt the Court would restrain them from breaking such a contract.

The facts are these: [His Lordship stated them as set out above, and continued:]

Now the first question is, what is the true intent and meaning of this deed. A building scheme has been carefully elaborated. It had been embodied in an estate plan, to which all purchasers were referred by this deed. The deed recites that some purchasers had already bought lots according to this scheme in respect of which they were bound to execute the deed. That was so. They had bought under the conditions to which I have referred, which

expressly mention the deed, and this deed executed under these circumstances by the vendors states that "it is intended" not only that the actual purchasers should execute, but that it should "be a part of all future contracts for sale of the said plots or parcels of land respectively, that the several purchasers should execute this deed, and should thereby be severally and respectively bound by the stipulations hereinafter contained."

Counsel for the trustees have argued that this only means that such was the intention of the trustees for the moment, but that they might alter it at pleasure. They did not enter into any covenant, it is said, because they did not wish to bind themselves in any way. And the phrase "it is intended" was adopted, no doubt, to induce persons to buy on the faith of the building scheme—that could not be denied—but to leave the trustees free to depart from it if they chose—at any rate as to land not actually sold.

That, it is urged, is the meaning, according to what is sometimes called "the good faith and honour," of this deed of contract.

Now I will apply to that argument a very simple test.

Suppose in a building scheme like this a purchaser of one or more lots was required to covenant that he would not build more than one house in each lot, and that, there being no such deed as this, he enquired by letter of the vendors whether all past and future purchasers would be bound by like covenants, and that the vendors answered in writing, "It is intended that all past and future purchasers shall be bound by a like covenant." Would that be a mere expression of intention which the vendors might alter at any time, or would it be a binding contract not to use or authorise the use of the remaining land otherwise? I should think that no lawyer or man of business would hesitate for a moment to say that would be a binding contract. The question is not what the vendor might mean, not whether in his own mind he intended to reserve a power of departing from the bargain; but what the purchaser would understand by the words, what effect they were intended or calculated to produce upon him.

(10) Law Rep. 5 P.C. 327.

(11) 51 Law J. Rep. Chanc. 530; Law Rep. 20 Ch. D. 562.

(12) 36 Law J. Rep. Chanc. 76; Law Rep. 2 Chanc. 72.

(13) Johns. 341; 1 De Gex, F. & J. 33; 29 Law J. Rep. Chanc. 1.

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If that would be the meaning of these words in such a letter, can they have any less or other meaning in such a deed as this? These recitals were inserted in the deed as one of the main inducements to purchasers to buy. It was obviously supposed that better prices could be obtained for the lots if each purchaser was assured that every other would be bound by like stipulations, and that the building scheme under which he was buying would be honourably carried out in respect of all the land coloured green on the plan.

Another mode of testing the argument is this. If this was merely a statement of intention which the vendors were not bound to abide by, they might change it at any time. If they sold half the estate at once to one or many purchasers, who bought and built houses on the faith of this statement, they might then immediately break up the building scheme and sell the rest for a manufactory, for artisans' cottages, or for any purpose, however inconsistent with a scheme for a residential property. Nay more, if it was merely intention which they might alter, they might change it as to any of the lots they had actually sold, and absolve any one or more purchasers from the necessity of covenanting at all.

The lapse of time before their change of intention is not in the least in their favour. For twenty years they have acted as though the expressed intention was binding upon them. If the deed be ambiguous, that conduct shews what they themselves understood it to mean.

I am clearly of opinion that the recitals in this deed do not mean that the intention was one which the trustees were at liberty to change, but that the meaning was that the land coloured green, whether sold or unsold, should not be used in a manner contrary to the building scheme; or, to take the very point now in controversy, that none of the lots marked on the building plan should have more than one house built upon it.

Then if that is the meaning of this deed, what is its effect? It is a deed *inter partes*, the several parties being the vendors and the purchasers who execute. No formal words are necessary to make a covenant in such a deed. A statement of a binding intention on the part of the

vendors who executed the deed, made on the face of it for the purpose of inducing the several purchasers to buy, is as good a covenant as could be made by the more formal words.

In my opinion the effect of this deed is that the vendors thereby enter into a covenant not to authorise the use of the unsold land coloured green on the plan in a manner inconsistent with the conditions of the building scheme as therein expressed; and in particular, with respect to the present dispute, not to authorise the building of more than one house upon each plot of the land coloured green on the estate plan annexed to the deed.

But if the deed did not bind them by such a covenant, what would be the effect of the whole transaction? A more perfect example of a building scheme on the faith of which persons have been induced to buy land and to expend money in building there could hardly be.

In the leading case of *The Duke of Bedford v. The Trustees of the British Museum* (14) the covenant sought to be enforced specifically in equity against the defendants had been entered into in 1675 by their predecessor in title, to build a mansion and offices and no other buildings on the land where the British Museum now stands, and the duke was held not to be entitled to equitable relief by injunction to prevent the defendants from building contrary to this covenant, because of the use which had in the meantime been made of the adjoining land, which at the date of the covenant was occupied by another mansion or unbuilt on. Sir T. Plumer said, "By the letter of the contract the duke is under no positive engagement to leave the northern boundary open; but the question is whether, according to good faith and the true understanding of the parties at the time when this contract was entered into, the terms of the engagement had not reference to the property while it remained in its then state."

Since that decision many cases have occurred, in which, especially where land has been purchased on the faith of a building scheme, an agreement has been implied between the several purchasers, or

(14) 2 Myl. & K. 572; 2 Law J. Rep. Chanc. 129.

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between them and the vendor, not to depart from the scheme.

In *Renals v. Cowlishaw* (2) there was a statement of the general doctrine by the late Vice-Chancellor Hall which was approved by Lord Justice James on appeal, and more recently by the Lords of Appeal in *Spicer v. Martin* (1). That statement in effect is, that every purchaser of a plot of land under a building scheme is entitled to the benefit of a covenant with the vendor by another purchaser, "where the Court is satisfied that it was the intention that he should be bound by a like covenant, and should have such benefit. This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others, where his vendor has contracted with him that he shall be the assign of it—that is, have the benefit of the covenant—and such covenant need not be express, but may be collected from the transaction of sale and purchase."

To apply that language, I should in this case, if there were no express covenant, "collect from the transaction of sale and purchase" an implied agreement by the vendors with every purchaser, that none of the unsold lots should be built upon in a manner inconsistent with the building scheme, or, at least, that they would not authorise such a departure from the scheme.

In *Spicer v. Martin* (1) Spicer by separate conveyances had acquired the fee-simple in seven houses in Cromwell Gardens, South Kensington. Each conveyance contained a covenant by him restricting his use of each house for anything but a private dwelling. He let one of these houses to Martin. He did not enter into any express covenant with Martin restricting the use of the other houses. But the lease to Martin had upon it a plan shewing all the seven houses, and Martin was informed before taking his lease that the leases of Spicer's other houses contained this restrictive covenant, and that there was a like covenant by Spicer in the conveyances to him.

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Martin thereupon in his lease entered into a like covenant as to the house he hired. Afterwards Spicer and his vendors arranged to authorise one Brett to convert five of the other six houses into an hotel, three of these houses being bought directly from Spicer for this purpose. The Lords Justices restrained Spicer from "authorising" this to be done. On appeal to the House of Lords this decision was confirmed. The House of Lords expressly disclaimed proceeding upon the doctrines of *Piggott v. Stratton* (13)—namely, that there had been a representation to Martin that Spicer was bound by a restrictive covenant as to the use of the houses, from which he could not depart. Lord Macnaghten, in a speech which had been read and was approved by Lord FitzGerald and Lord Watson, says this: "As regards the appellant"—that is, Spicer—"the case, I think, is doubly clear. It seems to me that when Spicer put his houses in Cromwell Gardens on the market, he invited the public to come in and take a portion of an estate which was bound by one general law—a law perfectly well understood, and one calculated and intended to add to the security of the lessees, and consequently to increase the price of the houses. The benefit of that increase, whatever it was, Mr. Spicer got. Can he or his representative be permitted to destroy the value of the thing he sold by authorising the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole?" That is, Spicer was bound to Martin by an implied contract—implied from the whole transaction—not to authorise a departure from the rule restricting the use of those seven houses for anything but dwelling-houses. I borrow the very words of that judgment. The defendants in this case are attempting to authorise the use of part of the estate "for a purpose inconsistent with the law by which" they or their predecessors as trustees professed to bind the whole.

The only possible distinction between the act they propose to do and that of Spicer is that they are proposing to authorise the new purchasers to build without compelling them to enter into a covenant. Spicer was about to do the same as to

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three of the houses which Brett was to take; as to others, he was going to release the covenants which former lessees from him had entered into. If there is any difference in this distinction I am not able to appreciate it.

Therefore, if in the present case the trustees were not bound by a covenant, as I think they are, I should hold they were bound by an implied contract restricting their dealing with the land in question in violation of the building scheme.

Purchasers with notice of such an agreement are as much bound as the parties to the agreement. Lord Cottenham, in *Tulk v. Moxhay* (15), says, "That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it, for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

The purchasers who bought in September last with notice of this contract are bound by it also.

Two other points were raised on behalf of the defendants which I must notice.

Mr. Renshaw faintly, but his junior with much earnestness, argued that if there were any contract restricting the number of houses on the unsold plots, it would be void for perpetuity. The argument was attempted in *Coles v. Sims* (16), and it was expressly decided that such a contract was not obnoxious to the rule. But the case which is most against this view is that upon which the argument was founded—*The London and South Western Railway Company v. Gomm* (11). In that case the Court of Appeal overruled two cases which had decided that a limitation of property was not obnoxious to the rule if the person to take under that limitation could release it. But it also decided that mere contracts, whether by deed or not, are not within the rule which only applies to limitations of property. The Judges expressed an opinion that a

contract by A. to sell land to B. or his heirs at a fixed price upon notice in writing given by B. or his heirs, created an interest in land, and that there was no real distinction in equity between such a contract and a limitation by which upon such payment the estate would vest in B. and his heirs. No doubt that doctrine is entirely novel. But there is nothing in the case which gives the smallest ground for the contention that a covenant by a vendor or purchaser restricting the use of land reserved or sold is within the rule against perpetuity.

Another argument was this. The vendors, it was urged, were trustees, and though they had power to sell, a sale with restrictive covenants would not be a proper exercise of that power. Counsel admitted that the sales which were made in September last were just as bad in this respect because they were made subject to conditions similar in kind though not the same. Under such circumstances the argument is rather surprising.

I am of opinion that the building scheme was within the powers of the trustees. I have no doubt that it was the best and most lucrative mode of dealing with the estate, and that they have received much more under it than could have been made by sale of the land in any other way. I have no reason to suppose that the conditions imposed were depreciatory. I should infer just the contrary even if the land now in question remained unsold.

There must be an injunction against the defendants restraining them from authorising any purchaser from them of any of the plots of land comprised in the building scheme, and coloured green upon the plan annexed to the so-called deed-poll, to build upon each plot more than one house or two semi-detached houses, contrary to such building scheme.

The defendants must pay the costs of the action.

Solicitors—Parish & Hickson, for plaintiff;
Frere, Forster & Co., for defendants.

(15) 2 Ph. 778; 18 Law J. Rep. Chanc. 83.

(16) 5 De Gez. M. & G. 1; 28 Law J. Rep. Chanc. 258.

KAY, J.
1889.
June 21, 29. }

In re BEACH.
CLARKE v. HAYNE.

Settlement—Construction—Gift to Wife's Next-of-kin after the Death of Husband and Wife—Time of ascertaining Class to take.

By a marriage settlement, property of the wife was vested in trustees, upon trust, in default of appointment by the wife, after the death of husband and wife, "for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto, in case the said M. Robinson" (the wife), "having survived the said R. Beach" (the husband), "were to die possessed thereof respectively and intestate, and to be divided between or among such persons, if more than one, in the shares and proportions in which the same would be divisible under the same statutes." The wife died in 1848, without making any appointment. The husband died in 1887. The question was raised on summons at what period the next-of-kin, who were to take in default of appointment by the wife, were to be ascertained:—Held, that the persons to take were those who would have been entitled to the wife's personal estate if she had survived her husband and died immediately after him.

Druitt v. Seward (55 Law J. Rep. Chanc. 239; Law Rep. 31 Ch. D. 234) and *In re Bradley*; *Brown v. Cottrell* (58 L. T. N.S. 631) not followed.

Originating summons.

On the 23rd of October, 1839, a settlement was executed on the marriage of Richard Beach with Martha Robinson, widow, of which Henry Hayne and George Hayne were the trustees. Certain copyhold hereditaments and personal estate belonging to M. Robinson were thereby vested in the trustees, in trust, after the marriage, for such persons as she should appoint; and, in default of appointment, upon trust for the said M. Robinson during her life, for her separate use, and after her death for the said R. Beach during his life, and, after the death of the survivor, "in trust for the person or persons who, under the statutes made for the distribution of the estates of intestates, would

then be entitled thereto, in case the said M. Robinson, having survived the said R. Beach, was to die possessed thereof respectively and intestate, and to be divided between or among such persons, if more than one, in the shares and proportions in which the same would be divisible under the same statutes."

Martha Beach died on the 21st of November, 1848, without having exercised her power of appointment. Richard Beach died on the 3rd of October, 1887.

The question raised by the summons was whether the persons entitled as next-of-kin of Martha Beach were those who were her next-of-kin at her death, or those who would have been her next-of-kin had she died immediately after the death of her husband.

The plaintiff was one of the next-of-kin, and the defendant the executor of the surviving trustee of the settlement.

John Forby was appointed to represent such of the next-of-kin as were living at the death of Martha Beach, but died before Richard Beach.

Dundas Gardiner, for the plaintiff, argued that the next-of-kin to take were those who survived Richard Beach, and cited *Pinder v. Pinder* (1), *Chalmers v. North* (2), *Wharton v. Baker* (3), *Downes v. Bullock* (4), *Wheeler v. Addams* (5), and *Druitt v. Seward* (6).

[KAY, J., referred to *White v. Springett* (7).]

W. F. Hamilton, for Forby, cited *Mortimore v. Mortimore* (8).

E. Clayton, for the defendant, cited *In re Bradley*; *Brown v. Cottrell* (9).

Gardiner, in reply.

KAY, J. (on June 29), after stating the provisions of the settlement as above set

- (1) 28 Beav. 44; 29 Law J. Rep. Chanc. 527.
- (2) 28 Beav. 175.
- (3) 4 Kay & J. 483.
- (4) 25 Beav. 54; 9 H.L. Cas. 1.
- (5) 17 Beav. 417.
- (6) 55 Law J. Rep. Chanc. 239; Law Rep. 31 Ch. D. 234.
- (7) 38 Law J. Rep. Chanc. 388; Law Rep. 4 Chanc. 300.
- (8) 48 Law J. Rep. Chanc. 470; Law Rep. 4 App. Cas. 448.
- (9) 58 L.T. N.S. 631.

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out, continued :—The wife died in the lifetime of the husband. The next-of-kin under the statutes at her death, and those persons who would be her next-of-kin if she had survived her husband and died immediately after his death, are not altogether the same; and the question is which of these two classes is to take.

It is to be observed that in this case there is no provision for the children of the marriage. The ultimate gift is to take effect whether the wife survives the husband or not. The argument on behalf of what has been called the artificial class—namely, those who would be entitled as next-of-kin if the wife had died immediately after the husband—requires that the words of the gift over should be construed so as to entitle a different class of persons according to the event. For example, the wife might have survived the husband many years, and her next-of-kin at her death might be very different from those who would have been next-of-kin if she had died immediately after him, who might also differ, as they do in this case, from her next-of-kin at her death in his lifetime. This is not an impossible construction, but it may be argued that it is not a probable intention. Moreover, the argument requires the Court to fix a time for the supposed death, which the settlement has not done, except by the words “in case the wife, having survived the husband, were to die,” &c. These words, it is said, must be read “as though she were to die immediately after the husband.”

It is argued that the object of the peculiar wording of the ultimate limitation is obviously only to exclude the husband in case he should survive. But, if it had not been for this limitation, the husband, surviving the wife, would take her personal estate in his common law right, not by virtue of the statutes of distribution. Therefore, if he be excluded, it must be by substituting as *cestuis que trust* persons who could not have any right under those statutes; that is, if the husband is excluded, and a class of persons is substituted, it must be an artificial class.

When once that conclusion is arrived at, there is no presumption in favour of the

persons entitled under the statutes at the actual death of the wife. That class substituted for the husband would be as artificial as any other. There is, therefore, no reason to depart from the grammatical meaning of the words. They cannot mean the persons who, if the husband survived the wife, are entitled under the statutes, or will then be entitled. There cannot be any such persons. The words are, “who would then be entitled.” Those words were only applicable to a supposed event. What is that supposed event? It is the wife surviving the husband, and then dying possessed thereof and intestate. It is impossible grammatically to read that as describing the persons who would be entitled at her actual death in the husband's lifetime, as though he had predeceased. The words mean literally. “You are to suppose that the wife, having survived the husband, were to die possessed thereof and intestate, and to ascertain the persons who would then be entitled under the statutes.” Reading “then” as meaning “in that event,” the event supposed is the wife surviving the husband and dying after him. It would have been easy to have worded the limitation thus, “the persons who would have been entitled under the statutes at the wife's death if the husband had died in her lifetime,” if that had been the intention. But those are not the words; and as the class must be an artificial one in the event which has happened of the husband surviving, there is no reason to do violence to the actual words in order to substitute one artificial class for another.

In *Pinder v. Pinder* (1) the trusts of a settlement were “for the husband for life, wife for life, children of the marriage, and, if none, for the wife if she survived; but if the husband survived, then, after his death, for the appointees of the wife, and, in default, for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled to the personal estate of the wife in case she had survived her husband and had died possessed of the same intestate, and to be divided among them according to the statute.” Lord Romilly held that the word “then,” if it

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stood alone, might be read "thereupon" or "on that occasion"; but that the additional words, "in case she had survived the husband and had died possessed of the same intestate," shewed that the class intended to take were the persons who would have been her next-of-kin if she had died immediately after her husband.

In a subsequent case in the same volume, *Chalmers v. North* (2), where the words were the same, his Lordship came to the same conclusion.

On the other hand, in *Druitt v. Seward* (6), where the words were, "in trust for such person or persons who, under or by virtue of the statutes made for the distribution of estates of intestates, would, on her decease, have been entitled thereto in case she, having survived her husband, had then died possessed thereof and intestate," the next-of-kin of the wife at her own death were held entitled, although she had died in the lifetime of her husband.

This was followed in *In re Bradley* (9), where the limitation in a settlement, after trusts for the wife during joint lives, then for the husband for life, were for the wife absolutely if she survived; but, if she died in her husband's lifetime, in trust for her appointees, and, in default, "for the person or persons who, under or by virtue of the statutes," &c., "would, on the decease of the" wife, "have been entitled thereto in case she had survived the" husband, "and had then died possessed thereof intestate," &c.

In the two last-mentioned cases the learned Judges who decided them did not profess to adopt the grammatical construction of the words, but held that the object was simply to exclude the husband; and for this reason they considered the wife's next-of-kin at the actual time of her death were intended.

With great respect, adopting that theory, I see no reason for arriving at such a conclusion. The exclusion of the husband, as I have pointed out, makes it necessary to substitute an artificial class; and why any other class should be preferred to that which the words, taken literally, describe, I am not able to imagine. I therefore hold that the persons to take are those who would have been entitled to

the wife's personal estate if she had survived her husband and died immediately after him.

Solicitors—P. G. C. Shaw, agent for Odden F. Read, Mildenhall; S. Newman; Boulton, Sons & Sandeman.

CHITTY, J. } *In re* THE WEST RIDING OF
1890. } YORKSHIRE PERMANENT BENE-
Jan. 22, 23. } FIT BUILDING SOCIETY.

Building Society—Winding-up—Borrowing Members—Liability to contribute to Losses of investing Members—Terms of Redemption.

A rule of a building society provided that, in the event of there being a "deficiency of income by which the society may be prevented from meeting its anticipated expenditure and liabilities," the amount should be apportioned between the investing and borrowing members. Losses having occurred,—Held, that "liabilities" included the sums due to the investing members in respect of their shares, and that the borrowing members were liable to contribute rateably to any losses thereon incurred by the investing members.

Another rule provided that property mortgaged to the society to secure advanced shares should be so secured "until the amount of such shares shall be repaid to the society, with all fines and other payments incurred in respect thereof":—Held, that under this rule a borrowing member was not entitled to redeem his mortgage, except on payment of what might be due from him in respect of his above-mentioned liability.

This society was established in 1849 under the Building Societies Act (6 & 7 Will. 4. c. 32), and was not registered under the Act of 1874. It was constituted in the ordinary form of advanced and unadvanced members, its object being to make advances to members of the amount or value of their shares for the purpose of erecting or purchasing houses. The amount of each share was fixed at 120l.,

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with a proviso that the value of a member's share should, on his joining the society, be 60%, and that its value should, at any subsequent period, be estimated according to the society's tables. Advances were to be made on the security of property to the satisfaction of the directors; and it was provided by rule 18 that "whenever the value of a share or shares shall be advanced to any member out of the funds of the society, pursuant to these rules, the property shall be secured to the society by way of mortgage until the amount of such share or shares shall be repaid to the society, with all fines and other payments incurred in respect thereof; and every such mortgage deed shall be made in such form, and contain all such covenants, clauses, and provisos, including a power of sale, as are usually inserted in deeds of the like nature, and as the solicitors of the society shall think proper." The rule with respect to the members' right of redemption was to the same effect, and in the mortgages which were taken by the society from its members as security for advances on their shares, the proviso for redemption was framed in accordance with these provisions.

Rule 39, headed "Surplus Profits," provided "that the present and future surplus arising from the transactions of the society, after providing for all liabilities, shall from time to time be appropriated equitably and equally between the investing and borrowing members by way of bonus, in proportion to the number of shares held by each member, and the period subscribed for to the society."

And rule 40, headed "Deficiency of Income," provided that "the directors shall, every three years at least, take into consideration the general affairs and the gross receipts and expenditure of the society at special meetings of their body, to be called for that purpose by the manager; and if they shall determine at such special meeting that there is a deficiency of income by which the society may be prevented from meeting its anticipated expenditure and liabilities, the amount of such deficiency shall be equitably and equally apportioned by the directors between the investing and borrowing members, and shall be paid by them

severally and respectively forthwith, or by such monthly or quarterly instalments as the directors shall determine; and if the same shall not be paid accordingly, every member who makes default shall pay the same fines as for an equal amount of subscriptions or repayments in arrear, as the case may be."

Losses having occurred from the frauds of a secretary, the directors, in 1887, held a special meeting to consider the affairs of the society, at which they resolved on a winding-up under the supervision of the Court; and on the 26th of November, 1887, an order to wind up the society was made. The assets were estimated (and for the purposes of this application were admitted) to be sufficient to satisfy the outside creditors of the society in full, but to be insufficient to satisfy the claims of the non-advanced members. Under these circumstances the liquidator claimed to make the advanced members contribute a rateable proportion of the loss which might be sustained by the other members, and, with this object, sought to have them placed upon the list of contributories. And certain advanced members having applied to the liquidator in the course of the winding-up to accept payment of the subscriptions and other payments due on their shares, and for a reconveyance, he refused, on the ground that, even after the outside creditors were satisfied, the securities covered any sums payable by the advanced members in respect of their proportion of the above losses.

With a view to having these questions decided, the chief clerk, on the application of the liquidator, settled certain advanced members on the list of contributories, and then adjourned the application into Court.

It appeared from the minute-book of the society that, excepting the meeting at which the winding-up was resolved on, no special meeting had ever been held, as provided by rule 40; but Chitty, J., held that, the directors being now *functi officio*, and ascertaining deficiency of income being merely a question of machinery, it was competent for the Court to determine the matter.

Romer, Q.C., and *Baker*, for the liquidator.—It is admitted that in adjusting

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the rights of the members of a building society *inter se*, advanced members are not *prima facie* liable to bear a share of losses sustained by investing members—*Brownlie v. Russell* (1)—even where they are entitled to share in profits—*Tosh v. The North British Building Society* (2); but both those decisions were expressly rested on the particular contract between the members of the societies, and on the absence in their rules of anything from which it could be inferred that the advanced members were to be liable for the losses of unadvanced members (3). But here rule 40 does make them liable. The term “liabilities” there used includes the sums to which the investing members are entitled, as these would have to be allowed for before the “profits” could be ascertained under rule 39. Profits and losses must be calculated on the same footing. The phrase “deficiency of income” in rule 40 does not imply any contrast with “capital,” but refers to all sums coming in to the society, and it is by this that the losses must be calculated. And this liability of the advanced members is a “payment incurred” in respect of their share within rule 18, and is a charge on the property they mortgaged to the society, and the security cannot be redeemed until the liability is satisfied.

Byrne, Q.C., and *Wurtzburg*, for the advanced members.—In a building society, advanced members are liable as contributors only to the claims of outside creditors, but not to claims by other members—*In re The Doncaster Permanent Building Society* (4). And this claim is not within rule 40. The “liability” there contemplated is one arising from a “deficiency of income”—that is, an absence of profit on the society’s transactions, out of which alone the investing members’ interest would be payable. The members’ subscriptions form the society’s capital, and an advanced member, on redeeming his security, has repaid to the society the share of the capital which he has received,

and all liability in respect of his share is extinguished. It follows that no such liability as that claimed is chargeable on the advanced members’ security under rule 18. And, even if it were chargeable, it would be a hardship that the right to redeem should be postponed until the extent of the claim is ascertained, which might, under rule 40, have meant a delay of three years.

Byrne, Q.C., and *T. B. Napier*, in support of the summons by the member seeking to redeem.

Romer replied.

CHITTY, J.—It is admitted that the assets of this society, after the outside creditors have been satisfied, may not be sufficient to repay the investing members the full amount of their shares; and the question now raised is, whether this loss is to be borne by them exclusively, or whether the advanced members are liable to contribute rateably thereto, so as to make the loss fall on both classes of members. To put a simple case by way of illustration, I will assume there to be only a single member of each class, and the assets, after all liabilities have been discharged, to amount to 100%, and that the investing member is entitled to demand payment of a full share of 120%; the question then being whether the other advanced member is liable to bear with the investing member this loss of 20%. Now, it is well established that in these societies advanced members are not liable to contribute to a loss such as this is, unless there be a contract between the members to that effect, and in the present case it is on the terms of rules 39 and 40 that this question must be determined. [His Lordship then referred to the constitution and objects of the society, and continued:] Now, under rule 39 it is clear that profits are to be credited in a due proportion both to the investing and to the advanced members. The effect of so doing in the case of the investing members is this, that, supposing there to be no subsequent losses, they will in a lesser time, and with diminished payments, have made up the amount of their shares. And similarly the advanced members, who are paying their subscriptions on the footing

(1) Law Rep. 8 App. Cas. 235.

(2) Law Rep. 11 App. Cas. 489.

(3) *Cf. per* Lord Selborne, Law Rep. 8 App. Cas. 252.

(4) Law Rep. 3 Eq. 158.

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of their mortgage deed, will be relieved *pro tanto* from these payments.

Now the rule is headed "Surplus Profits," and it is in these terms: [His Lordship read the rule and continued:] The term "liabilities" here clearly includes the amounts due to the investing members; the balance-sheets of the society all state this as being so—and correctly, the first item of liability being always "to value of shares not advanced upon." Of course, there is nothing put down in respect of the advanced members' shares, inasmuch as those have been paid. And in each of the balance-sheets down to 1886 there is inserted among the liabilities "profits due to members," not attributing this item to them rateably, but taking it as a gross sum due to them in a body. I have, therefore, no hesitation in holding under this rule that, in estimating profits, the sums payable to investing members must be treated as a liability. But if this rule stood alone it is plain that the advanced members would still not be liable to contribute to this loss, for an agreement to divide profits is not sufficient to make them liable for losses. But then comes rule 40, which must be read in connection with rule 39. The rules in many of these societies are not expressed as carefully as is desirable, and they are often difficult to construe, and this rule is itself open to some such observation upon it. [His Lordship read the rule and continued:] This language has been criticised in argument, especially the term "deficiency of income," which was apparently argued to be something distinct from "capital." But there is no such contrast in the rule, where "income" means merely all that comes in to the society. This is clear from its very nature, for the subscriptions consist partly of principal and partly of interest, and there is in these societies no such distinction between capital and income as exists in companies which have a fixed capital—no distinction, that is, between the tree and its fruit. Under this rule the directors are to consider every three years whether the income will be sufficient to meet the expenditure and liabilities anticipated within that period, and to make provision according. In my opinion, any

loss owing to which the assets might be insufficient to meet the claims of the investing members would have to be included among such liabilities, and by the rule this is to be borne, not by the borrowing members alone, but by both classes, equitably apportioned between them. I come to the conclusion, therefore, that the liquidators' contention on this point is correct, and that the advanced members are liable to contribute to any losses sustained by the investing members in respect of their shares.

The other question is this. The advanced members are prepared to pay off all the society's claims under their securities. But the liquidator contends that their securities include the just proportion of the losses of the society to which the advanced member is bound to contribute. This is contested by the member. But this question is really disposed of by rule 18, in conformity with which the mortgage deed was framed. For it throws on the security not merely the instalments and fines, but "other payments incurred," which is equivalent to saying "liabilities for payments." This is a liability accrued at the date when the advanced member seeks to redeem; it is, therefore, included in the security, which cannot be redeemed until the payment is made. The exact amount due is not yet ascertained, but *certum est quod certum reddi potest*. I hold, therefore, that the advanced members cannot redeem their mortgages except on payment of what may be due from them towards the losses sustained by the investing members, but I see no objection to the liquidator allowing them to redeem forthwith, on their paying into Court a sum provisionally assessed in respect of this liability.

Solicitors—Burn & Berridge, agents for J. R. Farrar, Halifax, for official liquidator; Ford & Ford, agents for E. T. Rhodes, Halifax; and Emmet, Son & Stubbs, agents for Wavell, Son & Marshall, Halifax.

STIRLING, J. }
 1889. } POSTLETHWAITE v. THE PORT
 Nov. 29. } PHILIP AND COLONIAL GOLD
 Dec. 13, 21. } MINING COMPANY.

Company—Winding-up—Reconstruction—Transfer to New Company in consideration of Shares—Scheme—Limitation of Time for Exercise of Option to take Shares—Forfeiture—Ultra Vires—Acquiescence—Delay—Companies Act, 1862, s. 161.

A scheme for the reconstruction of a company by the transfer of its assets to a new company in consideration of shares under section 161 of the Companies Act, 1862, is not vitiated by the insertion of a limit of time within which the option given to the shareholders of the old company to take shares in the new must be exercised, provided the limit be such as to leave the option available for a reasonable time.

This was an action by Theodore Postlethwaite, on behalf of himself and all other shareholders in the Port Philip and Colonial Gold Mining Company, against that company (which was in liquidation, and is hereafter called the old company), the liquidator of the old company, and the Port Philip Gold Company (hereafter called the new company). The action came on upon a motion to restrain the old company and the liquidator from parting with the assets of the old company, and to restrain the new company from dealing with any of such assets already transferred to them, otherwise than in the ordinary course of business. The object of the motion was to test the validity of an agreement for sale by the old company of its assets to the new company, purporting to have been entered into under the provisions of section 161 of the Companies Act, 1862, and by arrangement the hearing of the motion was treated as the trial of the action.

The plaintiff was the holder of 1,978 shares in the old company, which early in the year 1889 was in want of additional capital. With a view of obtaining this, a voluntary liquidation and reconstruction was determined upon; and accordingly, on the 28th of January, 1889, a resolution was passed that the old company should be wound up voluntarily. On the 18th

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of February this resolution was confirmed and a liquidator appointed. On the 2nd of April the liquidator issued a circular calling an extraordinary meeting of the shareholders for the 12th of April for the purpose of passing (if thought expedient) certain resolutions there set out, with or without modification. At the meeting the resolutions were passed, in a somewhat modified form, and were in the following terms:—

“That the liquidator be and is hereby authorised and directed to sell and transfer to a new company to be incorporated with limited liability under the Companies Acts, 1862 to 1886, all and singular the lands, hereditaments, mines, . . . and all other property and effects of this company in the colony of Victoria of every description whatsoever, except cash in hand or moneys due to this company, upon the following terms and conditions:—

“(1.) (a) The name of the new company shall be such as the liquidator may approve, and he may assent to the adoption by the new company of the same or a similar name to that of this company, and the nominal capital thereof shall be 50,000*l.*, in 200,000 shares of 5*s.* each, with the usual power to increase and reduce the same. The memorandum and articles of association of the new company shall also be subject to the approval of the liquidator.

“(b) The consideration for the said sale and transfer shall be: The payment of the sum of 50,000*l.* by the allotment to the liquidator or to his nominees of 200,000 shares” (that was, in fact, the whole capital) “of 5*s.* each in the new company credited with 2*s.* paid thereon, and leaving a liability of 3*s.* per share and no more, and the payment and satisfaction by the new company of any sums which may become payable to any shareholders of this company who have dis-sented under the Companies Act, 1862.

“(2.) That the liquidator be and he is hereby authorised and directed to procure to be allotted to every member of this company requiring the same, as his nominee under the contract hereinafter mentioned, two shares in the new company with 2*s.* credited as paid thereon for and in respect of every share held by him in this com-

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pany : Provided always, that to entitle the members of this company to an allotment of such new shares, application must be made for the same in writing in the form and manner prescribed by the liquidator, accompanied by a payment of 6*d.* per share on the number of shares applied for within ten days next after notice requiring him to apply for the same shall have been given in the manner in which notices are required to be given to members under the articles of association of this company."

"(3.) That the liquidator be and is hereby directed to dispose of so many of the said 200,000 shares as shall be in excess of the number to which the members of this company would be entitled if they all applied for the same, and also of the shares for which applications are not made within the time and on the terms aforesaid; and in making such disposition of the said shares the liquidator shall not be treated as a trustee for or in any fiduciary relation to the said members or to the new company, but shall have full discretionary power of selling and transferring the same to any person or persons at such price or prices (if any) and on such terms and conditions as such liquidator may think fit, and it shall not be necessary to first offer such surplus shares to the shareholders of this company; and the new company shall be entitled to retain all shares not applied for and taken by the liquidator or his nominee within three months after the incorporation of the new company. If the liquidator shall obtain any premium for the shares to which members of this company other than such dissentients would have been entitled had they applied for the same as aforesaid, such premiums, less the costs and expenses of realisation, shall belong and be paid to such members by the liquidator."

The fourth resolution provided that the liquidator was to be "authorised to enter into a contract in the form submitted to the confirmatory meeting, but with power to concur with the new company in any modification of the same which he may consider necessary or expedient for carrying into effect the arrangement embodied in the aforesaid resolution."

(5.) "That the liquidator be authorised

to enter into a contract with any person or persons for the purpose of obtaining subscriptions for any such shares, on such terms and conditions as he may think expedient."

The contract which was ultimately entered into with the new company on the 16th of July, 1889, was in accordance with the draft which was laid before the meeting. It contained a recital of the resolutions for the voluntary winding-up, and of the resolutions which were passed at the meeting in April. It also contained stipulations as to the sale, and it provided by clause 3 that the new company should pay, in addition to the purchase-money, to the liquidator a sum sufficient to cover the costs of and incidental to the scheme for the sale of the property, the formation and registration of the new company, the preparation and carrying-out of all necessary contracts, and of such verification of the title of the old company to the leases, claims, and other property sold as the new company should consider necessary, and should also pay the cost of keeping the mines free from water, and other outgoings at the mines, as from the 31st of March last, and any sum or sums of money which the liquidator might have paid or contracted to pay as commission for underwriting, selling, or disposing of the shares to which he might be entitled under the contract or any of them.

Then by clause 5 the liquidator was to have the right from time to time during the period of three calendar months from the date of the agreement to nominate the person or persons to whom the said 200,000 shares should be allotted. Every such nomination was to be in writing under the hand of the liquidator, and was to be left at the registered office of the new company.

Clause 6 provided that if the liquidator should not apply for the whole of the shares within the period of three calendar months from the date of the agreement, the new company should have the right, by notice in writing, to require the liquidator to apply for the same either in his own name or in the names of responsible persons within fourteen days.

The contract further provided that if the liquidator should fail to apply for such

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shares as aforesaid within that period, the shares not so applied for should be at the disposal of the new company, and might be accordingly sold, allotted, and disposed of by the new company to any person or persons for such consideration as the directors of the new company might think fit and the law might allow.

There was also a proviso that the liquidator was to keep the mines free from water, and continue the works and carry on the business of the old company.

Clause 12 provided that the liquidator should not be under any personal liability in respect of any shares to which he might be entitled or might have claimed under the agreement, except such shares (if any) as might be actually allotted to him at his request.

These resolutions were confirmed at a meeting held on the 29th of April. On the 8th of June the new company was incorporated, and on the 12th of June the liquidator issued a circular to the members of the old company, of which the material parts were as follows:—

“As you will no doubt recollect, at the extraordinary general meeting of this company, held on the 12th of April last, resolutions were passed authorising the sale of this company's mines and property in Victoria to a new company to be formed, and on the 29th of April these resolutions were confirmed, and the draft contract for giving effect to them was approved by the shareholders. I have now the pleasure to inform you that the new company, called ‘The Port Philip Gold Company (Limited),’ has been incorporated under the Companies Act, 1862–86, with a nominal capital of 50,000*l.*, in 200,000 shares of 5*s.* each, every shareholder in this (the old) company being entitled to apply for and have allotted to him two shares of the new company of 5*s.* each (credited with 2*s.* per share as paid thereon, and leaving a liability of 3*s.* per share) in respect of each share held by him in the old company. I have also much pleasure in stating that in pursuance of the powers and instructions given me at the above-mentioned meetings, I have entered into an arrangement with the Gold Trust and Investment Company (Limited), who for a payment of 3*d.* per share have guaran-

teed to find subscribers for the whole of the shares (if any) which may not be taken by the shareholders.

“By this arrangement subscriptions for the whole of the new capital are assured, without any necessity for advertising or offering shares to the public, with the attendant expenses and delay.

“In accordance with the rights reserved to the shareholders of the Port Philip and Colonial Gold Mining Company (Limited), by the special resolutions and draft contract above referred to, I now beg to offer you an allotment of shares of and in the Port Philip Gold Company (Limited), in respect of shares held by you in this company, as appears by the register of members thereof, provided application be made for the same in writing, accompanied by a payment of 6*d.* per share on the number of shares applied for, and that the said application and deposit be received by the Imperial Bank (Limited), Lothbury, London, E.C. (the bankers of the Port Philip Gold Company (Limited)), on or before the 25th day of June instant.

“If no application is received from you on or before the said 25th day of June inst., or so far as any application may not extend, you will be deemed to have refused an allotment of shares in the new company to which you are entitled under the said special resolutions and draft contract, and you will be excluded from an allotment accordingly. Any shares unapplied for will be disposed of by me, as liquidator, to such person or persons, and at such price, and on such terms and conditions (if any) as I may think fit.”

With this circular were sent two forms of application, and a further circular containing instructions as to filling up the forms of application, and adding: “Any shareholder from whom an application and deposit shall not have been received by the bankers above named on or before the 25th of June instant, shall be deemed to have declined the shares not so applied for, and will thereupon absolutely forfeit his or her right to an allotment. The time for receipt of application cannot be extended.”

The plaintiff was a stockbroker on the London Stock Exchange, and regularly attended to his business down to the 17th

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of June. From the 17th of June to the 24th of August he was compelled to absent himself from business by domestic affliction. The plaintiff did not attend any of the meetings of the company above referred to, but he did not dissent from the resolutions passed at them. It was proved that the notices of the meetings of the 12th and 29th of April and the circular of the 12th of June were duly sent by post to the plaintiff at his registered address—namely, the Stock Exchange—in accordance with the provisions of the articles of association of the old company. In answer to this the plaintiff stated that he had no recollection of having seen any of the circulars, except a notice and forms of application, which were proved by the evidence to have been posted along with the circular of the 12th of June, and that to the best of his knowledge and belief no other circular was ever received at his office. The plaintiff, however, admitted that in June, 1889, and shortly before the 17th thereof, the liquidator called on him at the door of the Stock Exchange, and asked him how many shares he would be willing to take up, and that he told him he intended to take up his proportion, and no more. Upon this evidence the Court assumed that the notices and circulars were duly received at the plaintiff's office, and that previously to the 17th of June he was, or with reasonable diligence might have been, aware of the obligation which lay on him, under the special resolutions, to send an application for shares by the 25th of June. He did not, in fact, send any application by that date; but on his return to business, on the 24th of August, he filled up the form of application and sent it to the liquidator. At this time, however, the liquidator had carried into effect the arrangements mentioned in the circular of the 12th of June, and consequently was unable to give him any shares. After some correspondence between the solicitors of the plaintiff and the liquidator this action was commenced on the 2nd of October, by writ, asking a declaration that the agreement entered into between the old company and the new company was *ultra vires* the old company and inoperative and void, and an injunction to restrain the old company and the liquidator from carrying into

effect the said agreement, or, in the alternative, from carrying it into effect, except upon allotting or causing to be allotted to the plaintiff shares in accordance with the scheme sanctioned by the resolutions of April. Notice of motion framed in accordance with the second of these alternatives was given, but it was afterwards amended, and was now to the effect above stated. The new company had allotted all their capital, in accordance with the agreement with the old company, and had been put in possession of the property of the old company, though a legal conveyance had not actually been made.

Graham Hastings, Q.C., and Farwell, for the plaintiff.—The clause in the scheme limiting a time within which shareholders of the old company must apply for shares in the new, is *ultra vires*, and vitiates the whole transaction—*Griffith v. Paget* (1) and *Clinch v. The Financial Corporation* (2).

The liquidator is not merely selling the assets of the company, he is actually giving them away, or rather paying some one to take them. That must be *ultra vires*.

Section 161 merely enables the liquidator to substitute shares for cash, and to distribute those shares amongst the shareholders. If the liquidator were distributing cash, could he say to the shareholders, "Unless you apply before a certain time your shares will be forfeited"? There has been no acquiescence by the plaintiff, nor is he debarred by delay.

Grosvenor Woods and Kerly, for the liquidator.—The scheme is in the common form which has been frequently sanctioned by the Courts. The terms of the Act are quite general and very wide. The liquidator has power to sell for "any benefit."

In *In re The Bank of Hindustan, China, and Japan (Limited)*; *Higgs's Case* (3) it was held that the shareholder is not bound to accept the shares; and it is distinctly pointed out in that case that there is no inequality in the forfeiture of his shares if he neglects to express his dissent

(1) 45 Law J. Rep. Chanc. 493; Law Rep. 5 Ch. D 894.

(2) 38 Law J. Rep. Chanc. 1; Law Rep. 4 Chanc. 117.

(3) 2 Hem. & M. 657.

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as prescribed by the section. With regard to the limitation of time, there are many cases in which such a limitation has been sanctioned—*Zuccani v. The Nacupai Gold Mining Company* (4) and *The Southport and West Lancashire Banking Company (Limited)* (5). See also *Healey on Company Law and Practice* (2nd ed.), 377.

There must be a time limited for the exercise of the option, otherwise the capital would never be raised. The liquidator must realise the shares like any other assets. It would be startling if such schemes as the present one were now to be held invalid.

Griffith v. Paget (1) does not apply here. In that case there were two classes of shareholders, having different rights *inter se*, and what was decided was that you could not alter the rights as between those two classes. Here we are not proposing to favour any particular class of shareholders. There is no inequality at all.

In *Southall v. The British Mutual Life Assurance Society* (6) a clause in an amalgamation agreement providing that part of the purchase-money should be paid to the directors of the selling company by way of bonus was held not to vitiate the transaction. The plaintiff has acquiesced in what has been done. After the resolutions were confirmed, he said, "Don't upset everything, but give me my shares." He cannot now, on an interlocutory application, obtain the relief which he claims.

In *Clinch v. The Financial Corporation* (2) the same difficulty did not arise. Even in cases of *ultra vires* the Court will not, where complications of interest have arisen, necessarily upset the whole transaction—*The European Assurance Society Arbitration* (7).

Buckley, Q.C., and *G. F. Hart*, for the new company.—The point in this case is one of great importance. If the contention of the applicant is right, section 161 would be unworkable. We admit that it is not competent for the majority to vote away the property of the minority.

(4) 61 L.T. 176.

(5) *Palmer's Company Precedents* (4th. ed.), 587.

(6) 40 Law J. Rep. Chanc. 698; Law Rep. 6 Chanc. 614.

(7) 17 Sol. J. 403.

Griffith v. Paget (1) does not apply. It is contended on behalf of the applicant that the section provides that the liquidator may sell and distribute amongst all the members. That is not so, because it does not include those who are dissentient or unwilling. What is to be done if all the shareholders do not come in within a reasonable time? The section is not yet fully worked out. It is now decided that the liquidator may sell in consideration of shares not fully paid up. He acquires the shares for the purpose of distribution. In the course of that distribution he offers a share to a particular member. If the member does not accept it, it becomes a part of the assets of the company in liquidation, and it is the duty of the liquidator to sell it if he can. The new company make it part of their bargain because it is of the essence to them that somebody should take the shares within a reasonable time. There is nothing in the Act to prohibit that.

In *Weston v. The New Guston Company* (8) there was an express decision of the Court of Appeal upon the point.

In *Zuccani v. The Nacupai Gold Mining Company* (4) there was no limit of time.

The 3d. per share paid to the Gold Trust Company is not paid by the old company, but by the new. Schemes containing similar provisions have constantly been sanctioned. See *Lindley on Companies* (p. 896) and *The Llanrwst Lead Mining Company* (9).

Graham Hastings, Q.C., in reply.—There is no universal practice to sanction such a provision in a scheme. Although no doubt such schemes have been sanctioned, the point has never been brought specifically before the Courts.

Griffith v. Paget (1) is a distinct decision that where the powers of the 161st section are exercised, the company can do no more than decide on the nature of the consideration to be accepted.

The Legislature has expressly laid down that dissent must be within a certain time. It would be an extraordinary thing to

(8) 1 Megone, 352.

(9) *Palmer's Company Precedents* (4th ed.), 518.

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import into the Act an express provision that a shareholder must assent within a certain time or lose his shares.

In *Weston v. The New Guston Company* (8) and *Zuccani v. The Nacupai Gold Mining Company* (4) the point did not arise, and the Judges did not intend to decide it.

In *Nicholl v. The Eberhardt Company* (10) the Court of Appeal recognised the seriousness of the point, but did not decide it.

[He also referred to *Alexander v. Simpson* (11).]

Cur. adv. vult.

STIRLING, J., stated the facts, and continued:—Two objections are urged against the plaintiff's title to relief—first, it is said that the resolutions and agreement are within the powers of the old company and are valid; and, secondly, that even if they are not, the plaintiff is debarred from relief by delay and acquiescence. With regard to the first of these objections, it was urged that the shares to be received in compensation for the sale to the new company were not for the purpose of distribution among the members of the old company within the meaning of section 161. It was not disputed before me, and it is shewn by the case of *In re The City and County Investment Company* (12) before the Court of Appeal, as well as by other cases, that a sale may be made for shares to which a liability attaches; and, further, that in such a case the new shares may be given directly to the shareholders of the old company, and need not in the first instance go to the liquidator, the reason being, as is stated by the late Master of the Rolls, that “it is perfectly well known that the liquidator will not take shares which are not fully paid up.” On the other hand, it was decided in *Higgs's Case* (3) that a shareholder, even although he has not expressed his dissent from the special resolution sanctioning the sale, cannot be compelled to accept the shares in the new company against his will.

How, then, are shares to which a liability is attached, which the liquidator will not take, and the shareholders cannot be compelled to accept, to be distributed among them pursuant to section 161? The answer is, by giving to every shareholder who does not dissent what in substance amounts to an option to take shares in the new company; and if the scheme under consideration had been framed in this simple form, I conceive its validity would not (regard being had to the decisions to which I have referred) have been open to question. If the shareholder fails to exercise his option, the result is that he loses all interest in the shares which he might have taken, but is bound by the resolutions which have been passed. This is laid down by Lord Hatherley in *Higgs's Case* (3) and also in *Clinch v. The Financial Corporation* (13). This being so, it is next to be considered within what time the option is to be exercised. It seems clear that it cannot remain open for ever. The distribution contemplated by section 161 must take place before the close of the winding-up, in the course of which the sale is made. It is said that the option ought to remain open until the liquidator has obtained, under section 138, the direction of the Court as to any shares which a shareholder who has not dissented has abstained from accepting. The liquidator may, no doubt, if he sees fit, protect himself by an application to the Court in reference to the distribution of the shares; but I see nothing which renders it obligatory on him to take such a course. All that seems incumbent on him to do is to take care that each shareholder has afforded to him reasonable opportunities of obtaining, if he is so minded, the shares intended for him; and if, having done this, the liquidator is able to wind up the affairs of the company and close the liquidation without recourse to the Court, he appears to me to be entitled to do so. The question, however, affects not only the selling company, but also the purchasing company. Every company is interested in knowing who constitute the body of its own shareholders, more particularly when a liability

(10) *Ante*, p. 103.

(11) *Ante*, p. 137; Law Rep. 43 Ch. D. 139.

(12) 49 Law J. Rep. Chanc. 195; Law Rep. 13 Ch. D. 475.

(13) 37 Law J. Rep. Chanc. 281 (287); Law Rep. 5 Eq. 450 (472-3).

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attaches to the shares. In the present case the company, having been formed to work a gold mine, was of a highly speculative character, and the liability attached to the shares was intended to furnish the means of obtaining the capital necessary for working the mine. Under these circumstances it was only reasonable for the purchasing company to stipulate, and for the liquidator and shareholders of the selling company to agree, that a limited time should be fixed within which alone the option should be exercisable; and I see nothing in section 161 (as interpreted by the decisions to which I have referred) to prevent this from being done. In my opinion, therefore, the scheme was not vitiated by the insertion of a limit of time within which the option was to be exercised, provided the limit was such as to leave the option available for a reasonable time. I am confirmed in this conclusion by such authority as is to be found on the point. In the first place, schemes containing similar clauses are shewn to have been repeatedly sanctioned by the Court. It is true that in no case does the point appear to have been formally adjudicated upon; nevertheless, I cannot think that it entirely escaped observation, and it appears to me that some weight is due to the circumstance that such clauses were passed without objection by Sir G. Jessel and Vice-Chancellor Hall. Next, I have said that if the scheme had been formed so as simply to give each shareholder an option without limiting any time for its exercise, it is difficult to see how objection could have been taken to it. Now, in the case of *Zuccani v. The Nacupai Gold Mining Company* (4), Lord Justice Fry laid it down that, no time being limited by the scheme then under consideration for the exercise of the option, it must, as a matter of law, be exercised within a reasonable time. The reasoning which led the Lord Justice to that conclusion appears to me to be applicable to the present case, and to shew that here also the option, if no time had been prescribed for the exercise of it, must have been exercised within a reasonable time. If this be so, it seems to me that the scheme cannot be vitiated merely by the circumstance that the scheme itself fixes that reasonable time.

It was said, however, that in *Nicholl v. The Eberhardt Company* (10) the Court of Appeal had expressed doubt as to the validity of such stipulations. In that case, however, the limit of time was left to be determined, not (as here) by the liquidator of the old company, but by the directors of the new company, and it was provided that all shares which should not be applied for within such time should be at the disposal of the new company—the latter being a different provision from that which is found in the present case. Even there, however, as I read the judgments delivered in the Court of Appeal, no great weight appears to have been given to the objection which was raised to the limitation of time for the exercise of the option; the objection, which was felt to be serious, being that to the second of the provisions I have mentioned. In the present case it is not suggested, or at all events it is not proved, that the limit of time which was ultimately fixed by the liquidator was unreasonable, and in my opinion the first and second resolutions were not beyond the powers of the company. Then is the third resolution invalid? I think not. It appears to me, when carefully examined, to be really for the benefit of a shareholder who does not exercise the option given to him. Such a shareholder not exercising the option reserved to him would, according to the decision of the Court of Appeal in *Weston v. The New Guston Company* (8), lose all his interest in the shares of the purchasing company; but, instead of this, a further chance of benefit is given to him by the provisions of the third resolution. This resolution, in effect, provided that the liquidator shall (without coming under any legal obligation so to do) be at liberty to make the most on behalf of the shareholders of the option, accounting to them for any premium to be received, less the costs and expenses of realisation. No loss or liability is thrown on the old shareholders, for by clause 3 of the agreement any expenses incurred by the liquidator are to be borne by the new company, while any benefit which may result from the dealings of the liquidator comes to the shareholder. In my opinion, therefore, the scheme is, in substance, one for the distribution

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among the shareholders, who do not dissent, of shares to which liability attaches, and is within the terms of section 161 of the Companies Act, 1862. In coming to this conclusion I conceive that I am not departing from anything decided or laid down in *Griffiths v. Paget* (1). In that case there was an attempt to distribute the shares which constituted the consideration for the sale in a different way from that in which a money consideration would have been divided, so that some of the shareholders would have been deprived of the property to which they were entitled. That was held to be invalid. In this case there is not in the resolutions as I read them any such attempt. There is no interest conferred on assenting shareholders of which non-assenting shareholders are attempted to be deprived. On the contrary the utmost appears to have been done for their benefit. Under these circumstances I think it is unnecessary for me to express an opinion on the second point, beyond this, that it appears to be open to serious doubt whether a shareholder who previously to the 17th of June expressed his willingness to take up his proportion of shares, who on the 24th of August sent in an application for those shares, and who did not previously to the 2nd of October, even if he did at that time, challenge the validity of the resolutions, is not precluded from claiming the relief founded on their invalidity in a case where these resolutions have been acted on to the extent which here appears.

The motion is refused.

Solicitors—Snell, Son & Greenip, for plaintiff;
Kerly, Son & Verden, for liquidator; Michael
Abrahams, Son & Co., for the new company.

NORTH, J. }
1889. }
Oct. 31. }

In re BLACKBURN;
SMILES *v.* BLACKBURN.

*Power of Appointment—Execution—
Will—Codicil—Confirmation.*

By a marriage settlement of 1853 personal estate was settled upon trusts for the husband and wife during their lives, and then upon trusts for the children as the husband and wife should jointly appoint, and, in default of such appointment, as the survivor should appoint. By his will, dated in 1854, the husband bequeathed the ultimate residue of his property "of which he might be possessed at the time of his decease, or over which he might have any power of bequest or disposal," for the benefit of his children other than the eldest son, who was specially provided for. The will contained a direction for the maintenance of infant children out of the income of such children's shares. By another settlement, executed a few days after the will, further personal estate was settled on the same trusts as the property settled by the original settlement. The wife died in 1882, and by two codicils, both executed shortly after her death, the husband confirmed his original will:—Held, that the codicils incorporated and repeated the provisions of the will, and that by the combined operation of the will and codicil the settled property passed under the dispositions originally contained in the will, but which would have been inoperative without the codicils, inasmuch as during the wife's lifetime the power of appointment was joint only and not separate.

Originating summons.

By settlement, dated the 4th of February, 1853, and made in anticipation of the marriage then contemplated and shortly afterwards solemnised between Joshua Blackburn and Mary Ann Smiles, personal estate was settled upon trusts for the husband and wife for their lives, and, after the death of the survivor of them, upon trusts for the children of the marriage as the husband and wife should by deed jointly appoint, and, in default of such joint appointment, then as the survivor should by deed or will appoint.

Joshua Blackburn, the husband, by his will, dated the 11th of August, 1854, gave,

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devised, and bequeathed to trustees all his real and personal estate, after payment of his debts, funeral and other expenses, upon certain trusts therein mentioned. The testator thereby conferred certain benefits upon his wife and eldest son, and then declared that any other estate or property whatsoever, real or personal, except any specific legacies which might be contained in that his will or any codicil thereto, of which he might be possessed at the time of his decease, or over which he might have the power of bequest or disposal, should be held in trust for the benefit of his children other than the eldest son. And the will directed the trustees, during the minority of any child or children, to pay to the testator's widow one half the income of the share or shares of such child or children, for his, her, or their maintenance and education.

By settlement, dated the 15th of August, 1854, and indorsed on the settlement of the 4th of February, 1853, further personal estate was settled on the same trusts as the property settled by the principal settlement.

By codicil dated the 10th of July, 1882, and executed shortly after the wife's death, which took place in May, 1882, the testator, who had then five children, two sons and three daughters, gave certain property to his younger son and his daughters, and in all other respects confirmed his original will in so far as it was still capable of taking effect. By another codicil of the same date the testator again confirmed his will, as well as the former codicil.

Joshua Blackburn, the testator, died in October, 1888, and the present summons was taken out by the trustees of the settlements, the five children being the defendants, for the purpose of having it determined whether the will and codicils operated as an exercise of the powers of appointment in the settlements.

W. Druce, for the trustees.

Warrington, for J. J. B. Blackburn, the eldest son.—The will was not an exercise of the power in either settlement, for the second settlement had not then been executed at all, and the testator had no sole power of appointment, his wife being still

living—*Cave v. Cave* (1). Moreover, the testator shews by his language that he does not intend the will to operate as an appointment—*In re Cotton*; *Wood v. Cotton* (2). The codicils only keep the will alive so far as it was effective originally, and give it no wider operation than it had—*Holmes v. Coghill* (3) and *Hope v. Hope* (4).

Swinfen Eady, for the younger son and the daughters.—The effect of the confirmation of the will by the codicils is to repeat the provisions of the will, where unaltered, as at the date of the codicils. The testator was then the survivor of himself and his wife, capable of executing a sole appointment, and the language of the will, then repeated, was operative as an execution of the powers.

Warrington, in reply.

NORTH, J. [stated the facts, and continued:] In this case it seems to me to be clear that the powers were well exercised by the first codicil. I agree with the observations of Lord Justice Knight-Bruce in *Cave v. Cave* (1). Seeing that the power in the first settlement was only exercisable by the testator alone after the death of his wife, and that when the testator executed his will the wife was alive, the making of this will was not an exercise of the power in that settlement, and still less could it be an exercise of the power in the later settlement, which itself had not then been made.

It seems to me, however, that the codicil had the effect of repeating the will, and making it as good and effectual as if it had been executed for the first time after the death of the wife. In other words, the codicil has the same effect as if the very words of the will were repeated in it. It is important to bear in mind that this is not a case in which the will professes to be exercising the particular power *nominatim*, but the testator is intending to exercise every power of which he shall be possessed at his death, and the reason for which the intention failed in *Hope v. Hope* (4) was that the particular

(1) 8 De Gex, M. & G. 131.

(2) 58 Law J. Rep. Chanc. 174; Law Rep. 40 Ch. D. 41.

(3) 7 Ves. 499.

(4) 5 Giff. 13.

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part of the will was not sufficiently precise and definite. Here, as a matter of construction, the effect of the codicil is, by relation to the words of the will, to express an intention to execute every power exercisable by the testator at his death. Now at the time when the codicil was executed the powers in both settlements were capable of being exercised, and, in my opinion, the effect is just the same as if the codicil had, in so many words, bequeathed and devised all the estate over which the testator might, at the time of his death, have the power of bequest or disposal. I come, therefore, to the conclusion that, on the words of the will incorporated into the codicil, the powers were well executed.

But then it is said that the other parts of the will are inconsistent with this construction, and on this part of the argument reliance has been placed on my decision in *In re Cotton*; *Wood v. Cotton* (2). But that case stood on an entirely different footing; there were there provisions in the will, such as those with reference to payment of debts and to other matters, and in particular a direction as to maintenance, which precluded me from finding a sufficient indication of an intention to exercise the power. It is, no doubt, the case that there is here also a provision for maintenance; but the direction that the trustees are to make certain payments to the testator's wife out of income can only refer to payments out of the testator's own unsettled property; for under the settlements the wife was herself entitled to the whole income of the settled property. I think, therefore, that neither the direction as to maintenance nor any other part of the will is sufficient to prevent my coming to the conclusion that there was an intention to exercise such powers as are conferred by the settlements.

Solicitors—Druces & Attlee, for plaintiffs and defendants other than J. J. B. Blackburn; P. W. Chandler, for defendant J. J. B. Blackburn.

NORTH, J. } CHRISTIE v. THE NORTHERN
1889. } COUNTIES PERMANENT BENE-
Oct. 29, 30. } FIT BUILDING SOCIETY.

Building Society—Dispute with Withdrawing Member—Arbitration—Appointment of Arbitrators after Action commenced.

By one of the rules of a benefit building society it was provided that every dispute between the society and any member in which the decision of the board should not be deemed satisfactory should be settled by a reference to arbitration pursuant to the Building Societies Act, 1874, and that five arbitrators should be elected by the members at a general meeting. A dispute having arisen between a member who had given notice of withdrawal and the society as to the amount which the member was entitled to receive on withdrawal, an action was commenced by the member against the society to enforce his claim. At the date of the issue of the writ in the action no arbitrators had been appointed pursuant to the rules. After the writ had been served a meeting of members was held, and five persons were elected arbitrators. The society then took out a summons to stay all further proceedings in the action and to have all matters in dispute referred to arbitration pursuant to the rules of the society:—Held, that the society could not, after litigation had commenced, nominate the tribunal to decide the question in dispute.

Adjourned summons.

The society was registered under the Act 6 & 7 Will. 4. c. 32, on the 24th of September, 1866.

The rules of the society contained the following (among other) provisions:—

Rule 70: "Any member who may be desirous of withdrawing invested shares shall at any time be entitled to receive back the net amount of his subscriptions, as soon as there are funds available, with such interest as the committee may determine. If more than one shall give notice to withdraw, the committee shall order such withdrawals to be paid in rotation, according to the priority of the notices, provided always that the widows and children of deceased members shall have preference. But in all cases a pro-

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portionate share of the expenses, if required, shall be first deducted. Any person who shall give notice to withdraw his invested shares shall thereupon cease to be a member of this society (in respect of the shares withdrawn), and forfeit all interest therein."

Rule 76: "It shall be lawful to repeal or make any alteration or amendment of these rules in the manner directed by 10 Geo. 4. c. 56. s. 9, as under."

Rule 77: "In case the committee for the time being shall be unable to determine any matter of dispute or difference which shall arise between the society or the trustees or officers thereof or any person acting under them, or any member or members thereof, or any person or persons legally claiming on behalf of any member or members thereof, respecting the construction of these rules, or any clause therein, or any by-laws, additions, alterations, or amendments thereof, or respecting any other matter, cause, or thing whatsoever, whether financial, personal, clerical, matters of fact, casualties, or fines or allowances, or otherwise, reference shall be made to arbitration pursuant to 10 Geo. 4. c. 56. s. 27. At the first meeting of this society, after the enrolment of its rules, five arbitrators shall be named and elected, none of whom being directly or indirectly beneficially interested in the funds of the society. In each case of dispute, the names of the arbitrators shall be written on pieces of paper and placed in a box or glass, and the three whose names are first drawn by the complaining party shall be the arbitrators to decide the matter in dispute."

Rule 78: "Every member, or any person claiming under a member, whether he shall have executed a mortgage to the society or not, shall be bound by and subject to these rules, and by alterations and amendments thereof."

The plaintiff was the holder of thirty 10*l.* shares, and part of another share, and in respect of these shares he had paid subscriptions amounting together to 303*l.*

On the 15th of April, 1887, the plaintiff gave notice to the secretary of his desire to withdraw from membership, and claimed payment of 303*l.*

On the 24th of June, 1887, the society

was registered under the Building Societies Act, 1874.

At a special meeting of the society, held on the 19th of January, 1888, it was resolved to rescind rule 70, and to substitute a different rule. At a meeting held on the 3rd of February, 1888, it was resolved to rescind all the then existing rules and to substitute an entirely new set of rules.

These new rules contained (among other) the following provisions:—

Rule 15: "(6) In the event of any loss occurring to the society on any mortgage, or any expense or loss whatever, or in the event of there being any apprehended loss or expense, the same shall be charged upon and divided amongst all the ordinary invested shares then in the society, in proportion to the amount of subscriptions on each share, including arrears.

"(7) All ordinary invested shares that may be withdrawn shall have deducted from them a fair proportion of such loss or apprehended loss, and the board may estimate from time to time the amount of such loss or apprehended loss, and thereupon make such deduction or charge as aforesaid.

"(9) A member who has given notice to withdraw his shares shall continue to be a member, but shall not be entitled to vote at or take part in any meeting of the society, and he shall not by reason or in consequence of such notice, or otherwise, cease to be a member of the society, but shall continue to be bound by these rules, and by all alterations and amendments thereof, until he shall have received the amount payable in respect of his shares."

Rule 32: "(1) Every dispute between the society or the board, and any member or person claiming by or through any member or under the rules, on which the decision of the board shall not be deemed satisfactory, shall be settled by reference to arbitration, pursuant to the Building Societies Act, 1874. Five arbitrators shall be elected by the members at a general meeting, none of them being directly or indirectly beneficially interested in the funds of the society. In each case of dispute the names of the arbitrators shall be written on pieces of paper and

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placed in a box, and the three whose names are first drawn out by the complaining party shall be the arbitrators to decide the matter in dispute."

The society refused to pay to the plaintiff the whole 303*l.*, claiming to make under rule 15 of their new rules certain deductions therefrom, which reduced the amount to 196*l.* 19*s.* 6*d.* The plaintiff denied the right of the society to make any deductions, on the ground that he was not bound by the new rules, and on the 18th of April, 1889, he commenced this action against the society to enforce his claim. At the date of the service of the writ no arbitrators had been elected under the new rules.

On the 7th of May, 1889, a special general meeting of the society was held, at which five arbitrators were appointed. Notice of the intention to hold this meeting was sent to the plaintiff.

On the 8th of May, 1889, the society took out this summons to stay all further proceedings in the action, and that the action and all matters in dispute between the plaintiff and the society might be referred to arbitration pursuant to the rules of the society.

The summons was adjourned into Court.

Sir Horace Davey, Q.C., Everitt, Q.C., and Farwell, for the society.—The plaintiff is bound by the new rules, although they were made after he had given his notice of withdrawal. [On this point they referred to *In re The Argus Life Assurance Company* (1), *Rosenburg v. The Northumberland Building Society* (2), and *Walker v. The General Mutual Building Society* (3).]

Napier-Higgins, Q.C., and Rutherford, for the plaintiff.—The plaintiff is not bound by the alterations in the rules. But, even assuming that the plaintiff is bound by the new rules, still the society cannot, after action brought, oust the jurisdiction of the Court by appointing arbitrators *ad hoc*. *Walker v. The General Mutual Building Society* (3) does not apply, because here the tribunal was ap-

pointed after the litigation had commenced.

Everitt, Q.C., in reply.

NORTH, J. [after stating the facts, and the provisions of the original rules of the society, continued :] Rule 77 seems to me to provide for the determination of such a dispute as that which has arisen between the plaintiff and the society—namely, whether he is entitled to receive back the whole of his subscriptions, or whether any, and, if any, what deductions are to be made from them. I think also that the question is clearly one which the committee is unable to determine, because the matter has been put in the hands of the solicitors; a discussion has taken place about it, and it is because the committee could not determine it that recourse has been had to litigation, and the only question is whether the dispute ought to be settled by an action in this Court or by a reference to arbitration. The rule provides that five arbitrators are to be elected at the first meeting of the society after the enrolment of its rules. I have already during the argument intimated an opinion that that provision is merely directory and not compulsory, and that if for any reason it happened that the arbitrators could not be appointed at the first meeting, an appointment at a second, and perhaps at a third, meeting would not necessarily be bad. But the rule is very important, as shewing that what is contemplated is that a standing body of arbitrators shall be elected as soon as possible before any of the questions to be referred to them should have arisen, and it is out of that standing body so elected before any question has arisen that three arbitrators are to be chosen by lot to decide any dispute when it actually has arisen. Under that rule no arbitrators were ever appointed, and at the time when the plaintiff gave his notice to withdraw, on the 15th of April, 1887, there was no tribunal constituted under the rules to which any dispute could possibly be referred, because the society had allowed about twenty-one years to elapse without complying with that requirement of the rules. On the 24th of June, 1887, the society proceeded to incorporate themselves by registration under the Act of

(1) 58 Law J. Rep. Chanc. 166; Law Rep. 39 Ch. D. 571.

(2) Law Rep. 22 Q.B. D. 373.

(3) Law Rep. 36 Ch. D. 777.

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1874, as they had a perfect right to do, and the plaintiff acting upon that has issued his writ against the society as defendants. It was suggested that by suing them in that way he had estopped himself from raising any objection to their having all the rights which a body incorporated under that Act might have. I do not see that he has done anything of the kind. He has recognised the fact, to which he could not shut his eyes—namely, that the society—the persons against whom he asserted a claim—had become an incorporated body. Before they were incorporated they could only be sued in the names of the trustees. But, so soon as the society which is the same body of persons which was formerly unincorporated became by virtue of the registration capable of being sued itself, it was perfectly competent to the plaintiff to sue it, and, in my opinion, he is in no worse position in so suing them than if they had remained unincorporated and he had sued the trustees.

[His Lordship then read rules 15 and 32 of the new rules, and continued:] The first question raised with regard to these rules is the important one—namely, whether the rules bind the plaintiff, who had under the old rules ceased to be a member of the society by giving his notice to withdraw before the incorporation of the society and before the new rules were passed. That point I do not think it necessary to decide on the present occasion, and I do not intend to decide it.

I am not satisfied that the new rules are binding on the plaintiff. But I will assume for the purpose of my present decision that the new rules apply to the plaintiff. But still, in my opinion, he is not bound to submit to arbitration, and for this reason. The old rules, as I have pointed out, required that there should be standing arbitrators appointed from the first. In the new rule as to arbitration there is an alteration of the language. It does not say when the arbitrators are to be appointed. All it says is that "five arbitrators shall be elected" by the members at a general meeting. But it goes on to give directions as to what is to be done in each case of dispute—namely, that out of a body of arbitrators who are supposed to be then existing—a standing body of

arbitrators—three are to be selected by lot. This is based on the assumption that the society have already done their duty by electing five good and competent arbitrators for the general purpose of arbitration, and then the bargain is that three persons chosen by lot out of the five shall decide the dispute. It is quite a different thing to say that any dispute is to be referred to the decision of a tribunal such as that to which I am now asked to send this dispute. No arbitrators had been appointed under the original rules, and no arbitrators had been appointed under the new rules down to the time when this dispute arose. It was found that the board could not settle it, and the parties must settle it in some legal way, and there being no other course open to the plaintiff, he issued his writ in the action. At the time when the writ was issued the dispute could not be referred to arbitration, because there were no arbitrators to whom it could be referred; and it is impossible for me to say that it was not open to the plaintiff to issue a writ, for, if that were so, the omission of the society to appoint arbitrators would deprive him of any remedy at all. In my opinion, therefore, the plaintiff was perfectly justified in commencing his action.

Then, after the writ had been served, the society proceeded to elect arbitrators by calling a general meeting of the members, at which five persons were elected. They are said to be perfectly competent and trustworthy persons—and I have not the slightest reason to doubt it. But still I do not consider that they constitute a tribunal such as is contemplated by the rule. That tribunal is to be a standing body of arbitrators, out of whom, when a dispute arises, three are to be chosen by lot. Whereas what has really happened is this—no arbitrators to whom the matter could be referred were elected until after the dispute had gone so far that an action had been commenced, and then the society, the defendants to the action, proceeded to nominate the judges who were to decide the question in dispute, and they ask me to say that the judges so nominated are the only persons who can deal with the matter. I do not doubt that they have been properly elected, or that they are a

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very good body of arbitrators, perfectly competent to deal with any dispute which may hereafter arise. But, in my opinion, the tribunal contemplated by the rule to decide a dispute between a member and the society is to consist of three persons to be elected by lot out of the standing body of arbitrators at the time, and it is not open to the society, after the dispute has arisen, to proceed to nominate the persons three of whom are to be the judges of the dispute. It is quite true that these gentlemen were appointed at a general meeting, but it was a general meeting of members of the society, who are the defendants. The general meeting would in all probability adopt the persons whose names were submitted to it, and those persons would be nominated by somebody. It is sufficient to prevent my sending the matter to such a tribunal that these gentlemen may have been nominated by the committee or the directors, or some of them, expressly because they or some or one of them are or is known to hold a particular view on this subject. Honest and impartial men I do not doubt they are, but still they may have been selected because of their known views on this subject. In my opinion the tribunal to which a dispute of this sort is to be left is not one to be chosen by lot out of a body of persons elected by one of the parties to the dispute after the dispute has arisen.

I think, therefore, that this action having been properly commenced, cannot be put an end to by referring the dispute to arbitrators thus elected. I must, therefore, dismiss the summons. The costs of the plaintiff will be his in any event.

Solicitors—Rowcliffe, Rawle & Co., agents for Bremner & Sons, Liverpool, for plaintiff; Norris, Allen & Chapman, agents for J. L. Johnson, Liverpool, for the society.

[IN THE HOUSE OF LORDS.]

1889. } *SOPER (pauper) v. J. ARNOLD*
 July 29, 30. } AND ANOTHER.

Vendor and Purchaser—Contract for Sale—Acceptance of Title—Default of Purchaser—Forfeiture of Deposit—Subsequent Discovery of Defect in Title.

A purchaser, after accepting the vendor's title, which was fully disclosed to him, made default in payment of the purchase-money, and thereby forfeited his deposit. The vendor resold three years afterwards, and on a summons under the Vendor and Purchaser Act the title was held to be bad, by reason of a defect which had existed at the time of the earlier sale:—Held, that the first purchaser could not recover back his deposit.

This was an appeal from a decision of the Court of Appeal which affirmed one of Kekewich, J. The proceedings in the Courts below are reported 56 Law J. Rep. Chanc. 456; 57 *ibid.* 145; Law Rep. 35 Ch. D. 384; 37 *ibid.* 96.

The respondents, in November 1882, sold to the appellant certain freehold hereditaments for 6,100*l.*, and the appellant paid a deposit of 610*l.* An abstract of title was delivered and approved by the appellant's solicitors. The abstract disclosed the fact that the respondents' title was derived from a sale by trustees under a power. The appellant was unable to pay the balance of the purchase-money at the time fixed for completion, and in consequence of his default the respondents rescinded the contract for sale and forfeited the deposit.

In 1885 the respondents again sold the hereditaments to another purchaser, who took the objection that a power of sale under which the vendors' predecessor in title had purchased had not arisen. The objection was held by Chitty, J., to be a good one, and the sale went off. The defect on which the objection was founded was fully disclosed in the abstract delivered to the appellant.

The appellant then brought this action, claiming a return of the deposit, with interest at four per cent.

Kekewich, J., gave judgment for the

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respondents, and his decision was affirmed by the Court of Appeal.

J. M. Rigg (J. A. Thorne with him), for the appellant. — The appellant, no doubt, accepted the title. But the respondents had absolutely no title, and could convey nothing. In such case a purchaser is not bound, and equity will relieve even after completion. The maxim *Ignorantia juris neminem excusat* does not apply to a case of common mistake on a question of private title. *Cooper v. Phibbs* (1) is conclusive in the appellant's favour on this point—*Jones v. Clifford* (2). In *Want v. Stallibrass* (3) the purchaser was held entitled to recover back the deposit, and that case is indistinguishable from the present. See also *Bingham v. Bingham* (4) and *Hart v. Swaine* (5). The observations of Lord Selborne in *Brownlie v. Campbell* (6) are relied on *contra*; but they were *obiter dicta* as regards English law, the decision being on a Scotch appeal.

W. Barber, Q.C. (Vernon R. Smith and R. Kemp with him), for the respondents. — The respondents do not dispute the correctness of Chitty, J.'s decision that their title was not a good one. But the question whether it was good or not was difficult, depending on the construction of the power of sale. The respondents acted *bona fide*, and had they sued for specific performance the Court would not have gone into the title, but would have declared that the purchaser had accepted it. After a conveyance has been executed there is no jurisdiction to set it aside, except in the case of fraud, *per* Lord Selborne in *Brownlie v. Campbell* (6); *a fortiori* where the purchaser is in default—*Ex parte Barrell* (7) and *Hove v. Smith* (8). Fraud was found in *Hart v. Swaine* (5).

Want v. Stallibrass (3) is distinguishable. *Bingham v. Bingham* (4) stands alone. [*Rogers v. Ingham* (9) and *Stewart v. Stewart* (10) were also cited.]

Rigg, in reply.

LORD HERSHELL.—The only question raised by this appeal is whether the appellant is entitled to recover from the respondents a sum of 610*l.*, which was paid to them some years ago as a deposit upon a contract of sale made between the appellant and the trustees of the will of Mr. Arnold, whereby the trustees agreed to sell certain property to the appellant for the sum of 6,100*l.* By the conditions of sale it was provided that "all objections and requisitions (if any) in respect of the title or the abstract, or anything appearing therein respectively, shall be stated in writing and sent to the vendors' solicitor within seven days from the delivery of the abstract, and all objections and requisitions not sent within that time shall be considered to be waived, and in this respect time shall be deemed the essence of the contract."

An abstract was delivered by the trustees to the appellant. That abstract disclosed that Mr. Arnold had purchased from the trustees of the will of Mr. Henry Hoare, and that those trustees had purported to sell to Mr. Arnold under the authority of a power contained in the will. The abstract disclosed the terms of the will—it shewed exactly the terms of the power which the trustees had purported to exercise in selling. The solicitors of Mr. Soper, the purchaser, made certain requisitions and objections. Some of the objections, indeed, were connected with the fact of the sale having taken place by the trustees of Mr. Hoare under the powers of his will; but they took no exceptions to the title except such as were removed to their satisfaction, and ultimately they accepted and approved the title. That fact is distinctly stated in the statement of defence to the action, and is not traversed in the reply; and, therefore, we may take it—indeed, we are bound to take it—that the title was so accepted and approved.

(9) Law Rep. 3 Ch. D. 351.

(10) 6 Cl. & F. 911.

(1) Law Rep. 2 E. & I. App. 149.

(2) 45 Law J. Rep. Chanc. 809; Law Rep. 3 Ch. D. 779.

(3) 42 Law J. Rep. Exch. 108; Law Rep. 8 Exch. 175.

(4) 1 Ves. 120; Belt's Suppl. 79.

(5) 47 Law J. Rep. Chanc. 5; Law Rep. 7 Ch. D. 42.

(6) Law Rep. 5 App. Cas. 925, 937.

(7) 44 Law J. Rep. Bankr. 138; Law Rep. 10 Chanc. 512.

(8) 53 Law J. Rep. Chanc. 1055; Law Rep. 27 Ch. D. 89.

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Thereupon a conveyance would have followed in the natural course; but the appellant, as is admitted, was unable to find the balance of the purchase-money, and for that sole reason the payment of the balance was not made, and the transaction was not carried through by a conveyance and the payment of the purchase-money accordingly. The time having elapsed when the payment was to be made, the vendors served a notice upon the appellant that unless he paid the money in accordance with the contract within fourteen days, they should rescind the contract, and not be under any further obligation to carry it out and complete the purchase. No payment was made—nothing was done—and matters remained in that position, the deposit continuing to be held by the respondents.

So matters stood for some years until the present action was brought, in which the appellant seeks to recover back the money which he so paid, upon the ground that the trustees of the will of Mr. Henry Hoare had not power to sell the estate, except upon a condition which had not happened. It must be taken, I think, for the purposes of this appeal that the trustees had not the full power of sale which they purported to exercise; that their power was only exercisable absolutely in case there were no children of the marriage who could become entitled to the property under the trusts of the will; and it appears that there is a daughter of the marriage who, on her majority, will become entitled under those trusts. There was, therefore, the plaintiff insists, a defect in the title such as I have called attention to; and his point is this—he says: “Inasmuch as I now discover that at the time when I paid the deposit on the sale, and at the time when I failed to pay the residue of the purchase-money, and you declared the contract to be at an end, you, the trustees, the vendors, could not have made out a good title to the property, therefore I am entitled to have my deposit back.”

Now, as I have pointed out, the defect, such as it was, was communicated, on the very face of the abstract of title, to the appellant, and was as well known to him as to the trustees at the time when he

accepted and approved the title. There can be no doubt that if he had possessed the money, and had been in a position to pay it, notwithstanding that defect the residue of the purchase-money would have been paid and a conveyance executed. I apprehend that it is clear that if that had taken place, no objection could afterwards have been taken to the title such as is now suggested, and no relief could have been obtained on account of the defect to which I have alluded. How does the matter stand, then, with regard to the deposit? The deposit is given as a security for the performance of the contract. The appellant admittedly cannot recover that deposit if it was through his default that the transaction was not completed. Now, under the circumstances which I have detailed, I cannot doubt that it must be regarded as a contract uncompleted through the default of the appellant. As I have said, he took no exception to the title, he was willing to take that title, he had intimated his willingness to take that title by accepting and approving of it, and the trustees, the vendors, were ready and willing to convey to him that title which he had so intimated his willingness to accept. But he, although he did not object to the title at all, was not prepared to carry out his contract; he had not the means, and that became known to the vendors. Thereupon they, after due notice, determined the contract as against him.

Now, when an action is brought by the appellant to recover the deposit, and the objection is taken that the vendors were not able to make out what is in law a complete and perfect title, the answer seems to me to be this—that the vendors were perfectly ready and willing to convey to the appellant that title which he had accepted and approved and declared himself willing to take, and the contract only went off because he afterwards was not in a position or prepared to carry it out on his part. That seems to me to shew that it was owing to his default that the contract came to an end; and I venture very much to doubt whether, under circumstances such as I have described, if the vendors had brought an action for specific performance to compel him to complete the purchase and to pay the residue of

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the purchase-money, he could have resisted such an action on the ground, even if he had then ascertained that it was a fact, or realised that it was a fact, that there was some defect in the title. No authority has been cited to shew that under such conditions, where a purchaser has accepted and approved a title, all the facts being known to him at that time, he can resist a decree for specific performance and claim to have the title investigated. If that be the case, it seems to me that it would be out of all reason to suppose that he could recover the deposit on the ground that the contract had come to an end, not through his default, but through that of the vendors, when the circumstances were such that they could have compelled him specifically to perform the contract. But, as I have said, I do not think it necessary to determine this point, because, for the reasons which I have stated, it seems to me that he was in default, that the contract went off owing to his default, and that, under those circumstances, he cannot recover the deposit. It seems to me that any other decision would lead to most inconvenient consequences, because, under circumstances such as these, where trustees were selling, the deposit might have been distributed by them amongst their beneficiaries, and then, at any time within six years afterwards, if the purchaser discovered that there was some defect of title which would have prevented their making out a perfect conveyancing title, he could bring an action against the trustees to recover back the deposit which he had so paid, though he had accepted and never taken any objection to the title. That would be a result which would be productive of the gravest inconvenience. I know of no authority in point of law to warrant it, and I therefore move your Lordships that this appeal be dismissed.

LORD FITZGERALD.—I have, during the course of this rather singular and unusual case, had upon my mind a considerable degree of hesitation in affirming the judgment of the Court below; but a great deal of it has been removed, I must confess, by the argument which Mr. Barber has addressed to us. Therefore, I am able to say that I do not dissent from the judg-

ment which has been announced by Lord Herschell—nay more, that I concur in it.

LORD MACNAGHTEN.—I certainly mean no reflection on the learned counsel for the appellant, who has argued the case with perfect fairness, and much ability, if I say that the appellant's claim seems to me to be groundless and almost absurd.

There was a contract for the sale of some real property. There were the usual conditions of sale. There was a deposit paid, and there were the ordinary provisions as to the forfeiture of the deposit. An abstract was delivered, the vendors' title was fully disclosed; that title was duly accepted and approved; the conveyance was prepared, and everything was ready for completion; but when the time came for paying the price, the balance of the purchase-money was not forthcoming. The purchaser had to abandon the contract; the deposit was forfeited, and the matter was closed, and I think finally closed, between the vendor and purchaser. Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money; but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited, it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.

Some years after the deposit was forfeited, it appears there was a contract to sell the property to some one else, and that person found out a flaw in the title which in the opinion of a learned Judge prevented the vendors from enforcing the contract. The appellant now comes forward and says, "Give me back my money, because if I had found out that flaw I should not have allowed my money to be forfeited." I am not sure that every Judge would have taken the same view of the construction of Mr. Hoare's will that Mr. Justice Chitty took; but I express no opinion upon that, and I assume that this flaw was a fatal defect in the title.

The real answer to the claim of the

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appellant, I think, is that the deposit was forfeited for a good and sufficient reason. It was forfeited because the purchaser could not pay the stipulated price, and for no other reason. If, instead of forfeiting the deposit, the vendor had brought an action for specific performance after the purchaser had accepted and approved the title, as it is admitted in this case he did, he would, I think, have been entitled to a judgment for specific performance, with a declaration that the title had been accepted, and, I apprehend, the Court would have declined to go into any question as to the construction of Mr. Hoare's will. Under these circumstances, in my opinion it would be most inequitable to allow the appellant to reopen the matter.

*Judgment appealed from affirmed,
and appeal dismissed.*

Solicitors—Granville, Smith & Co., agents for
T. & J. Hutchings, Teignmouth, for appel-
lant; Lovell, Son & Pitfield, for respondents.

NORTH, J. } *In re BARRATT*;
1889. } WHITAKER AND COMPANY v.
Oct. 30. } BARRATT.

*Administration — Executor — Right of
Preference — Retainer — Rules of Supreme
Court, 1883, Order XV. rule 1.*

*An executor's right to prefer creditors
in the payment of debts is not taken away
by an order under Order XV. rule 1, for
taking the executor's accounts and reserv-
ing further consideration; and where, after
such an order, the executor became trustee of
a settlement to which money was owing
from the testator, it was held that the money
so owing might be retained by the executor
in the character of trustee.*

Adjourned summons.

By settlement, dated the 3rd of Sep-
tember, 1884, and made in anticipation
of the marriage which was solemnised on
the 27th of September, 1884, between
John R. Barratt and Mary A. Gale, the
intended husband covenanted to pay to

George J. Tucker, who was a party to the
deed, 4,000*l.* within twelve months from
the marriage, upon trust to invest the
amount and to pay the income to the hus-
band and wife during their joint lives, and
after the death of either to the survivor,
and after his or her death, in the events
which happened, to hold the 4,000*l.* for
the husband absolutely.

By another settlement of the same date
the intended husband covenanted to pay
to George J. Tucker, who was a party to
this deed also, 300*l.* within three years
from the marriage, upon trust to invest
the amount and to pay the income to the
wife for her life, and after her death, in
the events which happened, to hold the
300*l.* for the husband absolutely.

John R. Barratt died in 1887 insolvent,
and without having paid any part of either
of the two amounts covenanted to be paid,
but having appointed his widow his exe-
cutrix; and the present action was com-
menced by Messrs. Whitaker & Co., cre-
ditors of the testator, against the widow
and executrix, by writ, claiming adminis-
tration of the testator's real and personal
estate, an account, and a receiver.

By order dated the 20th of February,
1889, and made under Order XV. rule 1,
on the application of the plaintiffs, accounts
were directed to be taken of the testator's
personal estate not specifically bequeathed
come to the hands of the executrix, or to
the hands of any other person or persons by
her order or for her use, and of the tes-
tator's debts, and it was stated that, the
Judge not requiring any other trial, further
consideration should be reserved.

By deed dated the 16th of March, 1889,
the widow and executrix was appointed
trustee of both settlements in the place of
George J. Tucker, who retired.

The executrix subsequently brought in
her account, which shewed receipts to the
amount of 4,370*l.* and payments to the
amount of 1,736*l.* The remaining amount,
2,634*l.*, she claimed to retain on account of
the 4,000*l.* due under the first settlement.

The plaintiffs' and other debts had not
been paid, and the plaintiffs took out
the present summons to have it decided
whether the executrix was or was not
entitled to retain the 2,634*l.* as she
claimed.

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F. Thompson, for the plaintiffs.—Under the old practice an executor could not vary the rights of the creditors after an order for accounts—*Jones v. Jukes* (1); nor can he do so after an order under Order XV. rule 1. The right of retainer has never extended to such a case as this, and the tendency of the Courts is to limit rather than to extend this right—*Cockcroft v. Black* (2), *Loane v. Casey* (3), *Thompson v. Thompson* (4), and *In re Compton*; *Norton v. Compton* (5).

[*NORTH, J.*, referred to *Jones v. Evans* (6).]

The Bankruptcy Act, 1883, s. 38, gives no right of set-off under such circumstances as these—*West v. Pryce* (7).

Cozens-Hardy, Q.C., and *Ribton*, for the defendant.—Under the rules in bankruptcy the defendant could set off against assets which she holds as executrix the value of her interest as tenant for life under the settlement, and even if an administration decree had been made she could have retained to this extent—*Eberle's Hotel and Restaurant Company (Limited) v. Jonas & Brothers* (8). But the defendant, as executrix, was fully entitled to give the preference to any creditor—*Marriott v. Thompson* (9); and the fact that an order for accounts was made could not interfere with this right—*In re Mills*; *Mills v. Mills* (10). Order LV. rule 10A (b), shews that it was not intended that Order XV. rule 1 should have such an effect.

F. Thompson, in reply.

NORTH, J.—The first point raised is as to the right of retainer, and it is said that the widow had a right to retain the whole sum up to 4,000*l.*, because she could have given a receipt for the amount due. She was tenant for life, but I do not think

that she could have given such a receipt as tenant for life: for, subject to her life interest, the amount belonged to her husband's estate, and she could not call for it as tenant for life. Neither as executrix could she call for it or give a receipt for it, because it belonged to the trust. If she could not do it in either character, then she could none the more do it because she filled both characters. If she had chosen to give up her life interest, as executrix she would have been able to give a receipt, for the whole fund would have belonged to her husband's estate in equity. But she would not do that, for this very good reason, that she would have been depriving herself of the very right which she is now claiming. And it seems to me that she had no right to call for or receive the money, though she occupied both those characters, and that she cannot combine those two characters in such a way as to enable her to say that the whole fund belongs to her, or that she can pass over the interest of the trustee.

But the next point is different. At the death of her husband she was not entitled to anything more than her life interest; but last March a deed was executed by which she was appointed the trustee of the fund, and in that capacity she became entitled to receive the whole fund due from her husband's estate under the settlements, and as tenant for life she is also entitled beneficially to a life interest in it. That was done subsequently to the order of February to account. Before that order was made she clearly could have paid the trustee the whole amount due, for she would have had a right to prefer one creditor to another. Then did the making of that order prevent her from so doing? I do not think it did; for no decree for administration was made. If there had been such a decree, it would have put an end to her power of preferring any creditor. But that was not so, and, in my opinion, the order made has no such effect. In *Jones v. Jukes* (1) no doubt the Lord Chancellor did say: "The administratrix cannot be allowed payments made after a decree to account." And it is said that there is here a decree for an account. But, in the first place, I do not think that a decree has been made in this action at all.

(1) 2 Ves. jun. 518.

(2) 2 P. Wms. 298.

(3) 2 W. Black. 965.

(4) 9 Price, 464.

(5) 54 Law J. Rep. Chanc. 904; Law Rep. 30 Ch. D. 15.

(6) 45 Law J. Rep. Chanc. 751; Law Rep. 2 Ch. D. 420.

(7) 2 Bing. 455.

(8) 56 Law J. Rep. Q.B. 278; Law Rep. 18 Q.B. D. 459.

(9) Willes, 186.

(10) W. N. 1884, p. 21.

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And, further, what is in that case called a decree to account was really a decree at the hearing of an administration suit. It was not merely a decree for an account, for such a decree was not then known. It is stated to have been a decree directing the usual accounts and a distribution. This certainly could not have been less than a decree for accounts, followed by a direction (and this is important) that the assets should be applied in due course of administration, so that the executor would then be prevented from preferring a creditor. But in the present case there is nothing of the sort. An order has been made in a different form—a form which the Legislature has authorised—for the purpose of securing advantages in the saving of expense and otherwise; but it is a different form from the usual judgment or order for administration, and parties who desire to establish certain rights must now take care that the order is taken in such a form as to prevent those rights from being taken away. This view of the case is borne out by Order LV. rule 10A (b), which recognises the fact that, unless there is the usual order for administration, there may be such difficulties as the present in the way of plaintiffs, and that other creditors will not be prevented from suing, nor executors from paying away assets to them. This is a case in which before the order was made the widow could have paid the trustee, and the making of an order in this form was not sufficient to prevent her. If that order did not prevent her from preferring a creditor, I do not know when her power to do so ceased, or what has since happened to deprive her of it. Then it is said that this is not a question of preferring, but of retaining; that the widow's contention is that since the date of the order a deed has been executed by which she became the trustee, and that she is entitled to pay herself, or, in other words, to retain what assets are in her hands. But I think that she is paying herself in a different character, and that a retainer by an executrix of money due to her as a trustee is really a payment of money as executrix to herself as trustee, and that the act is more properly called payment than retainer. By whatever name it is called it comes to the same thing; she could have paid the

trustee; and I do not think that the right to apply the money for the purposes of the trust was lost by the execution of the deed appointing her trustee. The costs will be costs in the action.

Solicitors—Kemble & Co., for plaintiffs; Agate & Garnett, for defendant.

[IN THE COURT OF APPEAL.]

COTTON, L.J.	}	NIEMANN v. NIEMANN.
BOWEN, L.J.		
FRY, L.J.		
1889. Dec. 10.		

Partnership—Dissolution—Deed providing that one Partner should wind up Affairs of Firm—Debt due to Firm—Arrangement to take Shares in Limited Company in Satisfaction of Debt—Appointment of one Partner Receiver—Jurisdiction.

On the dissolution of a partnership between the plaintiff and defendant, it was by deed agreed that the defendant should have sole management of the liquidation of the firm; that neither of the partners should make any claim on the other of them, but the defendant should pay all debts of the firm, and indemnify the plaintiff against the same, and should also pay and account to him for the share of any dividends which might be received in respect of any debts, after all the firm debts had been paid out of the existing assets of the firm. Among the assets of the firm was a debt due from a firm in Java. A Dutch company was formed for the purposes of taking over the property of the Java firm, subject to an arrangement being come to with the creditors of that firm to accept shares in the company in payment or part payment of their debts. In an action by the plaintiff against the defendant for an account of the partnership, and to restrain the defendant from compromising the claim of the firm against the Java firm, Kekewich, J., made an order appointing the defendant receiver, with liberty to compromise the claim in question, upon terms to be approved by the

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Judge in chambers:—Held, that there was no power, express or implied, in the deed of dissolution enabling the defendant to enter into the arrangement in question, and that the Court could not appoint the defendant receiver, and give him as such receiver greater power than he had under the deed of dissolution, without the consent of the plaintiff.

Decision of KEKEWICH, J., reversed.

Statement in Lindley on Partnerships (5th ed. p. 141) and *In re The Land Credit Company of Ireland*; *Weikersheim's Case* (42 Law J. Rep. Chanc. 435; Law Rep. 8 Chanc. 831) explained.

This was an appeal from a decision of Kekewich, J.

C. E. A. Niemann and H. W. F. Niemann, two brothers, carried on business in partnership for many years. The partnership was dissolved by a deed dated the 3rd of June, 1887, and made between the two partners, and it was thereby agreed that H. W. F. Niemann should have the sole management of the liquidation of the firm, and should pay all debts of the firm, and should indemnify C. E. A. Niemann against the same, "and neither of the said partners will make any claim upon the other of them, but the said H. W. F. Niemann shall pay all the existing debts of the firm and indemnify the said C. E. A. Niemann against the same, and shall also pay and account to him for the share of any dividends which may be received in respect of any debts or claims, after all the creditors of the firm shall have been paid out of the existing assets of the firm."

Among the assets of the firm was a debt of 20,000*l.* due from a firm in Java. It had been considered that nothing would be paid in respect of this debt, as all the property of the Java firm was subject to a mortgage to certain dealers at Amsterdam, but recently a Dutch company had been, or was about to be, formed, having its principal place of business at Amsterdam, for the purpose of taking over the estate of the Java firm, subject to an arrangement being come to with the creditors of the Java firm that such creditors were to accept in shares in the Dutch company amounts equal to twenty-five per cent of their claims.

C. E. A. Niemann brought this action against H. W. F. Niemann for accounts of the partnership lately existing between him and the defendant, and that the affairs might be wound up by the Court, and claiming an injunction to restrain the defendant from compromising the claim of the firm against the Java firm without the consent of the plaintiff.

On the 9th December, 1889, Kekewich, J., sitting for North, J., made an order expressing his approval of the general terms of the proposed compromise, and ordering, upon payment into Court of 2,000*l.* by the defendant as security for the eventual share of the plaintiff under the deed of dissolution, that the defendant be appointed receiver, with liberty to compromise the claim in question upon terms to be approved by the Judge in chambers; the defendant to give forthwith copies of documents relating to the compromise; and to prepare a memorandum stating the details thereof in order that the plaintiff might have an opportunity of considering the same.

The plaintiff appealed from this decision.

Cozens-Hardy, Q.C., and *Christopher James*, for the plaintiff.—No provision is made in the deed of dissolution of the partnership between the plaintiff and defendant, which enables the defendant, who is thereby authorised to wind up the affairs of the firm, to take shares in a company in satisfaction or part satisfaction of a debt due to the firm, and the Court cannot, by appointing the defendant receiver, give him powers wider than the powers he had under the deed of dissolution. He cannot without the consent of the plaintiff take these shares. In *In re The East of England Banking Company*; *Pearson's Case* (1) it was held that the Court had no jurisdiction to order a liquidator in a winding-up to consent to a compromise with a contributory; and in *In re Craushay*; *Dennis v. Craushay* (2), where the trusts of a will did not authorise investments in shares of a limited company, North, J., held that he had no jurisdiction to sanction the sale of the testator's share in

¹(1) 41 Law J. Rep. Chanc. 524; Law Rep. 7 Chanc. 302.

(2) 33 Sol. Journ. 126.

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certain mines to a limited company, the purchase-money to be paid in shares in that company.

Napier Higgins, Q.C., and *Ingle Joyce*, for the respondent.—The terms of the deed of dissolution are sufficiently wide to authorise the defendant to enter into the proposed compromise or arrangement. The defendant will take the shares in his own name, and the plaintiff will not incur any liability. One partner has implied authority to accept in the ordinary course of business security for a debt due to his firm, and when one of a firm of bankers accepted, as security for money due to a bank, shares in a company, and caused them to be registered in the name of the bank, it was held that he had implied authority so to do, although the consequence was that he thereby rendered himself and his co-partners liable as contributories to the company. See *Lindley on Partnership* (5th ed. p. 141), and *In re The Land Credit Company of Ireland; Weikersheim's Case* (3), there cited. The decision of Fry, J., in *The West of England and New South Wales District Bank v. Murch* (4) is an authority that an executor may sell partnership property to a company, and may accept payment of the purchaser partly in shares and partly in debentures of the company.

Cozens-Hardy, Q.C., replied.

COTTON, L.J.—This is an appeal against an order made by Mr. Justice Kekewich, who ordered to be wound up, in what he considered the best way, the assets of the partnership in dispute here. The action was brought to take the accounts of the partnership and for a receiver, the plaintiff and defendant being partners, and having carried on a business which a few years ago was dissolved by agreement. What the Judge has done has been to appoint a receiver, but he has appointed a receiver with liberty to come before him, I suppose, for the purpose of discussing the terms of a proposed arrangement to be entered into. There is a large debt due to the firm which has not been paid,

and which the defendant says that he has no chance of getting payment of except by the arrangement which he desires to carry out. He has filed an affidavit, which contains what may be called a skeleton of the arrangement, and he says that they have a very large claim on a certain firm, but that there are many other creditors, and it is said the only way of getting anything is to enter into an arrangement to form a company which will take over the property, and that certain shares will be handed over to the different creditors. That is, in fact, all the statement made on the affidavit of the defendant. To-day we get a detailed statement, from which it appears that there is to be, not a limited company in England, but in Holland. We have no evidence what a limited company in Holland is, but it is said to be a limited company. Well, this is strongly objected to by the plaintiff, one of the partners in the firm, and he says that the learned Judge had no right or power to compel him to assent to a compromise to be entered into by the defendant on these terms. I do not enter into the question of whether it is properly called a compromise or not, but I hold he had no power to authorise the defendant to enter into such an arrangement. How does the defendant justify it? He could not exercise the powers given to him by the deed made between the two brothers, except under the authority of the Court; he must get the leave of the Court to do it, and the Court could not give any extra powers beyond the authority which he had as partner. The effect of the action was simply a limit on his power, to prevent him exercising that power without the sanction of the Court. And when one comes to the question whether the Court could sanction the agreement which he proposes to enter into, is there anything in this deed which enables him to do that? I do not think it could be contended, subject to one case quoted by Mr. Ingle Joyce, to which I shall presently refer, that there would be power by one partner, though he was a partner who was carrying out the arrangements for winding up the affairs of the partnership, to enter into such an arrangement, unless some power was given him by the other partner; and

(3) 42 Law J. Rep. Chanc. 435; Law Rep. 8 Chanc. 831.

(4) 52 Law J. Rep. Chanc. 784; Law Rep. 23 Ch. D. 138.

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here in this deed, which is laudably short, I cannot see anything which will give him any special power to enter into any arrangement like this; he is made the person to wind up the concern, he is to pay all the debts, and I think it prevents (though that question has not been much argued) the plaintiff from interfering with the exercise of the powers given by this deed to the defendant his brother. He is to take upon himself the whole burthen of the liquidation of the firm and payment of the creditors, and indemnify the plaintiff against the claims of the said creditors, "and neither of the said partners will make any claim upon the other of them, but the said H. W. F. Niemann"—that is, the defendant—"shall pay all the existing debts of the firm, and indemnify the said C. E. A. Niemann"—that is, the plaintiff—"against the same, and shall also pay and account to him for the share of any dividends which may be received in respect of any debts or claims after all the creditors of the firm shall have been paid out of the existing assets of the firm." Well, that does not give him any special power as regards dealing with the assets, it only defines the burthen he undertakes; and, so far as there are any indications there, it shews that he would not have any authority to take shares in a new company, because the deed supposes *prima facie* that what will be received by him in respect of the assets of the firm would be divisible as dividends between himself and his partner. I think that is valuable in this way: it looks to the firm being wound up, and the assets of the partnership being realised in the ordinary way, which would be to realise and get payment of whatever could be got, payment in full, if not payment in such sum as could be obtained. Then has the Court any power to do this by appointing a receiver?—because that was the argument pressed upon us, and seems to be the one most relied upon here on the part of the respondents. It is very true the receiver is appointed on behalf of both the parties to the action, but it is only carrying into effect on behalf of both of them those powers which are settled and determined by the contract between them. It does not enable the Court to authorise the receiver to make a new contract be-

tween the parties, or to assume to himself that which by the contract between the parties is not given by one to the other. Therefore, in my opinion, it would be wrong to hold that the Court can, by appointing a receiver, enable the receiver to do that which it cannot authorise one partner to do against the will of the other. Then how does the case stand now? I do not enter into the question whether it is correct or not, that this proposed scheme will give the most profitable result to the two partners if they like to accept it; the only question we have here is whether the plaintiff, one of the partners, is right in saying you have no power to do this, the Court was wrong in purporting to give you authority to do it, it is not merely a payment of a debt, or a compromise of a payment of a debt, but it is sanctioning the defendant to enter on behalf of himself and his partner into a speculation, in order, if possible, with others to work out the estate of a debtor of the firm in such a way as probably to produce a profitable result. In my opinion the Court has no power either to authorise the defendant to do it without the appointment of a receiver, or to authorise the receiver to do it when the contract between the parties does not authorise it.

Then what ought we to do as regards this order? There is some little difficulty in it from this, that the order only purports to be the appointment of a receiver, and it was pressed upon us that the appointment of a receiver in consequence of the difficulties between the parties is almost of course; and, therefore, there can be no valid objection to that. I do not think one can quite deal with it in this way; the appointment of a receiver under this order was simply made for the purpose of enabling that scheme to be carried into effect; that was the sole reason and object of this order, and the appointment of the defendant as receiver was simply machinery for the purpose of enabling that to be carried out in such a way as that the Court might have control over it. I think Mr. Justice Kekewich was acting in the way he thought most advisable for the interests of both these parties; but, in my opinion, it was not right in the Court to authorise such a scheme to be carried

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into effect under the guise of compromising a claim against a debtor to the firm. The only thing, therefore, I think we can do is altogether to discharge the order being made simply for that purpose, without prejudice to any other application to be made for the appointment of a receiver. I was doubting whether it would not be best to leave the receiver as appointed, but to declare this scheme could not be carried into effect. I think, as the sole object of making the order—the sole object of appointing this receiver—is to carry into effect the scheme which has been proposed, the best course is to discharge the order altogether, and that we must give here the appellant the costs of the appeal. I do not know what was done with the costs below, certainly he must have the costs of the appeal here.

There is only one case which I think I ought to refer to which was cited as an authority for this being done, and that was *Weikersheim's Case* (3), and I refer to it merely because it was quoted as sanctioned by the opinion of Lord Justice Lindley in his book on Partnership (5th ed. p. 141). The case there was really this, that one member of a firm of bankers took as security and brought into the name of the partners shares in a company which involved liability, and it was said that that is an authority in favour of the receiver here doing what he is proposing to do. When one looks at the case one finds this, that the Judges who decided it (Lord Justice James and Lord Justice Mellish) decided that in the business of bankers it was so ordinary to take shares in companies as a security for a debt that it was part of the implied contract between them; but then Lord Justice James points out that in fact all the partners assented to this being done. I rather think that Lord Justice Lindley's statement here has been a little misunderstood. He does say (*Lindley on Partnership*, 5th ed. p. 141), "one partner has implied authority to accept in the ordinary course of business security for a debt due to his firm." I do not think there is any doubt about that. Then he goes on, "and where one member of a firm of bankers accepted as security for money due to a bank shares in a company, and caused them to be registered in

the name of the bank, it was held that he had implied authority so to do, although the consequence was that he thereby rendered himself and his co-partners liable as contributories to the company." At first sight the sentence does look as if it did not refer to the authority of the partners in that case, but was a general statement of the law that there would be an implied authority to accept shares under those circumstances. But when we look to the case to which he refers, we see of course that that was not the effect of that case, and I cannot think that he intended to lay down as a general rule of law that that could be done which was done in *Weikersheim's Case* (3), on the ground that the Judges held in that case that a partner in a bank would have that implied authority, though they really decided it on the ground that in that particular case the partners had known and assented to what was done. I thought it right to mention that, because that statement in Lord Justice Lindley's book might mislead others who did not look at the authority referred to, which I always like to do even in a book like Lord Justice Lindley's. In my opinion the appellant is right, and the appeal must be allowed.

BOWEN, L.J.—I am of the same opinion. I think the decision turns on a very broad and a very short point, that here there is no power under the deed to do what is desired. It seems to me, for the reasons given by the Lord Justice, that the Court has no power to clothe a receiver with an authority which would wholly transcend the nature of the original arrangement between the parties. It does not seem to me to be necessary to decide that in no case can anything but cash be taken by way of compromise. One can imagine that it would depend on the circumstances of each particular case whether anything can be received as an equivalent for cash; but here it is really not a compromise at all, it is the mere substitution for the payment of a debt, a speculation to take shares in a new and unformed company in Amsterdam, the object of which is by the employment of the assets to recoup the creditors. That is something far more than a compromise, and therefore I think

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it is not what the Court can impose on an unwilling partner.

I agree entirely with what has been said about *Weikersheim's Case* (3). The whole *ratio decidendi* there was, what was the ordinary scope and authority of a partner in a banking business! It seems clear as soon as the judgments of Lords Justices James and Mellish are referred to; both base their view on the broad foundation of their commercial opinion as to what is the ordinary business of a banker; and Lord Justice James assumes as a reason in that particular case the authority was not only to be implied from the scope of business of the partnership, but was actually an express authority conferred by the knowledge and assent of the other partner. That shews that *Weikersheim's Case* (3) is not an authority for the proposition for which it was cited, and that the passage in Lord Justice Lindley's book, if it did imply that (and perhaps it does not), would be *per incuriam*.

Fry, L.J.—If I were not differing from the decision of the learned Judge below, I should probably say nothing; but I will shortly state the reasons why I concur with my learned brethren. The arrangement contemplated in this case is, shortly, of this kind, that the claim which the partnership had against the Java firm shall be given up to a new company, which is intended to be formed, and that the partners in the old or dissolved firm shall become shareholders in a concern which is to be carried on with the property of the Java firm. In other words, instead of remaining creditors of the Java firm, they are to become partners by way of a limited company in the affairs of the business of their debtor. That is the nature and whole scope of the arrangement proposed. Now, it appears to me that such an arrangement as that is not within the ordinary powers of a partner who is charged with the liquidation of a dissolved partnership. It is not necessary to say if he is bound to receive all the property which he collects in the form of cash, or whether under the circumstances he may have proceeded in another form. That point does not require decision, but that he has power to enter

into a company or partnership to carry on the business of the debtor to the firm which he is winding up, is, in my opinion, not the case. I think, therefore, that, looked upon from the general point of view, the contention cannot be successfully urged. Then it is said that the deed of the 3rd of June, 1887, makes a difference, and that shews that the defendant was to be made so completely the *dominus* of the winding-up that he has power to do this. I find nothing in that deed in support of such contention. It appears to me only to contemplate an ordinary liquidation of the partnership affairs, with this exception, that the plaintiff is not to interfere in matters of discretion arising in that winding-up. It does not clothe the defendant with any larger power, or any power of doing anything else than a liquidating partner might do; and, as has been already observed by Lord Justice Cotton, the third section of the deed, which refers to the defendant accounting to the plaintiff for his share of any dividend received, looks as though the intention of the parties was that these outstanding claims were to be got in by way of receipt of dividends on the claim, and not by way of any such arrangement as is now proposed. In my opinion, the appointment of the defendant as receiver would not enlarge his powers, because, whilst the Court by appointing the defendant receiver protects his operations, and gives him power of having recourse to the Court for assistance and advice, it does not enable him to do that as against the plaintiff which the existing convention or agreement between the parties does not justify. I repudiate the notion that the Court has a general discretion to do what it thinks best for the parties in the winding-up of their affairs which are the subject of agreement and obligation between them, and it appears to me the argument urged upon us, that the Court can do what it thinks best, cannot hold. There appears to me to be no authority really cited in support of that contention. I will say nothing more about *Weikersheim's Case* (3), except that I entirely agree in the comments made upon it. With regard to the case pressed upon us, and perhaps especially upon me, of *The West of England and South Wales District*

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Bank v. Murch (4), I will only say that it has nothing to do with the case, as it appears to me, and whether rightly or wrongly decided seems immaterial. I will only state the conclusion I arrived at. There was in substance a compromise by the executrix with the bank of her deceased husband's co-partner, and I came to the conclusion (whether rightly or wrongly seems for the present purpose immaterial) that such compromise came under Lord Cranworth's Act. It has nothing to do with the power of a receiver appointed in a suit the object of which is the winding up the affairs of a dissolved partnership. I think, therefore, the order must be discharged, and the order suggested by the Lord Justice is right.

COTTON, L.J.—The appellant must have the costs both here and below.

Solicitors—Druces & Attlee, for appellant; Holt, Son, Coward & Hawkley, for respondent.

[IN THE COURT OF APPEAL.]

COTTON, L.J.	} <i>In re</i> GILES. THE REAL AND PERSONAL ADVANCE COMPANY (LIMITED) <i>v.</i> MITCHELL.
LINDLEY, L.J.	
LOPES, L.J.	
1890.	
Jan. 28.	

Practice—Appeal against Final Order in Chambers—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 50—Originating Summons—Dispute as to Priorities—Jurisdiction—Rules of Supreme Court, 1883, Order LV. rules 3 and 5a.

The time for giving notice of motion to discharge a final, not less than an interlocutory, order made in chambers is to be limited to twenty-one days.

The decision of KAY, J., in Johnson v. Hooley; in re Johnson (ante, p. 99; Law Rep. 42 Ch. D. 505) approved.

A question of disputed priority as between two mortgagees, even assuming that the Court has jurisdiction to decide it on originating summons—as to which, quære—is not such a question as ought to be determined by such a mode of procedure.

The plaintiffs, on the 21st of June, 1886, issued an originating summons against

Mr. and Mrs. Mitchell, and two persons named Giles, asking, as against Mr. and Mrs. Mitchell, for an account and for foreclosure or sale in respect of a mortgage to the plaintiffs dated the 22nd of August, 1884, by Mrs. Mitchell of her share in certain properties held by Messrs. Giles, as trustees, and against Messrs. Giles for an account of all rents and profits received by them as such trustees in respect of the mortgaged property.

On the summons coming on for hearing in chambers, the defendant Philip Giles claimed a charge under a memorandum dated the 19th of January, 1883, as against Mrs. Mitchell's interest in priority to the plaintiffs' mortgage; and by the direction of the chief clerk the Messrs. Giles brought in two accounts of the rents received down to the 25th of March, 1889, and shewing a balance in their hands of 5*l.* 1*l.* 8½*d.*, after allowing for the amount due to P. Giles on his charge.

The plaintiffs refused to accept these accounts, or to accept the 5*l.* 1*l.* 8½*d.* which the trustees offered to pay them, and disputed the claim of P. Giles to priority, alleging that they were entitled to priority by reason of the trustees concealing the security of P. Giles, when they, the plaintiffs, made enquiries from them, prior to taking their mortgage, as to the existence of any incumbrance.

The summons was adjourned to North, J., in chambers, to decide the question whether such a question as that could be settled on originating summons. His Lordship, on the 25th of July, 1889, granted the ordinary foreclosure judgment against Mr. and Mrs. Mitchell; but, holding that he had no jurisdiction to try such a question on originating summons, or that, if he had, he ought not to exercise it, dismissed the summons with costs as against the Messrs. Giles, without prejudice to any other proceedings which the plaintiffs might take by writ. Counsel for plaintiffs stated that he desired to appeal, and the Judge expressed a desire to have the case further argued in Court.

On the 18th of November, 1889, the plaintiffs' solicitors gave notice of motion to discharge or vary the order of the 25th of July, 1889, so far as it dismissed the summons against Messrs. Giles, and this motion

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was heard in Court on the 22nd of November, 1889. Counsel for the defendants objected that the notice ought to have been given within twenty-one days from the date of the order, and that consequently it was too late, and referred to a decision of Kay, J.—*In re Johnson; Johnson v. Hooley* (1)—as an authority that the limit of twenty-one days applied in the case of a motion to discharge a final order in chambers as much as an interlocutory order.

His Lordship, holding himself bound by that decision, refused the motion with costs, and declined to allow the plaintiffs an extension of time for giving such notice of motion.

The plaintiffs thereupon, on the 7th of December, 1889, gave notice of appeal to the Court of Appeal against the two orders of the 25th of July and the 22nd of November, 1889, and of an intended application by them that, if and so far as necessary, the time limited for moving to discharge the former of those orders might be extended.

Eustace Smith, for the appellants.

D. L. Alexander, for the respondents, the defendants *Giles*, urged by way of preliminary objection that the appeal was out of time; that having regard to the decision of Kay, J., in *In re Johnson; Johnson v. Hooley* (1) notice of motion to discharge the order in chambers should have been given within twenty-one days, notwithstanding that it was a final order; that by section 50 of the Judicature Act of 1873 no appeal lay against an order in chambers, as no effectual motion to discharge the order had been made; and so far from the Judge having given a certificate that he required no further argument, he had expressed a desire to have it re-argued. He should have applied to the Judge below to extend the time. The fact that a mistake has been made in the construction of a rule is no reason for allowing an appeal after the time has elapsed.

[*LINDLEY, L.J.*—Here there is no rule existing.]

Eustace Smith, for the appellant. — There is nothing in the Rules and Orders limiting a time within which notice of motion to discharge a final order in

chambers is to be made, and the first case on the point is the recent decision of Kay, J., which was not reported till after the notice of motion had been given. The only rule that could apply is Order LVIII. rule 15. But if he is bound by that decision, the notice of appeal asks for an extension of the time for appealing.

COTTON, L.J.—The preliminary objection taken to this appeal raises a point of some importance. An order was made by Mr. Justice North in chambers, but he wished to hear a further argument, and consequently a motion was made in Court to discharge or vary the order made in chambers. Such a motion is in no sense an appeal, but merely a rehearing of the former application. This notice of motion was, however, given after the expiration of twenty-one days. I think that was wrong. It has been established for some time that, in cases of interlocutory orders made in chambers, a party desiring to discharge such an order must move to do so within twenty-one days, following the analogy of appeals from interlocutory orders in Court. But it does not seem to have been settled, prior to the decision of Mr. Justice Kay in *In re Johnson; Johnson v. Hooley* (1), that the same rule applies to notices to discharge a final order made in chambers. That, I think, should be the practice. A motion to discharge an order in chambers, as I have said, is not an appeal, but merely a motion made so as to enable the Judge to have the matter heard over again more fully in Court. It is an application under section 50 of the Judicature Act, 1873, to discharge or vary the previous order. I think that Mr. Justice North was right in saying that he could not in this case rehear the matter in Court after the twenty-one days had elapsed. But the point as to the limitation of time was doubtful up to the time of the case being decided and published, and the application is in fact one made under section 50, the latter part of which gives the Court of Appeal a discretion as to giving special leave. [His Lordship read the section, and proceeded:] I am not quite satisfied that the condition imposed by that section was not performed, although by a blunder the motion before Mr. Justice North was made in such

(1) *Ante*, p. 99; Law Rep. 42 Ch. D. 505.

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a way that the learned Judge could not hear it.

But by special leave of this Court an appeal may be brought without a previous certificate, or a proper motion to discharge; and, in my opinion, having regard to the special circumstances of this case—namely, the doubt as to the practice and the absence of any positive Rule of Court on the point—and also having regard to the doubt whether the question at issue could be heard upon an originating summons, we should permit the appeal to proceed, even though the conditions of the section were not observed.

I desire, however, to say that I entirely agree with Mr. Justice Kay in his ruling that motions to discharge final orders in chambers ought not to be made at such a time as indirectly to keep alive the right to bring an appeal for a longer period than the year allowed for appealing against such an order when made in Court. The notice of motion should be served within twenty-one days from the date of the order.

Having now laid down that rule, I wish it to be understood that it must in future be followed, and I will not say what course we should adopt in any future case which should come before us without certificate and without effectual motion to discharge the order in chambers.

LINDLEY, L.J.—I agree. The difficulty arises from the fact that there is no rule limiting the time within which notice of motion to discharge a final order in chambers is to be given. The point was not decided till the decision of Mr. Justice Kay in the case of *Johnson v. Hooley* (1), which was not reported in the *Law Reports* till the December of that year. I think that decision was right. An application such as this to rehear in Court a decision in chambers should be made within twenty-one days. There is no rule of Court which says so, I agree; but we get at it by a process of reasoning which approves itself to my mind; and if we get to that, it follows that no such application as is required by section 50 has been made in this case.

But at the same time this is a new point. It is not a case where there is an

existing rule, and a blunder is made in construing it; and I do not think that any one is to blame for not arriving by reasoning or analogy at the conclusion to which we have come. The present is, I think, a case where we should avail ourselves of the power given to this Court by the later words in section 50, and give special leave to appeal.

LOPES, L.J.—I agree with the decision of Mr. Justice Kay in the case referred to, and I think it is a salutary rule that notice of motion to discharge a final order in chambers should be given within twenty-one days. But here there were, I think, circumstances which justify the Court in giving special leave to appeal. At the time the order in chambers was made in the present case there was no rule of any sort or kind pointing to this particular practice.

The appeal on the point of procedure was then argued.

Eustace Smith, for the appellants.—The Judge was, I submit, wrong in holding that there was no jurisdiction. The defendants being trustees of the rents for Mrs. Mitchell, and the plaintiff being her assignee, the application to the Court is within Order LV. rule 3 (g), for the determination of any question arising in the administration of a trust. But if not, then it falls clearly within rule 5 A of the Order, and that rule must contemplate the decision of a question of disputed priority by means of an originating summons, for the determination of such questions is almost a matter of course in every redemption action. It may be that an originating summons is not the most convenient mode of settling the present issue; and if the facts had been known at the time the summons was issued, probably the plaintiff would have proceeded by action commenced by writ.

D. L. Alexander was not called upon.

COTTON, L.J.—An order was in this case made in chambers dismissing so much of an action begun by originating summons as appeared to have necessarily the object of settling the question which had been raised by two of the defendants, whether a charge held by them had priority over

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the plaintiffs' mortgage. The defendants, who claimed priority, were trustees; but the claim was not made by them as trustees, but on the ground that they were entitled to a mortgage, not in their capacity as trustees, but on a contract between them and a *cestui que trust*, and entirely independent of their position as trustees.

There may, of course, be a question as to the validity of their mortgage, owing to the position they occupied with regard to the mortgagor; but the question of priority which is now raised does not in any way arise in the administration of the trust.

Mr. Justice North has decided either that he had no jurisdiction to try such a question on an originating summons; or that, if he had, it was not such a question as should be tried by that course of procedure. With that opinion I agree. What is an originating summons? By the Rules and Orders the Court is allowed to decide certain questions, but the jurisdiction to act on an originating summons depends on the question whether the particular questions at issue fall within those authorised by the Rules and Orders, and I cannot find in Order LV. rule 3 anything to justify such a point as this being heard on an originating summons. What was principally relied on by the appellant was clause *g* of that rule; but the question arising in the administration of the trust in that clause must mean some question which arises as between *cestui que trust* and the trustees. The object of originating summonses, so far as we may judge, was to enable simple matters to be settled without the expense necessarily arising from an action, but not to determine matters which may involve a serious question.

Rule 5 A of Order LV. has also been referred to. [His Lordship read that rule, and proceeded:] It was said that, in order to deal with a redemption suit effectively, it was necessary that questions of priority should be settled. I do not agree with that. It is very true that questions involving priority often arise in working out redemption, and if an action commenced by writ were brought we could deal with any question arising in it. But if a plaintiff chooses to come by way of originating summons, then, although it may be

very convenient to him on the ground of saving expense or otherwise, yet unless the relief claimed comes within the terms of Order LV., there is, I think, no jurisdiction to decide upon it. And even assuming that in a case like this there is jurisdiction, it would, in my opinion, be wrong to attempt to deal with such a question as that now at issue in these informal proceedings. An originating summons was a mode of procedure intended for the decision of questions of a simple uninvolved nature, but it is not a procedure calculated to deal with such a matter as this, where there is a real contest on disputed points.

The decision of Mr. Justice North is right.

We cannot deal with the question of costs, because they are in the discretion of the Judge, and we agree with his decision. The only point on which I entertained any doubt was whether or no an order should have been made at the instance of the mortgagees directing the trustees to hand over to them the balance of 5*l.* odd admitted by the defendants to be in their hands. But it appears that the trustees were willing to hand it over, but that the plaintiffs, thinking that some difficulty might be caused them, naturally refused to take it.

That being so, there was nothing as to which the Judge could give any decision against the trustees consistently with his decision that he had no jurisdiction on the summons, or that if he had any, it would not be well to exercise it.

LINDLEY, L.J.—The summons in this case was taken out by mortgagees of Mrs. Mitchell, seeking as against her an ordinary foreclosure judgment, which they have obtained under Order LV. rule 5 A. That rule was introduced to obviate the necessity of having recourse to the expensive procedure of an action in a simple case of foreclosure or redemption. That judgment was almost a matter of course.

But the plaintiffs have added as defendants two persons named Giles, who are trustees of the property comprised in the mortgage, and the plaintiffs seek to have an order as against them more or less for the administration of their trust. These two defendants say this, "we are

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entitled to a mortgage on this trust estate in priority to yours," and the plaintiffs dispute their right, and we thereupon have to decide whether such a question as this is one which can be properly determined on an originating summons. I am not sure that there is no jurisdiction. I am not sure that if there were an action for administration of the trust an enquiry might not be introduced into the decree as to the priority of these defendants. I am not so sure as Lord Justice Cotton that the relief claimed does not come within Order LV. rule 3 (g). But I am sure that Mr. Justice North was right in holding that it was not proper to decide the question on an originating summons. A discretion is given to the Judge under Order LV. rule 10 as to whether he will or will not order administration.

Then by rule 7 the application shall be supported by such evidence as the Judge may require—and we know that as a general rule upon a summons the evidence is taken by affidavit; and by rule 8 it shall be lawful for a Judge upon an originating summons to pronounce such judgment as the nature of the case may require. The moment a question of disputed priority arises, I cannot suppose that any Judge would decide it upon affidavit evidence. As a mere question of expediency and convenience, and whether there is or is not jurisdiction, I think that the learned Judge was right in the conclusion he came to, and therefore this appeal must be dismissed.

LOPES, L.J.—The jurisdiction to deal with particular matters upon an originating summons is new, and springs from the general rules of Court. I can find nothing in those rules giving jurisdiction in such a case as the present, either under Order LV. rule 3 or rule 5 A, or elsewhere.

I think the appeal should be dismissed.

Solicitors—Nye, Greenwood & Moreton, for appellants; Joseph Welman, agent for R. E. Geach, Guildford, for respondents, the defendants Giles.

NORTH, J. }
1889. }
Nov. 23. } EMERIS v. WOODWARD.

Compromise of Action—Application to set aside—How enforced—Summons or Action.

An application to set aside an agreement for the compromise of an action cannot be made by a summons in the action; but a fresh action must be brought for the purpose.

Gilbert v. Endean (Law Rep. 9 Ch. D. 259) followed.

Adjourned summons.

This was an action brought against an executor, claiming an order that he should execute transfers to the plaintiff of three mortgages, in pursuance of an alleged agreement. On the 2nd of August, 1887, an agreement was entered into between the plaintiff and the defendant for the compromise of the action on certain terms. This agreement was conditional on its being approved by the Judge in another action of *In re Haines*; *Haines v. Woodward*, which had been brought to administer the estate of George William Haines, the mortgagor; and the approval of the Judge was afterwards obtained.

On the 4th of February, 1889, the plaintiff took out a summons (entitled in both the actions) asking that so much of the agreement of the 2nd of August, 1887, as provided that the defendant Woodward should forthwith execute an assignment to the plaintiff of a mortgage dated the 30th of December, 1878 (being one of the three above-mentioned mortgages), might be varied as in the summons mentioned. On the 16th of July, 1889, the plaintiff took out a second summons (entitled in both the actions), asking for leave to amend the first summons by adding thereto the words, "or that the said agreement may be set aside *in toto*, or that the plaintiff may be at liberty to continue the action of *Emeris v. Woodward*, or to take such proceedings against the defendant as he may be advised."

Cozens-Hardy, Q.C., and *B. Eyre*, for the plaintiff.

A preliminary objection was taken on

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behalf of the defendants that an application to set aside a compromise ought to have been made the subject of a fresh action, and could not be made by a summons in the action.

It appeared from the chief clerk's note that this objection was taken in chambers.

Higgins, Q.C., and *T. L. Wilkinson*, for the defendant.—The first summons is really an application to set aside part of a compromise. Assuming that the plaintiff's claim is well founded, this cannot be done on a summons, but must be made the subject of a fresh action—*Gilbert v. Endean* (1). [They also referred to *Pryer v. Gribble* (2).]

Cozens-Hardy, Q.C., and *B. Eyre*, for the plaintiff.—If the objection was taken at chambers, the defendant has waived it by his subsequent conduct. He has filed affidavits in answer to those filed by the plaintiff, and has cross-examined the plaintiff's witnesses.

NORTH, J.—In my opinion, the objection must prevail. I think that the plaintiff's proper course is to bring a new action to set aside the compromise, and that he cannot, by means of a summons, set aside the agreement, and reopen the controversy. It is said that the defendant has by his conduct waived the objection. It is clear, I think, that such an objection can be waived by conduct. But the chief clerk's notes shew that the objection was raised in chambers at an early stage, and that it was clearly pointed out to the plaintiff that he ought to bring a fresh action. In my opinion the defendant has done nothing to waive the objection. Knowing of the objection, the plaintiff chose to put in his evidence; and, after that, it was incumbent on the defendant, for his own protection, to put in and complete his evidence in answer. I must dismiss both the summonses, with costs.

Solicitors—*G. L. P. Eyre & Co.*, agents for *Champney & Long*, Gloucester, for plaintiff; *Long & Gardiner*, for defendant.

(1) *Law Rep.* 9 Ch. D. 259.

(2) 44 *Law J. Rep. Chanc.* 676; *Law Rep.* 10 Chanc. 535.

CHITTY, J. } *In re E. W. MACDONALD.*
1889. } *MCALPIN v. MACDONALD.*
Dec. 7. }

Practice — Administration — Creditors whose Addresses cannot be found—Form of Order.

Under an administration decree made in 1866 divers creditors carried in proofs, but the proceedings were not completed, in consequence of an insufficiency of assets. In 1888 further assets fell in, and by the chief clerk's certificate it appeared that there was a sufficient fund in Court to pay all the creditors, but that some of the creditors whose claims were allowed could not be found:—Held, that the proper course was to retain in Court to the credit of each of such last-mentioned creditors a sum of Consols representing the amount of his debt and the interest thereon, and to fully administer the residue of the fund.

Form of order.

This was the further consideration of a creditors' action for the administration of the estate of a deceased testator.

The testator died in 1864, and the usual administration decree was made in May, 1866. Advertisements were issued, and a number of creditors sent in claims, but in consequence of the insufficiency of the assets the suit was for a time abandoned.

In November, 1888, the testator's legal personal representative paid into Court a sum of 1,180*l.*

On the 16th of November, 1889, the chief clerk made his certificate, by which it appeared that the debts of the testator, which had been allowed, amounted, with interest thereon and costs, to 607*l.* The first part of the first schedule to the certificate contained a list of twenty creditors who had been ascertained to be living or properly represented, and whose debts, with interest and costs, amounted in all to 325*l.*; and the second part contained a list of fifteen creditors whose debts, with interest and costs, amounted in all to 282*l.*, and as to whom no evidence had been adduced to shew whether such persons were living, or, if dead, who were their legal personal representatives, or the persons entitled to such debts. It was also certified that

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notices had been sent by post to these fifteen creditors, but had been returned. The sum paid into Court was represented by 1,218*l.* New Consols. The question arose how the debts of the creditors in the second part of the first schedule were to be provided for.

F. H. Colt, for the plaintiff.

G. E. Tyrrell, for the defendant, the testator's legal personal representative.

CHITTY, J., said that the right form of order would be to carry over to the account of each one of the creditors in the second part of the first schedule by name an apportioned part of the New Consols equivalent at the market price of the day to the amount of his debt, and then the rest of the fund could be dealt with. He added that he did not feel bound to direct any further enquiry, and there was no reason why the whole fund should be kept in Court while further information as to these creditors was being obtained.

The order, after providing for the payment out of the New Consols of the debts due to the creditors in the first part of the first schedule, proceeded: "Of the residue of the 1,218*l.* New Consols, let so much as at the price of the day of carrying over will be equal to the several amounts of the debts and interest thereon mentioned in the second part of the said first schedule, with subsequent interest thereon to the date of such carrying over, to be verified by affidavit, be carried over in this matter and action to the several accounts of the several creditors mentioned in the second part of the said first schedule respectively, and let the interest on the respective sums of New Consols so carried over be accumulated to the same and like accounts. Let the residue of the said New Consols, &c., be transferred out of Court to the defendant." Liberty to apply.

Solicitors—*H. Tyrrell & Son*, agents for *J. B. Clarke & Co.*, Birmingham, for plaintiff and defendant.

NORTH, J. }
1889. }
Nov. 16. }

WOOD v. GREGORY.

Practice—Partition Action—Form of Judgment—Request for Sale by Owners of a Moiety—Proof of Title at Hearing—Enquiry as to Persons interested.

As a general rule, when, at the trial of a partition action, a request is made for a sale of the property, the Court will not make an immediate order for sale, but an enquiry will be directed to ascertain who are the persons interested.

Short cause.

This was a partition action brought by the owners of one moiety of certain real estate against the owners of the other moiety. The plaintiffs, by their statement of claim, asked for a sale.

There was an affidavit that all the persons interested in the property were parties to the action. The value of the property was about 10,000*l.*

H. M. Humphry, for the plaintiffs.—As the affidavit shews that all the persons interested in the property are parties to the action, I ask for an immediate order for sale, without the usual enquiry at chambers as to the persons interested. This course was adopted by Kay, J., in *In re Stedman* (1).

W. Baker, for some of the defendants.
Oswald, for another defendant.

NORTH, J.—I cannot accept *In re Stedman* (1) as an authority that, in all partition actions, the title to the property is to be proved in Court instead of directing an enquiry in chambers. This may be a very proper course to adopt in simple cases, and especially when the value of the property is but small: and I have myself followed that course. But, looking at the nature of the property in the present case, and at the interests of the parties, which, as set forth in the statement of claim, appear to depend on a complicated pedigree, I think it will be more con-

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venient that the ordinary enquiry should be made in chambers. I will give leave to apply in chambers for an order for sale.

Solicitors—Torr & Co., agents for Chambers & Chambers, Brighthouse, for plaintiffs; W. M. White, agent for J. R. Farrar, Halifax, and Chester & Co., agents for Ibberson & Ibberson, Dewsbury, for defendants.

[IN THE COURT OF APPEAL.]

COTTON, L.J. } LEESON v. THE GENERAL
BOWEN, L.J. } COUNCIL OF MEDICAL
FRY, L.J. } EDUCATION AND REGIS-
1889. } TRATION OF THE UNITED
Dec. 18, 19, 21. } KINGDOM.

Medical Practitioner — Removal from Register — Judicial Enquiry — Domestic Forum — General Medical Council — Medical Practitioners Act, 1858 (21 & 22 Vict. c. 90), s. 29 — Jurisdiction of Court — Personal Interest of Member of Forum.

The General Medical Council held an enquiry upon a complaint made by the Medical Defence Union against the plaintiff, a registered medical practitioner, that he had been "guilty of infamous conduct in a professional respect," in that he had acted as "cover of" or by his advice and assistance had enabled one H. to carry on the business or profession of a medical electrician, and to practise as if he were duly qualified under the style of —. On the enquiry the charge was read by the solicitor to the General Medical Council, and the solicitor to the Medical Defence Union then stated the facts alleged against the plaintiff, who was present with his solicitor, and was heard in reply. The General Medical Council found that the plaintiff had committed the offence charged against him, that the offence was "infamous conduct in a professional respect," and directed the registrar to erase the plaintiff's name from the medical register. Two of the members of the General Medical Council were subscribers to and guarantors of the Medical Defence Union, an association having for its objects the protection of members, the prevention of unprofessional conduct, and the punishment of offenders, but were not mem-

bers of the council of that union, by whom the charge against the plaintiff was made, and who had full power under the articles of the association to act. The plaintiff brought this action against the defendants for an injunction to restrain them from removing his name from the register:— Held, that the offence charged against the plaintiff was within the jurisdiction conferred on the General Medical Council by the Medical Practitioners Act, 1858, and that as the council had acted honestly within its jurisdiction, the Court had no power to interfere with its decision.

Held, by COTTON, L.J., and BOWEN, L.J. (FRY, L.J., dissentiente), that the fact that two members of the General Medical Council were subscribers to the Medical Defence Union, by whom the charge was made against the plaintiff, did not invalidate the decision of the General Medical Council, as they were not actually or constructively accusers or quasi accusers of the plaintiff.

Decision of NORTH, J., affirmed.

The Queen v. Allan (4 B. & S. 915; 33 Law J. Rep. M.C. 98) considered.

This was an appeal by the plaintiff, a licentiate of the Royal College of Physicians, London, and a licentiate of the Royal College of Surgeons, Edinburgh, and a registered medical practitioner, from a refusal of North, J., to grant an injunction restraining the defendants from removing his name from their Register of General Practitioners until the trial of the action, and from publishing certain resolutions passed by them on the 28th of November, 1889, to the effect that the plaintiff had been guilty of infamous conduct in a professional respect.

The General Council of Medical Education and Registration of the United Kingdom is a body representative of the medical profession of the United Kingdom, including nominees of the Crown, and was established by the Medical Act, 1858 (21 & 22 Vict. c. 90). The Act, *inter alia*, provided that a register of duly qualified practitioners should be kept, and that only those whose names were entered on that register could sue for and obtain money payable to them for medical fees.

The 29th section of the Act was as

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follows: "If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall, after due enquiry, be judged by the General Council to have been guilty of infamous conduct in a professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register"; and the 40th section provided that any person who should wilfully and falsely pretend to be, or take or use the name or title of, a physician, surgeon, general practitioner, or any name, title, addition, or description implying that he is registered under this Act, or that he is recognised by law as a physician or surgeon or general practitioner, should, upon a summary conviction for any such offence, pay a sum not exceeding 10*l*.

On the 15th of November, 1889, the solicitor of the General Council of Medical Education and Registration (hereafter called the General Medical Council) wrote and sent to the plaintiff the following letter:—

"On behalf of the General Medical Council, I give you notice that information and evidence has been laid before the council by which you are charged with having been guilty of infamous conduct in a professional respect, the particulars of which alleged conduct are as follows:—For that you, being a registered practitioner, do act as cover of or by your present advice and assistance do enable one Cornelius Bennett Harness (an unqualified person) to carry on the business or profession of a medical electrician, and to practise as if he were duly qualified under the style of the Medical Battery Company, Limited, and the Electropathic and Zander Institute, at 52 Oxford Street, London, W., the said Cornelius Bennett Harness publicly advertising himself as the Medical Battery Company's consulting medical electrician. I am directed further to give you notice that on the 27th of November, 1889, a meeting of the General Medical Council will be held at 299 Oxford Street, London, W., at four o'clock in the afternoon, to consider the above-mentioned charges against you, and decide whether or not they should direct your name to be

removed from the medical register, pursuant to section 29 of the Medical Act, 1858. You are invited and required to answer in writing the above charges, and to attend before the General Medical Council at the above-mentioned place and time to establish any denial or defence, that you may have to make to the above-mentioned charges, and you are hereby informed that if you do not attend as required, the General Medical Council may proceed to hear and decide upon the said charges in your absence. Any answer or other communication or application which you may desire to make respecting the said charges or your defence thereto must be addressed to the general registrar of the Medical Council, and transmitted so as to reach him not less than three days before the day appointed for the hearing of the case. A copy of section 29 of the Medical Act, 1858, and of a certain standing order of the General Medical Council is enclosed herewith for your information. A copy of the evidence sent to the General Medical Council in support of the complaint is also enclosed."

The following is the standing order referred to:—

"Proceedings for the removal of a name from the register under section 29 of the Medical Act, 1858, shall be commenced by the issue of a notice in writing on behalf of the General Council by the solicitor addressed to the accused person. Such notice shall specify the nature and particulars of the charge alleged against the accused person, and shall inform him of the day on which the General Council intend to deal with the case and decide upon the said charge, and shall require and invite the accused person to answer in writing the charges brought against him, and to attend before the General Council on such day."

The charge against the plaintiff was made in the name of the Medical Defence Union, an incorporated company, limited by guarantee under the Companies Act, 1862. The objects of the union were, *inter alia*, (a) to support and protect the character of medical practitioners practising in the United Kingdom; (b) to promote honourable practice, and to suppress and prosecute unauthorised practitioners; (c) to

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advise, defend, or assist in defending members of the union in cases where proceedings involving questions of professional principle or otherwise were brought against them. Article 36 of the articles of association provided that the management of the business and the control of the union was vested in a council, which was thereby authorised to exercise all such powers and do all such acts as might be exercised or done by the union, and which were not by the articles or statute expressly directed to be exercised or done by the union in general meeting. Article 2 limited the power of the council by providing that the objects of the union, so far as they related to the suppression or prosecution of unauthorised practitioners, should not be acted on without the sanction of a unanimous resolution of the council confirmed by a majority of the members of the union present and voting in general meeting.

The enquiry into the charge against the plaintiff was held by the General Medical Council. The solicitor of the council opened the proceedings by reading the charge against the plaintiff, and written statements in support of the charge were then submitted to the General Medical Council by the solicitor for the Medical Defence Union. The plaintiff was present at the enquiry, attended by his solicitor, who submitted statements to shew that the plaintiff had done nothing which was infamous in a professional respect. After the members of the General Medical Council who had conducted the enquiry had deliberated, the president informed the plaintiff that the council had come to the following resolutions:—“(1) That you have committed the offence charged against you. (2) That the offence is, in the opinion of the council, infamous conduct in a professional respect. (3) That the Registrar has been directed to erase your name from the medical register.”

The resolutions of the General Medical Council as subsequently printed set forth the charge against the plaintiff in the exact words contained in the letter of the council's solicitor.

Of the members of the General Medical Council who took part in the enquiry,

two—namely, Dr. Glover and Mr. Teale—were also members of the Medical Defence Union, being subscribers of 10s. a year and guarantors; but neither Dr. Glover nor Mr. Teale was a member of the council of the Medical Defence Union.

The General Medical Council had no power to make, and did not make, the plaintiff pay the costs of the enquiry.

Immediately after the conclusion of the enquiry the plaintiff brought this action against the General Medical Council, claiming an injunction as above stated. North, J., held that the charge against the plaintiff was really that he had acted as “cover” of Mr. Harness, not merely to enable him to carry on the business of a medical electrician, but to practise as if he were a duly qualified medical practitioner, and that was a matter within the statutory jurisdiction of the General Medical Council; and that as they had acted regularly and *bona fide* in their proceedings, the Court had no power to interfere. He also held that the two members of the General Medical Council who were also members of the Medical Defence Union were not thereby incapacitated from taking part in the enquiry, and that the decision was not invalidated on this ground, and he refused to grant the injunction claimed.

From this decision the plaintiff appealed.

Rigby, Q.C., Cozens-Hardy, Q.C., and George Henderson, for the appellant.—We admit that by section 29 of the Medical Practitioners Act, 1858, a jurisdiction is conferred on the General Medical Council which is not subject to any appeal to the Court, provided that the case dealt with by them is within their proper seizin, and they have acted honestly within their jurisdiction. But if the council act in a matter not within their jurisdiction, or do not conduct the proceedings properly and *bona fide*, then the Court will interfere by *mandamus* or injunction—*Ex parte La Mert* (1) and *Albutt v. The General Council of Medical Education and Registration of the United Kingdom* (2). Here

(1) 4 B. & S. 582; 33 Law J. Rep. Q.B. 69.

(2) 58 Law J. Rep. Q.B. 606; Law Rep. 23 Q.B. D. 400.

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the charge against the plaintiff is that he enabled Harness, an unqualified person, to carry on the business of a medical electrician as if he were duly qualified, under the style of the Medical Battery Company. That must mean as if he was a duly qualified medical electrician. For a duly qualified medical practitioner to act as "cover" for an unqualified medical practitioner, and to enable him to act as if he was a duly qualified practitioner, is an offence within the 29th section. But that is not what is charged here. The charge is that the plaintiff enabled Harness to act as a duly qualified medical electrician—which he is; and there is no evidence that Harness ever claimed or professed to be a duly qualified medical practitioner. The charge, therefore, is not one within the jurisdiction of the General Medical Council under section 29, and the plaintiff is entitled to the injunction he asks. Our next point is that two members of the General Medical Council who heard the charge against the plaintiff, and joined in the decision complained of, were members of the Medical Defence Union, who acted as prosecutors in the charge. The principle is well established that a person cannot act as prosecutor and judge in the same matter; neither can a person act as judge who has a pecuniary interest in the matter in question—*The Queen v. Allan* (3), *Dimes v. The Proprietors of the Grand Junction Company* (4), *The Mercers' Company of Chester v. Bowker* (5), *The Queen v. Gibbon* (6), *The Queen v. Milledge* (7), and *The Queen v. Farrant* (8). The order is therefore invalid, as two of the persons who acted as judges were also in the position of prosecutors.

Everitt, Q.C., and *Muir Mackenzie*, for the respondent, were only called upon on the second point.—All the cases referred to on behalf of the appellant were cases where magistrates were exercising quasi-criminal jurisdiction in a judicial capacity.

(3) 4 B. & S. 915; 33 Law J. Rep. M.C. 98.

(4) 3 H.L. Cas. 759; 19 Law J. Rep. Chanc. 345.

(5) 1 Str. 639.

(6) Law Rep. 6 Q.B. D. 168.

(7) 48 Law J. Rep. M.C. 139; Law Rep. 4 Q.B. D. 332.

(8) 57 Law J. Rep. M.C. 17; Law Rep. 20 Q.B. D. 58.

In the present case the proceeding before the General Medical Council was not a judicial or a quasi-judicial proceeding. The Medical Defence Union did to some extent act as prosecutors, but it was not necessary that the charge or complaint should be made by any one to the General Medical Council, who might, *mero motu*, have set the proceedings in motion. It would have been *intra vires* for the General Medical Council to have started the proceedings, and their decision could not have then been impeached. And the decision of the General Medical Council cannot now be impeached because two of the members happen to have been subscribing members of the Medical Defence Union who presented the charge against the plaintiff. These two gentlemen, although subscribers to and guarantors of the Medical Defence Union, were not members of the governing body or council who instituted the proceedings, and had no control over the action of that body, and they had no pecuniary interest in the matter. In *The Queen v. Allan* (3) one at least of the magistrates was a member of the committee which instituted the proceedings; the proceedings were of a criminal nature, and they were instituted, not by a corporate body as here, but by an incorporate body.

They cited *The Queen v. Handsley* (9), *The Queen v. Farrant* (8), *The Queen v. The Rochester Dean and Chapter* (10), *The Queen v. Band* (11), *The Queen v. Meyer* (12), *The Queen v. The General Medical Council* (13), and *The Queen v. Pettimangie* (14).

Sebastian, for the Medical Battery Company.

Rigby, Q.C., replied.

Cur. adv. vult.

COTTON, L.J.—This is a motion, by way of appeal from Mr. Justice North, to restrain the defendants, who are the General Medical Council, from acting on the

(9) 51 Law J. Rep. M.O. 137; Law Rep. 8 Q.B. D. 383.

(10) 17 Q.B. Rep. 1; 20 Law J. Rep. Q.B. 467.

(11) 35 Law J. Rep. M.C. 157; Law Rep. 1 Q.B. 230.

(12) Law Rep. 1 Q.B. D. 173.

(13) 30 Law J. Rep. Q.B. 201.

(14) 9 Law Times (N.S.), 683.

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resolution at which they arrived, which was that the name of the plaintiff be struck off the register of medical practitioners, and to prevent them from publishing that resolution.

The General Medical Council is a body which is formed under 21 & 22 Vict. c. 90, which Act was passed for the purpose of enabling persons requiring medical aid to distinguish qualified from unqualified practitioners. It is a body partly composed of medical men who are named by certain public bodies, partly of persons elected by the general body of qualified medical men in the country, and partly of persons named by the Queen.

The Act required, and for the first time required, that there should be a register; and those only who are entered on the register can sue for and obtain payment of any money payable to them for medical attendance or medical fees; and then powers were given to this body by various sections, of which section 29 was the first and the most important one. [His Lordship read it, and continued:] And that was what was done in this case by the General Medical Council. There was another clause, clause 40, which I ought to refer to, because it was a good deal referred to in argument. It enabled criminal prosecutions to be taken against persons who falsely pretended to be registered practitioners, but the proceeding taken in this case was not under the powers of that last section, because Dr. Leeson was on the register at the time when this order was made by the General Medical Council, and was properly on the register.

Now, there have been a good many points argued here; and the first was that the matter in respect of which the General Medical Council here adjudicated or decided was not a matter within the powers given to them under section 29; and for that purpose the charge made against the plaintiff, and which was brought to his notice by writing, according to the practice of the General Medical Council, was referred to, and it was as follows:—“You, being a registered medical practitioner, do act as cover of, or by your presence, advice, and assistance do enable one Cornelius Bennett Harness, an unqualified person, to carry on the business or profes-

sion of a medical electrician, and to practise as if he were duly qualified under the style of the Medical Battery Company (Limited),” &c. I need not read more. It was said that there was nothing contained in this complaint which would justify the General Medical Council in exercising the powers given to them by section 29, and there was a good deal of verbal criticism ably pressed upon us as to the effect of what was said in the notice. It was said that there is no allegation that Mr. Harness is practising as if he were a duly qualified medical man. It only says, “as if he were duly qualified under the style of the Medical Battery Company,” and that all that Dr. Leeson was supposed to have done was that he assisted him to represent himself as a medical electrician. I cannot read it in that way. We know what a duly qualified medical man is in the Act. A person is duly qualified if he is on the register, and in that respect duly qualified to obtain the benefit of the Act as regards the privileges which are conceded to those medical men who are on the register; and I have no doubt that this notice does state that which would justify the General Medical Council, if they were satisfied that it was supported by the facts, in coming to the conclusion that an offence had been committed which was, in the words of the Act, “infamous conduct in any professional respect.” That, in my opinion, is the true construction of the words of the charge which is made against the plaintiff. And it was found that he had been guilty of the acts charged against him, and there was a direction to erase his name from the register.

There has been here a good deal of question as to what took place on the enquiry, and we have had the evidence which was before the General Medical Council brought before us. In my opinion, it would be wrong to consider whether the General Medical Council arrived at a right conclusion on the evidence which was brought before them. The General Medical Council cannot, strictly speaking, take evidence. They cannot take evidence on oath. They cannot take evidence which we as lawyers have to consider as evidence. They have statements made be-

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fore them in support of any complaint which is made, and also they have statements made on the other side by the medical man against whom the complaint is made; and if it is once established that the complaint made before them does involve a matter in respect of which they can exercise the jurisdiction given to them by section 29, then I think we ought not to look at the evidence, or in any way consider whether they have arrived at a right conclusion. Of course, if it was alleged and proved before us that they had acted corruptly—if it was proved that there was no statement made before them on which they could reasonably and honestly arrive at the conclusion at which they did arrive, then I think we ought to consider it to see whether the fact that there was no statement which could justify the conclusion, was such evidence as, if not displaced, would lead us to the conclusion that the council had not acted honestly with respect to the charge brought before them, but had acted with some other indirect object. But although there were some allegations in the affidavit of the plaintiff in this case that there was prejudice against him, that was not pressed upon us at all by counsel, nor was it in any way supported by anything which was brought before us. Dr. Leeson seems to have had a most perfect consideration of his case. The complaint was brought forward in the ordinary mode required by the rules and regulations of the General Medical Council. He was there; he was represented by his solicitor, and he brought his own witnesses—that is to say, those who with him were to make statements in support of his contention that in his conduct he had done nothing which was infamous in a professional respect; and everything was heard, most fully heard and considered, and then the Council arrived at the conclusion at which they did arrive. In my opinion, that being so, we cannot consider as to whether they are right or wrong. That must be left to them.

In my opinion, therefore, the first ground which was taken in support of this application fails, because I think there was a charge which justified the General Medical Council in making the

enquiry under section 29, and there was no reason for suggesting that the proceedings were improperly conducted by them.

But then there was another point raised, which occasioned rather more doubt, and which was this. It was suggested as a second point that this order made by the General Medical Council must be considered as made by a non-competent tribunal; for it was said that, taking the council as acting judicially, it was so constituted on this particular occasion that any order made by it ought, having regard to the decided cases, to be considered as a nullity. Now it appears that the complaint against Dr. Leeson—I will not call it indictment—was brought in the name of the Medical Defence Union, and it turns out when attention is called to the matter that two of the members of the council who were present when the case of Dr. Leeson was considered were members of the Medical Defence Union; and it was said that they are to be considered in the light of prosecutors, and that as they were prosecutors they could not also sit as Judges of the matter. It was therefore contended that any decision which the council arrived at when these two members, who were incompetent to act as judges in the matter, were present, must be considered as a nullity.

Of course, the rule is very plain that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case, either in his own case or in any case where he brings forward the accusation or complaint on which the order is made. To my mind it is clear here that the General Medical Council in respect of the complaint against Dr. Leeson were acting judicially. They were not in the ordinary sense Judges, but they had to decide judicially as to whether or not the complaint against Dr. Leeson was well founded; and they could, if they found it was well founded, make an order which would be of great importance to him, and deprive him of being on the register, with very serious consequences. But then we have to consider this. Were either of these two gentlemen, Mr. Teale and Dr. Glover, to be considered as complainants in this case?

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In considering this, we must look a little at the Medical Defence Union. The Medical Defence Union was a company limited by guarantee under the Act of 1862, and one of the objects was "to support and protect the character and interests of medical practitioners practising in the United Kingdom," and then "(2) To promote honourable practice and to suppress or prosecute unauthorised practitioners." Then they are "to advise and defend, or assist in defending, members of the union in cases where proceedings involving questions of professional principle or otherwise are brought against them." So that it was not only to prosecute those who offended against the Act, but to defend those against whom charges were brought unreasonably. Then, if we look at the articles we find this—that there was a council, and the council practically had all the powers of the company which formed the union except in one respect, they could not institute prosecutions against any one who was acting in violation of the law, without the vote of a general meeting. One of the articles is as follows: "The objects for which the union is established shall be carried out in the manner provided by these articles, provided that the second of the objects of the union as there set forth, so far as relates to the suppression or prosecution of unauthorised practitioners, shall not in any case be acted upon without the sanction of a unanimous resolution of the council, confirmed by a majority of members present and voting at a general meeting." But we are not now considering a prosecution under the Act, and except in that respect there is no limit on the power of the council, who can do everything which is not expressly or by Act of Parliament required to be done by the whole body. Neither Mr. Teale nor Dr. Glover were members of the council; they were members of the union by subscribing 10s. a year and by giving a guarantee, the amount of which we do not know, which was to provide any expense which would be necessary in order to carry out the objects of the association. The powers of the council are referred to in article 36. [His Lordship read it, and continued:] Now this complaint made against Dr.

Leeson was a complaint brought forward by the council, to which neither of these two members of the General Medical Council belonged. They were not upon it, and they could not, having regard to the articles, exercise any control or give any direction as to what should be done by the council in bringing forward this complaint. Then, are they, as members, in any way interested? The expenses of this complaint could not be thrown by the General Medical Council on Dr. Leeson, the person complained of. They had no power to give any costs, and therefore, whatever might be the result of this complaint made against him, it would not in any way affect the liability of Mr. Teale and Dr. Glover to contribute anything to the expenses of this proceeding. Then, as regards the question whether they are to be considered as complainants here, we ought to look to substance, and not, because this complaint is brought by the council in the name of the union, to say that a person, a member of a union who has nothing to do and can have nothing to do with bringing forward this complaint, is to be treated as a prosecutor or as one of the persons who is bringing forward this complaint. The term "prosecutor" is sometimes objected to, but I use it for the sake of simplicity. Therefore, it cannot be said that here these two members have been incompetent to act because they were adjudicating upon a complaint brought forward by themselves; and, as I have already shewn, there can be no pecuniary interest, and no bias in that respect either from any pecuniary liability which was thrown upon them, or anything of that kind. Whichever way it was determined, their liability as to contributing to the expenses would be just the same. I may also observe that as regards the objects of the union I give no opinion as to whether it is desirable to form such unions, the objects are just as much to defend those who are improperly attacked as to bring before the General Medical Council any question which may reflect on the conduct of any member of the profession; so that on that ground they are not to be considered as complainants here—as persons who are bringing forward this charge—and there was hardly any

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contention that their position as members of the union did actually involve a bias which would prevent them from adjudicating on this case.

Numerous cases were quoted, but, in the view which I take of it, it is only necessary to advert to one, which probably is the strongest in favour of the appellant here—*The Queen v. Allan* (3). There certain gentlemen, riparian owners and owners of salmon-fishing, and some who were outsiders, formed themselves into a body not in any way incorporated, all of whom apparently would have equal power, and there was a committee formed which was a committee to direct prosecutions. Three magistrates were sitting on the bench when a question was brought before them, and they were members of this association which had been formed. One of them was a member of the committee that had directed the prosecution. There was no doubt, therefore, he was a prosecutor in the matter which was brought before the magistrates for decision, and therefore there could be no doubt that, having regard to the principle laid down, the conviction was bad. But the other two had nothing to do with that committee, and were only members of the association; and that was the principal point relied upon here. But Chief Justice Cockburn, no doubt, does use language which would seem to shew that, even if only those magistrates who were members of the association and not on the committee had been on the bench, the conviction would have been bad. What he said was this: "Certain members of that association were present as Justices and took part in this conviction. They were essentially prosecutors, being members of an association the aggregate of which were undoubtedly the prosecutors." Well, I myself do not think that the language of Judges ought to be taken without reference to the facts of the case; and although he did use that large expression, yet Lord Blackburn, who was on the bench too, and Mr. Justice Mellor did not use language which can be even tortured into saying that if any member of the association had been on the bench at the time, that would have vitiated the proceeding. What Lord Blackburn said was this:

"One of the Justices who joined in the conviction, being a member of the committee of the association which instituted the proceedings, was one of the prosecutors. There may be difficulty in finding magistrates in this neighbourhood who are not interested to hear such an information, but members of the association which institute the prosecution must not act as Judges upon it." There, I think, he puts it that the conviction was bad because one member of the committee who were actually prosecutors was sitting on the bench at the time; and Mr. Justice Mellor's language, I think, fairly interpreted, leads to the same conclusion. But even if Chief Justice Cockburn did intend by the language he used to say that the conviction would have been bad if any one of the members of the association who had nothing to do with the prosecution, and could not have, and who had not been on the committee, that that would have vitiated the conviction, I should not follow him in a case like this, where neither Mr. Teale nor Dr. Glover had or could have any voice at all in this prosecution, and who on the evidence knew nothing at all about it till the matter was brought before them as members of the General Medical Council.

In my opinion this objection, which is a most serious one, cannot prevail, and we ought to hold that Mr. Justice North was right in refusing the injunction.

BOWEN, L.J.—As to the first point raised by the appeal, I shall say very little in addition to what the Lord Justice has already stated. These proceedings were in the nature of judicial proceedings, although the forum is a domestic one, and although the evidence taken before such forum differs in many respects from evidence which is adduced in a Court of law, and in particular in the all-important respect that it is not given upon oath. The only thing which the Courts can investigate when proceedings of the General Medical Council of this character are brought before them is whether the domestic forum has acted honestly within its jurisdiction. The jurisdiction is defined by the statute. There must be an adjudication by the General Medical Council

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of infamous conduct in some professional respect, and that adjudication must be arrived at after due enquiry. The statute says nothing more, but in saying so much it certainly imports that the substantial elements of natural justice must be found to have been present at the enquiry. There must be due enquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at after he has had a full opportunity of being heard. With respect to the charge made, the charge of which he has notice, it is a charge of infamous conduct in some professional respect, and the particulars which should be brought to his attention in order to enable him to meet that charge ought to be particulars of conduct which, if established, is capable of being viewed by honest persons as conduct which is infamous. That is all. We have seen that those conditions have been fulfilled by the enquiry and by the tribunal which institutes it. The functions of the Court of law are at an end. It appears to me that we have no power to review the evidence, any more than we have a power to say whether the tribunal came to the right conclusion. If, indeed, it could be shewn that nothing was brought before the tribunal which could raise in the minds of honest persons the inference that infamous conduct had been established, that would go to shew that the enquiry had not been a due enquiry; but if there is no blot of that kind upon the proceedings, the jurisdiction of the domestic tribunal which has been clothed by the Legislature with the duty of discipline in respect of a great profession must be left untouched by Courts of law. It appears to me, for these reasons, that the view which Lord Justice Cotton has expressed is the sound one, and I entirely concur with it.

Next comes a very serious question, whether or no the tribunal which adjudicated in respect of the appellant's conduct was, in respect of two of its members, rendered incompetent by the fact that they had taken part as accusers before the council of the person upon whose conduct they were adjudicating. As the Lord Justice has said, nothing can be clearer

than the principle of law that a person who has a judicial duty to perform disqualifies himself for performing it if he has a pecuniary interest in the decision which he is about to give, or a bias which renders him otherwise than an impartial judge. If he is an accuser he must not be a judge. If he has a pecuniary interest in the success of the accusation he must not be a judge. Where such a pecuniary interest exists, the law does not allow any further enquiry as to whether or not the mind was actually biassed by the pecuniary interest. The fact is established from which the inference is drawn that he is interested in the decision, and he cannot act as a judge. But it must be in all cases a question of substance and of fact whether one of the judges has in truth also been an accuser. The question which has to be answered by the tribunal which has to decide—the legal tribunal before which the controversy is waged—must be: Has the Judge, whose impartiality is impugned, taken any part whatever in the prosecution, either by himself or by his agents? I think it is to be regretted that these two gentlemen, as soon as they found that the person who was accused was a person against whom a complaint was being alleged by the council of a society to which they subscribed and to which they in law belonged as members, did not at once retire from the council. I think it is to be regretted, because judges, like Caesar's wife, should be above suspicion, and in the minds of strangers the position which they occupied upon the council was one which required explanation. Whatever may be the result of this litigation, I trust that in future the General Medical Council will think it reasonable advice that those who sit on these enquiries should cease to occupy a position of subscribers to a society which brings them before the council. But having said that, I come back to the point which we have to decide, whether these two gentlemen took any part whatever in the prosecution either by themselves or by their agents. It appears to me, in spite of the cloud which the ingenuity of the appellant's counsel raised upon the point, that the true answer must be here, upon the facts—and it is a question of fact—in the negative. I think,

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although they were members of the corporation whose council did bring this complaint before the General Medical Council, they did not themselves take any part, and could not have taken any part whatever, in the prosecution, and that the prosecution was not conducted really by the council of the union as their agents. The council of the union was supreme in the matter, and I think that they stand clear, upon the facts being investigated, of all suspicion whatsoever.

For those reasons, treating the latter part of the case as one which depends upon an inference of fact; and regretting, as I do, that there should be colour for the suggestion that has been made, and that a controversy should accordingly have arisen which required to be carefully considered—with the care which we have brought to bear upon it, nevertheless I think that, as a matter of substance and of fact, these gentlemen were not accusers on this particular occasion.

The appeal, therefore, in my judgment, must be dismissed with costs.

Fry, L.J.—Two questions have been argued before us. The first was a question whether the charge which was laid before the General Medical Council was one which was within the jurisdiction of that council. Now, with all that has been said by my learned brothers on that part of the case I entirely concur—I shall add nothing to what they have so fully and clearly expressed.

Then comes the second question—whether, having regard to the fact that two members of the council were subscribers to what is known as the Medical Defence Union, the council as constituted was competent or incompetent to determine the charge. Now there again there are two subordinate questions in which I entirely agree with my learned brethren. In the first place, I cannot for one moment yield to the argument which was addressed to us by the leading counsel for the General Medical Council, that they were not acting judicially in the performance of their duties on that occasion. The nature of the proceedings and the effect of the proceedings seem to me to be very strong to shew that it must be a judicial proceeding, because

the result was to deprive Dr. Leeson of rights which before that were vested in him as a duly qualified medical man on the register of the council. Further than that, the language of the statute, if it be necessary to refer to that, is, in my judgment, equally clear. It requires a due enquiry. It requires a judgment. It requires that that judgment shall find him guilty. Now, “enquiry” and “judgment” and “guilt” are all words which express, and which are relevant to, a proper form of judicial proceedings; and therefore, although this body proceeds by different rules of evidence to those on which the Courts of law proceed, I cannot for a moment doubt that the council were proceeding judicially; nor can I help adding that the manner in which the council has proceeded on this enquiry, as on all other enquiries, shews that the council are fully aware that they are performing judicial duties, and endeavour evidently to perform them in a very admirable manner.

The second point is this. It was urged before us that the Medical Defence Union were not in fact complainants. It was said that the council could proceed without any prosecutor or person acting before it. They might proceed *mero motu*. That is quite true; but it is equally true that in this case they did not proceed *mero motu*, but they proceeded in this manner. They allowed the solicitor and the honorary secretary of the Medical Defence Union to appear before them in the character of complainants—a course which seems to me to have been a very convenient one to pursue; and it is not unworthy of remark that, on the very same meeting of the council at which these proceedings were taken against Dr. Leeson, rules in respect of the procedure at such enquiries were passed by the council which divided themselves into two classes of cases. One of these classes was where the enquiry is brought before the General Medical Council by a complainant, and the complainant appears personally, or by counsel, or by a solicitor, then a certain order of procedure was enacted, and that order of procedure followed very nearly the procedure before a Court. It gave the complainant an opportunity to state his case, then produce his proofs; then the accused

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was to be invited to state his case and to produce his proofs; and then there was an opportunity given for a reply in certain cases. The second class of cases was where no complainant appeared. There the council proceeded simply by reading the complaint and calling on the accused practitioner to state his case and produce his evidence. It is evident, therefore, the Medical Defence Union, either as a whole or by their executive, were proceeding as complainants and as *quasi*-prosecutors in this enquiry. No doubt the Medical Defence Union acts through its council, through its executive body; and this proceeding was taken by the executive body, and they were represented, as I have already stated, by their solicitor and the honorary secretary. They acted, in fact, as prosecutors, producing the evidence and stating the case, and urging what was to be said for the prosecution or *quasi*-prosecution.

Now, to that union two of the members of the General Medical Council which sat upon this case, and who therefore took part in this decision, were subscribers, and it may be taken that this prosecution—I call it a prosecution for the sake of brevity—this proceeding was within the objects of the union. It appears to me that subscribing to a union of this description implies two things. It implies a general sympathy with the objects of the union; and it implies, secondly, a confidence in the discretion of the executive body who have to carry on the business of that union. No doubt the amount of confidence and the amount of sympathy may vary in different cases and from time to time with the same subscribers; but that is the natural conclusion, I think, one arrives at when one finds a person subscribing to an association for carrying on prosecutions. Now that, in my opinion, makes the subscriber to an association of this kind what has been called a virtual prosecutor—of course, he is not an actual prosecutor; he is not before the tribunal *in propria persona*, he has not even given instructions to the solicitor who appears; but he has shewn his sympathy and his confidence in that body who are acting in this respect, and I cannot think that a body of subscribers to a union of this

description could form a satisfactory body of judges to determine the proceedings taken by the union itself. Taking that view of the case, I cannot shut my eyes to the fact, which Judges know as well as everybody else, that there are in this country numerous associations formed for the purpose of carrying on prosecutions in respect of alleged violations of the law of various kinds. They may be sometimes in respect of violations, or alleged violations, of rights of fishery in a river, as in the *Tees Case* (3); or they may be violations, or alleged violations, of the laws which restrain cruelty towards animals; or they may be violations, or alleged violations, of the ecclesiastical laws. Now it appears to me that subscribers to those associations indicate their sympathy with the general proceedings of the body in carrying on those prosecutions, and I think they come within the description which has been laid down of virtual prosecutors.

To my mind this point is determined by authority. I do not say authority binding on us, but authority which I think deserves the utmost respect and consideration—I mean the case to which Lord Justice Cotton has referred, of *The Queen v. Allan* (3). In that case there was a voluntary association of persons which consisted of two classes—ordinary members who were the owners of river-side property, or occupiers of the rights of fishing in the Tees and its tributaries; secondly, honorary members who might be desirous of promoting the objects of the association by contributing to its funds, and who were, as I understand, not riparian proprietors or owners of rights of fishing in the Tees. That body acted, as most of these bodies do, through a committee, and that committee was not only to make by-laws and rules and regulations, but they were the persons to engage and dismiss watchers, and, in the event of proceedings under the Act being considered necessary, they—that is, the committee—were to instruct the secretary to enforce its provisions; and the secretary and treasurer were, subject to the approval of the committee, to determine what proceedings should be taken against any person acting in contravention of the law.

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The ordinary members, therefore, and the honorary members had nothing whatever to do with instituting the prosecutions or appointing watchers. The person who laid the information in that case was a watcher of the association; therefore engaged and liable to dismissal, not by the general body, but by the committee. The magistrates who sat on the bench to hear that complaint were three. Mr. Allan was an ordinary member and the owner of property having a frontage to the river; Mr. Smith was not only an ordinary member, but he was an active member of the committee, and had been concerned in a resolution which authorised the committee to take proceedings for the recovery of such penalties as, in their opinion, had been incurred at the defendant's locks; and lastly, Mr. Rease, who was not an ordinary member, but only a subscribing member of the association. Those were the three Justices.

Now in what way did the Court deal with the application to quash the conviction on the ground of the magistrates being the virtual prosecutors? The Chief Justice Cockburn said, "It is impossible to hold consistently with the principles which have been established by decided cases, and are founded upon the very essence of justice, that these magistrates were competent judges upon the occasion in question." Observe, he does not hold that one magistrate is disqualified, but he holds that all three were disqualified according to the essential principles of justice—"An information was laid against the defendant for the violation of the provisions of an Act of Parliament passed for the protection of salmon fisheries." Then he said, "Certain members of that association were present as Justices"—again dealing with them all individually—"and took part in this conviction; they were essentially prosecutors, being members of an association the aggregate of which were undoubtedly the prosecutors." Then Lord Blackburn—Mr. Justice Blackburn as he then was—in my view, notwithstanding what has been said by Lord Justice Cotton, took the same view. He deals, no doubt, in the first place with the case of Mr. Smith, who was a member of the committee; but he goes on to add this:

"There may be difficulty in finding magistrates in this neighbourhood who are not interested to hear such an information; but members of the association which institutes the prosecution must not act as judges upon it." In other words, he says neither an ordinary nor an honorary member of this association can act as judge upon the matter. Every subscriber to that association appears to me, in the view of these two learned Judges, disqualified from sitting as judge or acting as judge on that complaint.

I think, therefore, that is a decision which in point of substance and principle applies to the present case. Of course, it is not binding upon us; but, in my view, that decision is right, and I think it ought to be upheld and applied to the present case. I think it is a matter of public policy, so far as is possible, that judicial proceedings should not only be free from actual bias and prejudice of the Judges, but that they should be free from the suspicion of bias or prejudice; and I do not think that subscribers to associations for the purpose of carrying on prosecutions can be said to be free from suspicion of bias or prejudice in the cases of prosecutions instituted by the associations to which they subscribe. It is needless for me to disclaim any intention, in arriving at that conclusion, of holding that the two gentlemen in question were liable to any bias. That appears to me a point which is not really open to us, because I put my decision on the ground of public policy, and I disclaim any right to enquire whether in fact they were or they were not biassed—I need hardly say that I do not believe they were.

Lastly, it was urged that the case I have referred to is not in point, because there the association was not an incorporated one, and in the present case it was incorporated. That, in my judgment, has nothing to do with the case. Corporation or non-corporation is quite immaterial in considering the operation upon the mind of being a member of a union for the purpose of carrying on prosecutions. I think, therefore, that we should be misled by a trivial and immaterial difference if we gave any effect to that. If the matter, therefore, rested with me, I should have

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held that the decision of the General Medical Council in this case was invalid, and that the council as constituted on the occasion in question was not competent to decide on it, and in so doing I think that I should best maintain the dignity and, therefore, the usefulness of the General Medical Council. My learned brethren are of the opposite opinion, and therefore this appeal will be dismissed, with costs.

Appeal dismissed, with costs.

Solicitors—R. Furber, for appellant; Farrer & Co., for respondents.

NORTH, J. 1889. Dec. 14, 16, 17, 18.	}	<i>In re</i> JOBSON. JOBSON v. RICHARDSON.
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Will—Construction—Vested or Contingent—"From and after" the Death of the Tenant for Life.

A testator gave all his real and the residue of his personal estate to a trustee (as to a specified leasehold house), upon trust to permit his daughter, Elizabeth Jobson, to receive the rents thereof for her life, and "from and after her decease the same premises shall be in trust for all the children of the said Elizabeth Jobson, in equal shares as tenants in common, on their respectively attaining the age of twenty-one years." The will contained no direction as to the application of the rents of the leasehold house after the death of Elizabeth Jobson and during the minority of her children:—Held, that, notwithstanding the words "from and after," the interest of the children in the leasehold house was contingent on their attaining twenty-one.

Adjourned summons.

Robert Jobson, by his will dated the 1st of May, 1869, after giving certain specific legacies, devised and bequeathed all the real estate and the residue of the personal estate of or to which he should die seized or possessed, unto Thomas Crone, his heirs, executors, administrators, and assigns, upon the trusts, and to and for the intents and purposes thereafter

declared concerning the same—that was to say, as to all his leasehold messuage or dwelling-house with the appurtenances situate and being No. 5 in front and back Terrace Seaham Harbour, in the county of Durham, upon trust to permit and suffer his daughter, Elizabeth Jobson, to receive and take the rents and profits thereof for her life, and "from and after her decease the same premises shall be in trust for all the children of the said Elizabeth Jobson, in equal shares as tenants in common, upon their respectively attaining the age of twenty-one years." And as to all the residue of his real and personal estate, upon trust to sell and convert into money such part thereof as should be of a saleable nature, and to collect and get in the remainder thereof. And the testator declared that his said trustee should stand possessed of the proceeds thereof upon trust to pay certain legacies, and should stand possessed of the residue of the said proceeds, after paying thereout his debts and funeral and testamentary expenses, in trust for his said daughter Elizabeth Jobson, his daughter Esther Richardson, and his son John Jobson, in equal shares as tenants in common.

The will contained no direction for the application of the income of the leasehold house after the death of Elizabeth Jobson and during the minority of her children.

The testator died on the 18th of August, 1869, leaving his daughter Elizabeth Jobson surviving. She married William Costello, who died in the year 1878. There was one child only of this marriage—namely, a daughter, Ada Winifred Costello—who survived her mother and died under the age of twenty-one.

This was an originating summons taken out by the trustee of the will as plaintiff against Robert Richardson (the administrator of the testator's daughter, Esther Richardson, one of the residuary legatees) and Michael Costello (who was the sole next-of-kin of Ada Winifred Costello), as defendants. The plaintiff was also the administrator of Ada Winifred Costello.

The summons asked for a declaration that, according to the true construction of the trusts by the said will declared concerning the leasehold house, the plaintiff, as administrator of Ada Winifred Costello,

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was entitled to the said leasehold house; or that the rights and interests of the several persons entitled under such trusts might be declared.

Terrell, for the plaintiff.—The will must be read as if the words were “payable on the children respectively attaining twenty-one.” The property is to be held in trust for the children “from and after” the death of the tenant for life. The period of vesting, therefore, is at the death of the tenant for life—*Andrew v. Andrew* (1). If this is not the right construction, you must strike out the word “from.” Again, a direction for the application of the income of a legacy for maintenance makes what would otherwise be a contingent legacy a vested one. No doubt there is no express direction that the income of the leasehold house should be applied for the maintenance of the children during minority; but the Conveyancing Act, 1881, supplies that direction, and the same principle applies as if there were an express direction for maintenance.

[*NORTH, J.*—I cannot import the statute into the will.]

He also referred to *Ingram v. Suckling* (2), *Bres v. Perfect* (3), and *In re Bevan's Trusts* (4).

Medd, for the defendant Michael Costello, in the same interest.—If the words in the present case had been “to be paid and divided” the case would have been clear—*Williams v. Clark* (5) and *Farmer v. Francis* (6).

The gift in the present case is substantially the same as in those two cases. This is also a case of a “severed” legacy—*Saunders v. Vautier* (7).

[*NORTH, J.*—Does the principle on which a severed legacy is held to be vested, although there are words of contingency, apply to a gift of leaseholds.]

(1) 45 Law J. Rep. Chanc. 232; Law Rep. 1 Ch. D. 410.

(2) 33 Law J. Rep. (O.S.) Chanc. 89.

(3) 1 Collyer, 128.

(4) 56 Law J. Rep. Chanc. 652; Law Rep. 34 Ch. D. 716.

(5) 4 De Gex & Sm. 472.

(6) 2 Sim. & S. 505; 4 Law J. Rep. (O.S.) Chanc. 154.

(7) 1 Cr. & Ph. 240; 10 Law J. Rep. Chanc. 354.

I submit it does. Again, this is a gift to a class in whose favour the Court will always struggle to make a gift vest—*McLachlan v. Taitt* (8) and *Williams v. Haythorne* (9).

Skelton Cole, for the defendant Robert Richardson.—The gift to the children is contingent on their attaining twenty-one. The decision in *Williams v. Clark* (5) turned on the words “equally to be divided.” In *Saunders v. Vautier* (7) separation of the legacy was rendered necessary for the purpose of giving effect to the gift of *corpus*. In the present case it is only rendered necessary for the purpose of giving the income to the tenant for life.

Terrell, in reply, referred to *Branstrom v. Wilkinson* (10).

NORTH, J.—The question in this case is whether Ada Winifred Costello took a vested interest in the leasehold house, notwithstanding she died under twenty-one. If she did, it now belongs to her next-of-kin. If she did not, it passes under the residuary gift. By his will the testator gave his real and personal estate to trustees upon certain trusts, one of which is as follows: As to all that his leasehold messuage or dwelling-house, with the appurtenances, No. 5 in front and back Terrace, Seaham Harbour, upon trust to permit his daughter, Elizabeth Jobson, to receive the rents thereof during her life, and from and after her decease upon trust for all her children in equal shares as tenants in common, on their respectively attaining the age of twenty-one years. The sole question I have to decide is as to the meaning of the gift in remainder after the death of Elizabeth Jobson. I do not think there is any other clause in the will which throws any light upon the clause in question.

There is another gift similar in terms to the one under consideration—namely, the gift of real estate to the testator's son and daughter, John Jobson and Esther Richardson; but there is, however, a gift over there, and, in my opinion, that gift

(8) 2 De Gex, F. & J. 449; 30 Law J. Rep. Chanc. 276.

(9) Law Rep. 6 Chanc. 782.

(10) 7 Ves. 420.

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does not affect the present question. Now let us look at the facts. Elizabeth Jobson only had one child, a daughter, who survived her and died under twenty-one; and the question is, whether that child took a vested interest on her mother's death, although she did not attain twenty-one. There is nothing in the will throwing any light on the gift in question. The will contains no direction for the application of the income of the leasehold house during the minority of the children. There is not, as in some cases, an appropriation of income for maintenance until the children attain twenty-one. It is true that the provisions of the Conveyancing Act, 1881, as to maintenance apply; but that fact does not affect the present question, since I am of opinion that those provisions apply equally, whether the gift is vested or contingent. Then the contention is that the words "from and after" the death of Elizabeth Jobson mean that the gift is vested on her death. In my opinion that is not the meaning of the words "from and after." In my opinion the words "from and after" do not mean immediately from the death of the tenant for life, but only "subject to the life interest of the tenant for life." That this is the right construction in the present case is perfectly clear to me. Supposing, instead of the child surviving the mother and dying under twenty-one, the child had attained twenty-one and died in the mother's lifetime. If the gift is only to take effect "from and after" the death of the mother, and does not in any way vest in the meantime, then, according to the contention of the plaintiff, the child would take no interest at all. It is impossible to come to that conclusion, and the case of *M'Lachlan v. Taitt* (8) is a strong authority in favour of the view that a child who attained twenty-one in the lifetime of the mother would take a vested interest, which could not be divested by the death of that child in the lifetime of the tenant for life. In my opinion, the words "from and after" mean simply and solely "subject to the life interest"; and a gift to children "from and after" the death of a tenant for life has not the effect of giving those children vested interests on the death of the tenant for life, when the gift is

coupled with the words "on attaining twenty-one," or "when they attain twenty-one," or other similar words.

The case of *Andrew v. Andrew* (1) is relied on by Mr. Terrell as shewing that the child took a vested interest on the death of the tenant for life. In that case, however, there were present several considerations which are absent from the present case. In the first place, if the Court had come to a different decision, the infant would have been left penniless during his minority, and it was to avoid this extremely improbable construction that the Court came to the decision it did. Again, there was in that case a gift over in default of the tenant for life having a son; and this fact entered very greatly into the consideration of the Court in arriving at the decision it did. There was nothing to indicate in that case that the Court would have come to the conclusion it did if the words had only been "from and after" the death of the tenant for life. Another class of case relied on was *In re Bevan's Trusts* (4). In that case, however, the gift was of a separated fund, and there was also a gift over in the event of the tenant for life dying without leaving issue. Then Mr. Medd relied on *Williams v. Clark* (5). In that case there was a gift upon trust for the testator's daughter for life, with remainder in trust for her husband for life, and after the decease of the survivor to pay and divide the trust fund to and among the children of the daughter, if more than one equally to be divided between them, share and share alike, when and as they attained twenty-one. The Vice-Chancellor's conclusion was this, that the first direction "to pay and divide" amounted to a gift independently of the direction to divide at twenty-one; and the subsequent words, "equally to be divided between and among them, share and share alike, as and when they shall attain the age of twenty-one years," merely prescribed the time of payment. And the Vice-Chancellor said the construction he was asked to adopt would render twelve words of the will superfluous—"if more than one, equally to be divided between and among them." And the result was he declined to adopt the construction asked for by leaving out those words. It

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is quite clear to my mind that if that second direction to divide had been omitted, the Vice-Chancellor would not have come to the conclusion he did. That case, therefore, is rather an authority in favour of the view that the gift in the present case is not vested. Then it has been argued that the gift was separated from the rest of the testator's property, and *Saunders v. Vautier* (7) was relied upon. In that case there was a gift of a sum of stock to trustees, upon trust to accumulate the dividends until Daniel Wright Vautier should attain the age of twenty-five years, and then to pay or transfer the principal, together with the accumulated interest, unto the said D. W. Vautier, his executors, administrators, or assigns absolutely. There clearly was from the first a separation of that particular fund from the rest of the testator's estate, and an appropriation of it for the benefit of David W. Vautier, and it was held that that was sufficient to shew that the interest was a vested one. In the present case, however, there is no such direction to accumulate the income, nor do I find any appropriation of the fund. It was argued that there was a severance here because the house was vested in trustees. But the fund was severed from the rest of the estate for the benefit of the tenant for life, not of the children. There is no segregation or appropriation for the benefit of the children at all. I hold, therefore, that there is nothing in principle in *Saunders v. Vautier* (7) which in any way leads to the conclusion that this is a vested interest. Looking at all these considerations, I cannot find any grounds for holding that the gift, "from and after" the death of Elizabeth Jobson, to her children on their respectively attaining twenty-one, has the effect of giving a child who does not attain that age a vested interest.

Under these circumstances, therefore, I hold that the leasehold house forms part of the testator's residuary estate, and belongs to the residuary legatees.

Solicitors—*Indermaur & Brown*, agents for F. Harle, Chester-le-Street, for plaintiff and defendant Richardson; *Maples, Teesdale & Co.*, agents for H. B. Wright, Seaham Harbour, for defendant Costello Michael.

NORTH, J. }
1889. }
Nov. 23. }

FRANCIS v. HARRISON.

Parties—Foreclosure Action—Trustees—Rules of Supreme Court, 1883, Order XVI. rule 8.

Foreclosure action by a first mortgagee against the mortgagor, and a second mortgagee, who had become bankrupt. The second mortgagee was a trustee of the money secured by his mortgage, for various persons:—Held, that, notwithstanding Order XVI. rule 8, the persons beneficially interested under the second mortgage were necessary parties to the action.

Motion for judgment.

This was a foreclosure action, which now came on for hearing as a short cause.

The plaintiffs were first mortgagees. The defendants were Harrison, the mortgagor; Sankey, a second mortgagee; and Cooper, his trustee in bankruptcy.

Sankey had been adjudicated a bankrupt in February, 1889. He was a trustee of the money secured by his mortgage, for various persons.

The plaintiffs, by their statement of claim, submitted that the several *cestuis que trust* were not necessary parties to the action, but that they were sufficiently represented by the defendant Sankey.

Sankey had not entered an appearance to the writ. The other defendants had appeared, but had not delivered any defences.

Higgins, Q.C., and *Fossett Lock*, for the plaintiffs.—Sankey, as trustee, sufficiently represents his *cestuis que trust*, without joining any of them as parties (1).

In a redemption suit, trustees sufficiently represent their *cestuis que trust*—*Jennings v. Jordan* (2).

[NORTH, J., referred to the argument and judgment in the same case before the Court of Appeal, under the name of *Mills v. Jennings* (3).]

None of the defendants appeared.

(1) Order XVI. rule 8.

(2) 51 Law J. Rep. Chanc. 129; Law Rep. 6 App. Cas. 698.

(3) 49 Law J. Rep. Chanc. 209; Law Rep. 13 Ch. D. 639.

Francois v. Harrison.

NORTH, J.—In my opinion, the defendant Sankey does not sufficiently represent his *cestuis que trust*. *Mills v. Jennings* (3) was a redemption action. A foreclosure action differs entirely from a redemption action. In the former the defendant has to provide money to redeem the mortgage, in the latter the defendant has to receive money paid for redemption. It cannot be supposed that an insolvent trustee will be able to find money to redeem a mortgage. The observations made by Lord Justice Cotton in *Mills v. Jennings* (3) appear to me to be precisely in point. The Lord Justice said, "Under Order XVI. rule 7 of the Rules of Court, 1875, trustees may, both as plaintiffs and defendants, sufficiently represent the trust estate without any of the parties beneficially interested being before the Court, with power, nevertheless, for the Court or a Judge to direct any of such last-mentioned persons to be made parties. But this rule is in substance a repetition of rule 9, section 42, of the Chancery Act, 1852; and it was argued that in suits relating to mortgages it had been held, as in *Goldsmid v. Stonehever* (4), that trustees did not sufficiently represent their adult *cestuis que trust*, unless it was probable that the trustee, from being executor, or otherwise, had funds in hand sufficient to enable him to redeem. But that case was a suit for foreclosure, in which the trustee was a defendant, whom the plaintiff sought to foreclose; and there is a reason in such a case for not giving the plaintiff the relief he seeks, unless he brings before the Court all those interested in the equity of redemption, who may probably have the means of redeeming the mortgage. Here the plaintiff-trustee is seeking to redeem, and the dismissal of his bill will be effectual in favour of the defendant Jennings so as to prevent any further proceedings for redemption in respect of the property vested in the plaintiff as trustee." I should have had great difficulty in holding that even a solvent trustee, who is a mortgagee, sufficiently represents his *cestuis que trust* as defendant to a foreclosure action. But here the trustee is a bankrupt, and under

these circumstances I think the *cestuis que trust* are not only proper, but necessary parties to the action, and I cannot give judgment for foreclosure in their absence. I will give liberty to amend, but I can make no other order.

Solicitors—H. A. Dowse, for plaintiffs; Long & Gardiner, for defendant Harrison; Kingsford, Dorman & Co., for defendant Cooper; defendant Sankey in person.

STIRLING, J. } 1889. Jan. 16. Nov. 6, 23. }	<i>In re THOMPSON;</i> <i>BEDFORD v. TEAL.</i>
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Charity—Bequest to—Corporation Bonds
—Impure Personality—Mortmain Act (9 Geo. 2. c. 36).

A testator, by his will dated in 1887, gave certain pecuniary legacies to charity, his estate consisting mainly of corporation bonds. By some of the bonds the borough fund, and by another the district fund, was charged, the fund in each case comprising the rent of surplus lands. By another bond the general district rates were charged under an Act which charged the principal sums borrowed by the corporation on mortgage thereunder upon the lands acquired under the Act. The corporation had at the date of the charge lands acquired under the Act. By another bond the undertakings, works, and property of certain gaslight companies were charged. By another, gas rents and the general district rates were charged:—Held, that all the bonds except the last were impure personality, and could not be given to charity.

This was a summons, taken out by the executors of the will of John Robert Thompson, to determine the question whether there ought to be an abatement of certain charitable bequests by reason of the assets of the testator consisting of corporation bonds.

The testator, who died on the 1st of October, 1887, by his will dated the 3rd of June, 1887, gave several pecuniary legacies to charitable institutions, amounting in the whole to 2,450*l.*, and he directed

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(4) 9 Hare, App. xxxviii.
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that the said legacies should be paid exclusively out of such part of his personal estate as might be legally bequeathed for charitable purposes; and the will contained a residuary bequest.

At the date of his death the testator had no real estate. His personal estate amounted to 5,283*l.* 11*s.* 9*d.*, of which 4,968*l.* was invested upon municipal corporation mortgages of the nominal value of 5,000*l.*

The corporation bonds were as follows:—

1. A mortgage of the Batley Corporation, dated the 14th of October, 1880, for 500*l.*, expressed to be made under the Batley Corporation Waterworks Acts, 1871 and 1878, and to be a mortgage of a proportion of the works authorised by the said Acts, and of the rates, rents, profits, and other moneys arising or accruing and in any way vested in the mayor, aldermen, and burgesses by virtue of the said Acts from the public water rates and annual rents authorised by the said Acts to be levied and made, and also of the borough rates and borough fund of the said borough.

2. A mortgage of the same corporation for the like amount dated the 9th of January, 1882. This mortgage was made under the Dewsbury and Batley Corporations Gas Act, 1873, and was expressed to be a mortgage of the interest of the mayor, aldermen, and burgesses in the gas rates, rents, and money to be received in respect of the gasworks of the mayor, aldermen, and burgesses. And also as a collateral security the borough rates and borough fund of the said borough. The corporation were by the said Acts empowered to charge the borough fund.

The town clerk of the borough of Batley deposed that the borough fund was composed (*inter alia*) of rents received from surplus lands, some of which were originally acquired for market purposes, and were sold subject to rentcharges.

3. A mortgage of the Bradford Corporation for 1,000*l.* dated the 26th of April, 1870. It was headed "No. 29, 1,000*l.* on the General District Rates (Markets Account)," and was expressed to be made under the provisions of, among other Acts, the Bradford Corporation Act, 1866, and to be a mortgage of the rates arising or

accruing by virtue of the said Acts, some or one of them, from the general district rates to be levied within the district of the said borough.

By section 57 of the Bradford Corporation Act the corporation were authorised to borrow on mortgage any sums, not exceeding in the whole 150,000*l.*, to be applied in making and providing the market-places and market-houses, and the buildings, works, and conveniences connected therewith by the same Act authorised to be made and maintained.

By section 60: "The mortgagees under this Act may enforce payment of arrears of principal and interest due on their mortgages by the appointment of a receiver, and in order to authorise the appointment of a receiver the amount owing to the mortgagees by whom the application for a receiver is made shall not be less than 10,000*l.* in the whole."

By section 69: "The principal sums from time to time borrowed by the corporation on mortgage under this Act for purposes other than the purposes of the waterworks, and the interest thereon, are by this Act charged upon the lands and property from time to time acquired by the corporation, whether by lease or by purchase under this Act, and the general district rate of the borough."

4. A mortgage of the same corporation for 400*l.* dated the 1st of April, 1887, and expressed to be made under the Bradford Improvement Act, 1850, and in exercise of all other powers vested in the said corporation or enabling them in that behalf, and to be a mortgage of the borough fund of the said borough, and the rates, rents, profits, and other moneys forming such borough fund or arising or accruing from the said borough fund.

The Bradford Improvement Act, 1850, constituted the corporation the local board of health, but it did not authorise them to charge the borough fund. The corporation were, however, authorised as the local authority to charge the borough fund by the Tramways Act, 1870, and by a provisional order obtained thereunder from the Board of Trade.

The town clerk deposed that the corporation were seized or possessed of (*inter alia*) the following real or leasehold pro-

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party :—the town hall of Bradford, the markets and market-places situate in Bradford acquired by the corporation under the Bradford Corporation Act, 1866, and certain surplus lands acquired by the said corporation for the purpose of effecting an enlargement of the town hall and improvements of the streets in the said borough, but which had not yet been used for that purpose, and in the meantime were let to several persons as tenants of the said corporation at yearly or other rents.

5. A mortgage of the Keighley Corporation for 500*l.*, dated the 24th of June, 1884, and expressed to be made under the Public Health Act, 1875, the Public Health Supplemental Act, 1855, No. 2, and the Keighley Improvement Act, 1824, or some or one of such Acts, and of every other Act or power in any wise enabling them in this behalf, and to be a mortgage of the rates and charges arising or accruing by virtue of the said Acts or any of them, and of the general district rates of the corporation, and of their rents, rates, and charges (if any), as the corporation had power to grant, assign, or otherwise charge for that purpose. By these and other Acts the local board of health were authorised to manufacture and supply gas and to recover rents for such supply by warrant of distraint from a Justice of the peace; and by the Keighley Waterworks Extension and Improvement Act, 1869, they were authorised to borrow 10,000*l.* for gasworks purposes on the mortgage of their gas rents and other funds carried to the gas account, with or without including the general district rate, and the mortgages so granted were deemed to be granted in accordance with the provisions of the Public Health Acts applicable to mortgages of the general district rate. In 1882 the powers of the local board became vested in the corporation of Keighley. The amount secured by the mortgage was borrowed under two sanctions of the Local Government Board, granted in pursuance of the above-mentioned Acts for the erection of gasworks, and the interest on the mortgage was paid exclusively out of the rents, charges, and other income arising from the gasworks. In the event of such income proving insufficient for payment of interest, the

mortgage was to become a charge upon the general district rates levied under the sanitary Acts.

6. A mortgage of the Dewsbury Corporation for 500*l.*, dated the 7th of October, 1878, and expressed to be made under the Batley Corporation Waterworks Act, 1871, and the Dewsbury and Heckmondwike Waterworks Act, 1876, and to be a mortgage of the share and interest of the mayor, aldermen, and burgesses in the rates, rents, and money to be received in respect or by means of the waterworks of the Dewsbury and Heckmondwike Waterworks Board, and also, as a collateral security, the borough rates and borough fund, or general district rates and public water rate of the said borough. By the Act of 1876 the corporation were empowered to charge the borough fund as a collateral security. With reference to the borough fund the town clerk deposed as follows :—

“The corporation is seized or possessed of the following hereditaments and real estate—that is to say (a), the town hall, now in course of construction upon freehold land acquired by the corporation for the purpose; also the borough offices of Dewsbury, held by the corporation for an unexpired term of years under a lease thereof granted to the said corporation; some portions of the borough offices which are not required or constantly used by the corporation for their own use or that of their officers and servants are sublet by the corporation to the School Board, the Waterworks Board, and the Chamber of Commerce of Dewsbury, as yearly tenants thereof, at certain rents, which rents are paid to the treasurer of the corporation, and are by him carried to the credit of the account of and form part of the borough fund.”

7 and 8. Two mortgages of the Wakefield Corporation for 500*l.*, dated respectively the 10th of May, 1881, and the 9th of December, 1884, and respectively expressed to be made under the Wakefield Corporation Waterworks Act, 1880, and to be mortgages of the share and interest of the mayor, aldermen, and burgesses in the revenues to be received in respect or by means of the waterworks authorised by the said Act, and also, as a collateral

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security, the general district rates and district fund of the said borough. By section 58 of the aforesaid Act, "for securing repayment of moneys borrowed under the authority thereof, the said corporation may mortgage the water revenues and the district fund and general district rate or either of them." With reference to the district fund, the town clerk deposed that it consisted "of the income and profits accruing from the various undertakings of the corporation, the proceeds of the said general district rate, contributions from the county authority and from the Government in respect of the maintenance of main roads, and the rent of a cottage, the site of which, with other surplus lands, was acquired by the corporation under the Public Health Act, 1875, for the purposes of their sanitary department or undertaking" (*).

9. A mortgage of the Leeds Corporation for 600*l.*, dated the 2nd of January, 1871, and expressed to be made under the Leeds Corporation Gas Act and the Acts incorporated therewith, and to be a mortgage of the borough fund and borough rates of

(*) The material provisions of the Public Health Act, 1875, are as follows :—

Section 177: "Any local authority may, with the consent of the Local Government Board, let for any term any lands which they may possess, as and when they can conveniently spare the same."

Section 207: "All expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of district fund and general district rate leviable by them under this Act (subject to certain exceptions)."

Section 209: "In the district of every urban authority whose expenses under this Act are directed to be defrayed out of the district fund and general district rate, there shall be continued or established a fund called the district fund; a separate account, called 'the district fund account,' carried under this Act to the account of that fund, shall be kept by the treasurer of the urban authority; and such moneys shall be applied by the urban authority in defraying such of the expenses chargeable thereon under this Act as they may think proper."

Section 210: "For the purpose of defraying any expenses chargeable on the district fund which that fund is insufficient to meet, the urban authority shall from time to time, as occasion may require, make by writing under the common seal, and levy, in addition to any other rate leviable by them under this Act, a rate or rates to be called 'general district rates.'"

the said borough, and also the undertakings, works, and property of the Leeds Gas Light Company and the Leeds New Gas Company vested in the said mayor, aldermen, and burgesses under the said first-mentioned Act, and the gas rents and other income to be derived under the same Act. By this Act the corporation were empowered to borrow on mortgage upon the borough fund and upon the security of the undertakings, works, and property to be vested in the corporation under the Act.

F. H. Colt, for the summons.

Chas. Browne, for the residuary legatees.—As to the Batley bonds: even though the bonds are personal estate, yet, if there is a charge on funds relating to land, although the charge is only by way of collateral security, that brings them within the Mortmain Act—*In re Hatton* (1), which is a decision by North, J., upon similar bonds—*Brook v. Badley* (2), and *In re Watts; Cornford v. Elliott* (3).

Bardswell (*Graham Hastings, Q.C.*, with him), for persons representing the charities, admitted that the case could not be distinguished from *In re Hatton* (1).

STIRLING, J., accordingly held that the Batley bonds were impure personalty, and could not be given to charity.

Browne then argued the case as to the Bradford bond for 1,000*l.*

Bardswell, contra.—I submit that, in order to say that a bond is impure personalty, it is essential that the land should be directly affected, and I claim the benefit of the decision of North, J., in *In re Hatton* (1) with regard to the Huddersfield bonds.

[STIRLING, J.—It is there held that where there is a charge upon the undertaking within the meaning of *Gardner v. The London, Chatham, and Dover Railway Company* (4), then there is no charge upon

(1) 4 Times Law Rep. 311.

(2) 37 Law J. Rep. Chanc. 884; Law Rep. 3 Chanc. 672.

(3) 55 Law J. Rep. Chanc. 332; Law Rep. 29 Ch. D. 947.

(4) 36 Law J. Rep. Chanc. 323; Law Rep. 2 Chanc. 201.

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the land; but here there is an express statutory charge upon the land.]

Is not the charge upon the undertaking of the Bradford Corporation? The remedy is against the fund, and not against the land. The holder of the bond may obtain the appointment of a receiver, but he cannot go against the land itself; and, there being no direct charge upon the land, the bond is not obnoxious to the Mortmain Act—*Attres v. Howe* (5), *Holds-worth v. Davenport* (6), *In re Harris*; *Jacson v. The Governors of Queen Anne's Bounty* (7), and *Jervis v. Lawrence* (8).

[STIRLING, J., referred to *Thornton v. Kempeon* (9) and *In re Christmas*; *Martin v. Lacom* (10).]

Browne replied.

STIRLING, J. [after referring to the terms of the Mortmain Act, continued:]—The question I have to determine with reference to this bond is, does it create an estate or interest in lands, tenements, or hereditaments; or is it a charge or incumbrance affecting, or to affect, any lands, tenements, or hereditaments? Now, on the face of it, the bond is issued under the provisions of (among other Acts) the Bradford Corporation Act, 1866, and it is headed "No. 29, 1,000*l.* on the General District Rates (Markets Account)." I assume, therefore, that this money was borrowed for the purpose of erecting the markets in the borough of Bradford. Now, the Act of 1886 under which it is borrowed provides as follows: [His Lordship read section 69 of the Act, and continued:] So that, in addition to the general district rate of the borough, the sum borrowed by the corporation on mortgage under the Act is by the statute itself made a charge upon the lands and property from time to time acquired by the corporation, whether by lease or purchase, under that Act.

(5) 47 Law J. Rep. Chanc. 863; Law Rep. 9 Ch. D. 337.

(6) 46 Law J. Rep. Chanc. 20; Law Rep. 3 Ch. D. 185.

(7) 49 Law J. Rep. Chanc. 687; Law Rep. 15 Ch. D. 561.

(8) 52 Law J. Rep. Chanc. 242; Law Rep. 22 Ch. D. 202.

(9) Kay, 592; 23 Law J. Rep. Chanc. 977.

(10) 55 Law J. Rep. Chanc. 878; Law Rep. 33 Ch. D. 332.

The property of the corporation includes markets which were acquired and created under the provisions of the Act of 1866. Therefore the question—does the bond create a charge on lands, tenements, or hereditaments?—answers itself. The Act is express upon the point. Now, the language of the Statute of Mortmain is peculiar. It not only includes charges or interests affecting any lands, but if any lands will by possibility be brought under the charge or incumbrance, it makes the gift void. In this case, there are existing lands on which this principal sum is charged by virtue of the local Act. Therefore, I decide this point without reference at all to any question as to the borough rate and the nature of it. I am of opinion that the 1,000*l.* bond cannot be validly given to charity.

Counsel then dealt *seriatim* with the remaining bonds.

STIRLING, J., without giving any formal judgment, held that the Keighley bond, being charged upon the general district rates, might be given to charity; and that the Leeds bond, being a charge on the undertaking, works, and property of the gas company, could not be given to charity. His Lordship reserved judgment as to the Wakefield bonds, and directed the case to stand over for further evidence so far as it related to the Bradford bond for 400*l.* and the Dewsbury bond. The effect of the further evidence is included in the statement of facts.

November 6.—On this day the case again came on as regards the Bradford bond for 400*l.* and the Dewsbury bond.

Browne argued upon the further evidence that the bonds were impure personality.

Hastings, Q.C., and *Bardswell, contra*, contended that a charge upon the borough fund was analogous to a charge upon a railway, which gave to the mortgagee an interest in the net result of the undertaking, but did not confer upon him the right to go upon the land or to take the rents from the tenants.

[STIRLING, J., referred to *In re David*;

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Buckley v. The Royal National Lifeboat Institution (11).]

Browne replied.

Cur. adv. vult.

STIRLING, J. (on November 23).—In this case I have to say whether certain bonds of the corporations of Dewsbury, Bradford, and Wakefield are pure or impure personalty. The point which I have to consider came before Mr. Justice North in the case of *In re Hatton* (1). In that case his Lordship said this: "Another question raised by the summons was whether certain debentures or mortgages of the Batley Corporation, to the amount of 7,500*l.* in all, were pure or mixed personalty—that is to say, whether they gave the holder of the mortgages such an interest in land as to render them obnoxious to the Statute of Mortmain and incapable of being bequeathed to charities. To take the words of one of the bonds (they were substantially in the same form), the Corporation of Batley granted to the said Eliza Hatton, for the purpose of the Act under which the charge was given, the interest of the said mayor, aldermen, and burgesses in the gas rates, rents, and money to be received in respect of the gas-works of the said mayor, aldermen, and burgesses, and also, as collateral security, the borough rates and borough fund of the said borough." Then his Lordship continues: "Now, the borough fund in this case consists of (among other things) rents of surplus land; and although, no doubt, they are fee farm rents out of land that has been sold subject to this arrangement, yet they are not the less rents. There are many decisions which have held that a gift of an interest in the rents of land is a gift of an interest in land, and is void under the statute. Under these circumstances, though, if I could have decided the other way, I am satisfied that the mischief aimed at by the statute would never have arisen, yet I feel bound by the many previous decisions of the Court, where it has been held that a charge upon rents, or a gift of rents, or

a legacy payable out of rents, is an investment in land under the statute." In that decision and in those words I concur, more particularly because, like the learned Judge, I should prefer to decide the other way, being satisfied that the mischief aimed at by the statute would never arise. But I am bound by the numerous decisions to which Mr. Justice North refers.

It is, therefore, in each case necessary to enquire whether a charge is constituted upon the rents of land. I take first of all the case of the Dewsbury mortgage. [His Lordship referred to the terms of the mortgage, and continued:] This is the same case exactly as occurred before Mr. Justice North, because in that case, as in this, there was a charge in the first instance upon the gas rates, and a collateral security, as here, upon the borough rates and borough fund. What, then, does the borough fund of Dewsbury include? [His Lordship referred to the affidavit of the town clerk, and continued:] It is clear from that affidavit that the borough has corporate property producing rent, which rent forms part of the borough fund, and is consequently charged by the bond in question.

I next turn to the Bradford mortgage for 400*l.* [His Lordship referred to the terms of the mortgage, and continued:] The words are a little wider in that case, and make the matter, if possible, more plain, because there is an express charge upon rents. What do we find as regards this? [His Lordship referred to the affidavit of the town clerk, and continued:] Here again we find rents of real estate forming an essential part of the borough fund, and therefore open to the objection which has been pointed out by Mr. Justice North.

There remains the case of the two bonds of the Corporation of Wakefield for 500*l.* each, which are not charged upon the borough fund, but on another fund—namely, the district fund under the Public Health Act. [His Lordship referred to the terms of the bonds and to the sections of the Public Health Act set out in the statement, and continued:] I have searched through the Act for the purpose of finding any direction as to what is to become of the rent of the land authorised to be let

(11) 58 Law J. Rep. Chanc. 542; Law Rep. 41 Ch. D. 168. On appeal, 59 Law J. Rep. Chanc. 87; Law Rep. 43 Ch. D. 27.

In re Thompson.

under section 177; and, curiously enough, there is no express direction as to it. There is a provision in section 175 as to the dealing with surplus lands and as to the application of the proceeds of sale; but these are in the strict sense surplus lands—lands which are not required for the purposes of their undertaking. Section 177 is wider, so that if land is required for the purposes of the board, and it can be conveniently let, there is power for the local authority to let it with the consent of the Local Government Board, and that even although they could not sell it. I am unable to see to what other fund these rents can belong than to the district fund, and consequently the reasoning of Mr. Justice North applies, although there is no express provision here, such as is to be found in the Municipal Corporations Act, directing the rents of the property to be paid into the fund in question. Then the question again arises here, to which fund as a constituent of this district fund do the rents belong? That appears from section 58 of the Wakefield Corporation Act, 1880, and from the affidavit of the town clerk. [His Lordship referred to the affidavit, and continued:] The cottage from which the rent accrued was acquired under the Public Health Act; but under the terms of that Act all the expenses chargeable under that Act are payable, of whatever kind, out of the district fund, and the corporation have authority to charge that. It seems to me in this case that rent of land enters as an ingredient, and that the reasoning of Mr. Justice North must apply. I come, therefore, with the same expression of regret to the conclusion that all these are non-pure personality.

I ought to add that I have considered the argument of Mr. Graham Hastings, that in each case these were undertakings similar to that which was the subject of decision in *Attree v. Have* (5) and *Gardner v. The London, Chatham, and Dover Railway Company* (4); but, having regard to the terms of the Public Health Act and of the Municipal Corporations Act, I cannot arrive at that conclusion; and I observe that in the case of *In re David; Buckley v. The Royal National Lifeboat Institution* (11), which has been decided by the Court

of Appeal since the hearing of this matter, their Lordships gave no encouragement to that view. The costs of all parties will be paid out of the general residuary estate.

Solicitors—Torr & Co., agents for M. Cranswick, Leeds, for summons; T. W. & T. B. Nelson, agents for Nelson, Eddisons & Lupton, Leeds, for residuary legatees; Fowler, Perks, Hopkinson & Co., for persons representing charities.

KEKEWICH, J. }

1890.

Jan. 31.

Feb. 3.

OLIVER v. HUNTING.

Vendor and Purchaser—Specific Performance—Sale of Land—Memorandum in Writing—Separate Documents—Parol Evidence—Statute of Frauds, section 4.

Where a memorandum alleged to constitute a contract in writing is contained in two or more separate documents which are not connected together by internal evidence, parol evidence is admissible to supply the connection.

Vendor and purchaser signed a document containing all terms necessary to constitute a contract for the purchase of land, except a description of the land itself. The vendor subsequently signed a receipt for a sum of money paid by the purchaser as paid on account of certain land expressly described. In an action by the purchaser for specific performance,—Held, that parol evidence was admissible to connect the two documents, and on such evidence specific performance was decreed.

The plaintiff claimed specific performance of a contract to sell to her certain land at Fletton, in the county of Huntingdon.

On the 7th of September, 1888, the following memorandum of that date was signed:—

“Memorandum of terms of agreement between Mr. Hunting and Mrs. Oliver.

“Price 2,375*l*.

“Vendor to make good title.

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"Purchaser to pay for her own conveyance.

"Fixtures included in purchase.

"Purchase to be settled as soon as possible.

"Possession on the 25th of September.

"Time allowed up to the 1st of January next to clear bricks.

"Deposit to be paid on the 10th.

"Stamford, September 7th, 1888.

"Joseph Hunting.

"September 7th, 1888.

"E. Oliver."

On the 12th of September, 1888, the defendant signed and sent to the plaintiff the following letter :—

"Peterborough, September 12, 1888.

"Mrs. Oliver Bourne.

"Dear Madam,—I beg to acknowledge receipt of cheque value 375*l.* on account of the purchase-money for the Fletton Manor House Estate, for which I thank you. The sale is fixed for Monday, September 24th, at 11 A.M. I have not found a cottage to let, but will make further enquiries, and advise you early. On other side I give addresses of three people who have furniture vans. You need see no fear of giving me trouble; anything I can do for you is a pleasure,

"Yours truly,

"JOSEPH HUNTING.

"N.B. The bricks, cow, and flowers will be sold the same day as the furniture."

The defendant resisted specific performance on the ground that there was no sufficient memorandum in writing to satisfy the Statute of Frauds. At the trial the plaintiff claimed to be entitled to adduce parol evidence to connect together the memorandum of the 7th of September, 1888, and the letter of the 12th of September, 1888.

The evidence of the plaintiff was taken, subject to the question of its admissibility in law, and she deposed that the only transaction which she had had with the defendant was in respect of the purchase in question, that the total purchase-money was 2,375*l.*, of which the 375*l.* was part, and that no other purchase-money was payable to the defendant under the memorandum.

The arguments and judgment were directed to the point of law.

Neville, Q.C., and *Dunning*, for the plaintiff.—The two documents can be connected together by parol evidence, and that being done there is a sufficient contract in writing—*Baumann v. James* (1), *Studds v. Watson* (2), *Cave v. Hastings* (3), and *Long v. Millar* (4).

Warmington, Q.C., and *Swinfen Eady*, for the defendant.—There is no reference in the one document to the other, and nothing in writing to connect the two documents together; neither is there any ambiguity in either document. No parol evidence is admissible, and there is no written contract that can be enforced—*Blagden v. Bradbear* (5), *Blackburn on the Contract of Sale* (2nd ed.), p. 44, see *per Williams, J.*, *The North Staffordshire Railway Company v. Peek* (6), *Warner v. Willington* (7), and *Boydell v. Drummond* (8).

Neville, Q.C., in reply.—There being only one purchase between the plaintiff and defendant, the two documents here signed by the parties to be bound are sufficient to satisfy the statute.

KEKEWICH, J.—The elementary proposition of law applicable to this case, about which there is no doubt, is this. A memorandum signed by the party sought to be charged, so as to bring a particular case within the Statute of Frauds, need not be put upon one piece of paper; neither need it be a complete document signed by the party at one and the same time. It may be contained in two or more pieces of paper, but these must be so connected together that you can read them, and from them make out a single memorandum of contract between the parties. Directly you get beyond that, you get into difficulties. To illustrate that in a simple manner, I will put this: An intending

(1) Law Rep. 3 Chanc. 508.

(2) 54 Law J. Rep. Chanc. 626; Law Rep. 28 Ch. D. 303.

(3) 50 Law J. Rep. Q.B. 575; Law Rep. 7 Q.B. D. 125.

(4) 48 Law J. Rep. Q.B. 596; Law Rep. 4 C.P. D. 450.

(5) 12 Ves. 466.

(6) E. B. & E. 958, at p. 1001; 29 Law J. Rep. Q.B. 97.

(7) 3 Drew. 523; 25 Law J. Rep. Chanc. 662.

(8) 11 East, 142.

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purchaser accepts the offer made by a proposing vendor, thus: "In reply to your letter of the 15th instant." Can you annex to that reply the letter of the 15th instant? Surely you cannot, without enquiring what letter it is, unless the purchaser has, with unusual prudence, completed his reference to the letter by saying, "a copy of which is on the other side." In the absence of any further evidence, you must enquire what the letter of the 15th instant was, because *non constat* there may not have been half a dozen other letters of that day. And so, from that very simple illustration, you can get a very large variety of cases of a more complex character. It is not for me to say that the old rule was better or worse than the present rule, but that it was a different rule I do not doubt. I take the old rule from Lord Blackburn's book on *Contracts of Sale*, which is cited by Mr. Justice Williams in *Peck v. The North Staffordshire Railway Company* (6), where, after referring to *Hinde v. Whitehouse* (9) and *Kenworthy v. Schafeld* (10), Mr. Justice Williams says, "The principle of these cases seems to me to be well stated in the same work by my brother Blackburn as follows: 'If the contents of the signed papers themselves make reference to the others so as to shew by internal evidence that the papers refer to each other'—as in the case I have mentioned—'they may be all taken together as one memorandum in writing; but if it is necessary, in order to connect them, to give evidence of the intention of the parties that they should be connected, shewn by the circumstances not apparent on the face of the writings, the memorandum is not all in the writing, for it consists partly of the contents of the writings, and partly of an expression of an intention to unite them, and that expression is not in writing'"—see *Blackburn's Law of Contract of Sales* (2nd ed.), p. 44. I observe that the learned editor of Lord Blackburn's book, a useful work in its present form, omitted the passage referring to *Hinde v. Whitehouse* (9), and evidently avoids this diffi-

cult question, which he considers, and I have no doubt with truth, is a question too difficult to be a subject for a digression.

Of the older cases, *Boydell v. Drummond* (8) might be consistently cited as within the old rule; but certainly a later and different rule has been introduced, and it is a rule which, to say the least of it, is consistent with the intentions of mankind generally, because, if in the illustration I have given of a reference to a letter of the 15th instant one were to exclude all parol evidence respecting such a letter, the result might be to work gross injustice. In a case of that kind you may give parol evidence to shew what the document was. I take it, you may go further than that, and if you find a reference to something, which may be either a conversation or another written document, then, if it is the latter, you may put it in evidence, and so connect it with a document already admitted or proved. So far there is no difficulty. That rule was applied in *Ridgway v. Wharton* (11), where the question was as to the meaning of the word "instructions," which did not by any means necessarily point to a written document. But later cases have gone further than that, and it seems to me that the case of *Long v. Millar* (4), followed by Mr. Justice Field in *Cave v. Hastings* (3), does establish a very much larger series of exceptions to the old rule. I confess to have felt rather embarrassed by the judgment of Lord Justice Thesiger in *Long v. Millar* (4)—that is to say, I am unable quite to understand what he means by some passages in his judgment, which, it seems to me, are inconsistent. But, seeing that I have the judgments of Lord Justice Bramwell and Lord Justice Baggallay, which are entirely free from doubt or embarrassment, and that Lord Justice Thesiger concurred in those judgments, I think I may put aside any difficulty of that kind. Lord Justice Bramwell gives a judgment which, beyond its reference to the particular case, is exceedingly useful as illustrating this branch of law, because he gives an illustration which seems to me to go to the very root of the matter.

(9) 7 East, 558.

(10) 2 B. & C. 245; 2 Law J. Rep. (o.s.) K.B. 175.

(11) 6 H.L. Cas. 238; 27 Law J. Rep. Chanc. 46.

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The illustration is this: "Suppose that A. writes to B. saying that he will give 1,000*l.* for B.'s estate, and at the same time states the terms in detail; and suppose that B. simply writes back in return, 'I accept your offer.' In that case there may be an identification of the documents by parol evidence, and it may be shewn that the offer alluded to by B. is that made by A., without infringing section 4 of the Statute of Frauds, which requires a note or memorandum in writing." If that is sound, which I take it to be, then, according to the other cases, and according to the modifications which those cases have introduced into the old law, it is difficult perhaps to say where a reference is to stop, and substantially it never stops short of this: that wherever parol evidence is required to connect two written documents together, then that parol evidence is admissible. It seems to me that you cannot exclude, although you are not bound to introduce, the notion that there is something, either in writing or conversation, which ought to be proved. You are entitled to rely upon there being a written document which requires explanation. Perhaps the rule, or rather the principle, upon which it is based is this, that you are always entitled in questions of this kind to enquire into the circumstances under which the written document was written, not in order to find any objection by the writer of the language, nor for any other purpose than to ascertain from the surrounding facts and circumstances with reference to what, and with what intention, it must have been written. I think myself that must be the principle upon which parol evidence of this kind is admitted.

Turning to the case before me, I find a letter of the 12th of September, 1888, written by the defendant Joseph Hunting to Mrs. Oliver, the plaintiff. [His Lordship read the letter:] Now I have two things which are perfectly clear—first, that there was a property called the Fletton Manor House, and suggesting the subject of purchase, and therefore the subject of the sale. Then I have also the fact that 375*l.* is part of the purchase-money for that house. But beyond that I have no terms of the contract. I am entitled to

consider the circumstances under which that letter was written, in order to give to it any meaning which I properly can—not to add terms to it, but to find out what the meaning must necessarily be, having regard to the facts and circumstances. Having got that evidence, the conclusion is unavoidable that it refers to the previous memorandum of terms of agreement, under which Mrs. Oliver became the purchaser of this particular property for 2,375*l.*, on account of which the cheque for 375*l.* was signed. Having got that evidence in, and the connection thus established between the two documents, I have enough to enable me to read the two documents together, and then I have a distinct memorandum of the contract, satisfying all the conditions in which the first document failed—namely, the identification of the property intended to be sold and purchased.

That being so, the objection of there being no memorandum fails. I have not referred to the case of *Strudds v. Walker* (2), because I am not quite sure how far the learned Judge intended to go. If I am right in the view which I take of his judgment, that he only regarded the parol agreement in order to see whether it connected the two written documents together, and having found that it did so, he was able to read the two documents together; if that is the right view of the judgment, which I believe it to be, then it merely follows *Long v. Millar* (4) and *Cave v. Hastings* (3). Therefore, under the circumstances, I think that the plaintiff is entitled to judgment for specific performance, and the costs of the action.

Solicitors—Law & Worssam, agents for W. F. Law, Stamford, for plaintiff; Hatchett, Jones & Co., agents for Ackers, Peterborough, for defendant.

[IN THE CHANCERY DIVISION AND IN
THE COURT OF APPEAL.]

KAY, J.
1889.
June 27.
July 1, 10.
COTTON, L.J.
LINDLEY, L.J.
LOPES, L.J.
1890.
Jan. 15, 16, 29.

SEARLE v. COOKE.

Copyholds — Enfranchisement — Confusion of Boundaries — Rentcharge — Enquiry as to Land charged — Substitution of Lands of equal Value — Personal Action for Arrears — Copyhold Acts, 1852 (15 & 16 Vict. c. 51), s. 24, and 1887 (50 & 51 Vict. c. 73), ss. 16–42 — Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44.

Copyhold lands were compulsorily enfranchised at the instance of the lord in 1880, in consideration of the payment of annual rentcharges. At that date the boundaries of the copyhold lands were, and had been for some time previously, confused and incapable of identification, but no proceedings were taken on the enfranchisement, either by lord or tenant, under section 24 of the Copyhold Act, 1852, to identify the parcels charged. The rentcharges were paid down to February, 1887, since which time no payment had been made:—Held, that the enfranchisement, while it put an end to the relationship of copyhold tenant and lord, and to all incidents of copyhold tenure in the future, did not relieve the former copyhold tenant from liability for any past breach or neglect of his duty as such; that, accordingly, he remained liable in respect of the confusion of boundaries which had occurred during the subsistence of the copyhold tenure; and that S., the owner of the rentcharges by purchase from the former lord, was entitled to a personal judgment for payment of the rentcharges and arrears, and to an enquiry to ascertain the parcels subject to the rentcharge, and, in the event of the non-ascertainment of such parcels, to substitution of other lands of the defendant equal in value to the enfranchised lands; and that the fact that the enfranchisement was

compulsory, and at the instance of the lord, and that the lord had not availed himself of the statutory means of having the parcels identified, was no bar to the granting of such relief.

Decision of KAY, J., affirmed.

Appeal from a decision of Kay, J.

The defendant George Cooke was, on the 31st of October, 1838, at a General Court Baron in and for the manor of Nedging-with-Newton, otherwise Newton Fen, in Suffolk, admitted tenant to two tenements called "Wraggs and Fens," and lands and pastures belonging thereto containing 10 acres, and to a tenement called "Aldham's Tenement," and lands containing by estimation two acres.

At a General Court Baron holden on the 9th of November, 1840, in and for the said manor, the defendant Cooke was admitted tenant to a piece of land and pastures in Bildeston called "Cooke Croft," containing by estimation 4 acres, and abutting upon certain lands in the admittance described; and also to certain lands and tenements called "The Downes," containing by estimation 14 acres; and also to a close of land called "Shirlocks," together with a piece of meadow theretofore called "Calves Meadow," containing together by estimation 11 acres 3 roods, parcel of Nortons; and also to two pieces of land and pasture containing by estimation 8 acres, with a barn thereupon made, some time since wasted.

At a General Court Baron holden on the 27th of May, 1851, in and for the said manor, the said defendant was admitted tenant to all those 8 acres of land and pasture called "Clerks," lying in Nedging, formerly "Alabasters," with their appurtenances situate in Noughton and Nedging, or in some other parish or parishes next adjoining. All these lands were copyhold of the said manor of Nedging-with-Newton, otherwise Newton Fen.

In 1880 these lands, of which the defendant was still tenant on the court rolls, were compulsorily enfranchised by the plaintiff Paine, and Brettell, the lords of the manor.

By three awards of enfranchisement, under the hands and seal of the Copyhold

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Commissioners, and each dated the 19th of February, 1880, the Commissioners, in pursuance of the power vested in them by the Copyhold Acts, enfranchised the said copyhold lands free from the rights reserved by the Copyhold Act, 1852, s. 48, to be holden as freehold, subject to the payment of the following annual rentcharges issuing out of the said lands respectively, which rentcharges had been ascertained under the provisions of the Copyhold Acts, as the consideration for such enfranchisements respectively—that is to say, in respect of “Wraggs and Fens” and “Aldham,” an annual rentcharge of 3*l.* 15*s.* 4*d.*; in respect of “Cooke Croft,” “The Downes,” “Shirlocks,” “Calves Meadow,” and the two other pieces of land to which Cooke was admitted on the 9th of November, 1840, an annual rentcharge of 10*l.* 11*s.* 4*d.*; and in respect of “Clerks,” formerly “Alabasters,” an annual rentcharge of 2*l.* 8*s.* 9*d.*; discharged from all fines, heriots, reliefs, quit-rents, and all other incidents whatsoever of copyhold or customary tenure.

These annual rentcharges were, by three several indentures dated the 20th of March, 1880, conveyed by the plaintiff Paine and Brettell to the plaintiff Searle in fee.

From the 19th of February, 1880, down to the 19th of February, 1887, the defendant Cooke paid the plaintiff Searle the annual rentcharges as and when they respectively became due; but had made no payment on account of any of the rentcharges since that date.

By three deeds of demise, dated the 7th of April, 1888, and made between the plaintiff Searle of the one part, and the plaintiff Paine of the other part, Searle, in exercise of the power conferred on him by section 16 of the Copyhold Act, 1887 (1), and of every or any other power enabling him, demised to Paine the lands comprised in the said awards respectively for a term of 500 years, upon trust, by mortgage or sale or demise, or by receipt of income, to raise and pay the annual rentcharge issuing out of the hereditaments comprised in each

such deed, and all costs and expenses occasioned by non-payment thereof.

The defendant Cooke admitted that he was still seized of, or entitled to, and in possession of, the enfranchised hereditaments, and also of other freehold lands lying intermixed with them without any boundaries or visible distinguishing marks.

The plaintiffs alleged that the defendant Cooke had, on his several admittances, neglected to present and make known the metes and boundaries of the lands to which he was so admitted tenant, and had neglected to keep the boundaries; and that, in consequence, the plaintiffs were unable to set forth in respect of what particular lands the said rentcharges were respectively due and payable; and that, by reason thereof, they could not safely distrain upon or exercise their other rights and remedies over such lands for recovering payment of the rentcharges and the arrears.

The plaintiffs claimed—first, a declaration that the plaintiff Searle was entitled to the three several rentcharges; secondly, payment by Cooke to Searle of the said several rentcharges, and of all arrears thereof, from the 19th of February, 1887; thirdly, that the particular lands charged with the said several annual rentcharges, and comprised in the said several deeds of demise, might be ascertained, and the proper metes and bounds thereof fixed and determined; and if by reason of confusion of boundaries or alteration of names, or any other circumstances, it should be impossible to distinguish or ascertain the particular lands so charged, or any of them, or any part thereof, that in that case such a quantity of land now in the possession of the defendant Cooke as might be of equal value with the said enfranchised lands, or so much thereof as could not be distinguished or ascertained, might be set out for securing the said annual rentcharges respectively; fourthly, execution of the trusts of the several deeds of demise under the direction of the Court.

The defendant Cooke denied that he had neglected to present and make known the metes and boundaries of the lands to which he was admitted tenant, and alleged that if he did not present and make known

(1) “Every such rentcharge shall be recoverable by such remedies as are given by section 44 of the Conveyancing and Law of Property Act, 1881. . . .”

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such metes and boundaries it was because they did not exist, and had not existed for long anterior to the admittances, and that the absence of such metes and boundaries was well known to, and acquiesced in by, the lords of the manor of which the said lands were copyhold at the time of his admittances and at the time of the enfranchisement awards and the creation of the rentcharges. He further denied that he had neglected to keep the boundaries, and alleged that if he did not keep them it was because they did not exist and because he was not required to keep them; that the intermixing of the lands and confusion of the boundaries had happened without any neglect or default of his, and had been well known to, and acquiesced in by, the plaintiffs and their predecessors in title down to shortly before the commencement of the action.

He further stated that he was willing, and had always been willing, that the particular lands charged with the said several annual rentcharges should be ascertained, and the proper metes and boundaries thereof fixed and determined; but submitted that as the position and lands had not been altered since the several awards of enfranchisement and the creation of the rentcharges, and as he had not been guilty of any neglect or fault, and as the ascertaining of such lands and the fixing and determining of such metes and boundaries were solely at the desire and for the advantage of the plaintiffs, the costs of ascertaining such lands and fixing and determining such metes and boundaries must be paid by the plaintiffs.

The plaintiffs, by their reply, alleged that the confusion and non-existence of the metes and boundaries at the time of the defendant's admittance was owing to the neglect of the defendant's predecessors in title, and it was the duty of the defendant on his admittance to restore, make known, and maintain the same. They further denied that the absence of such metes and boundaries was known to and acquiesced in by the lords of the manor, as alleged by the defendant.

The action was heard before Kay, J., on the 27th of June, 1889, and following days.

The lands subject to the rentcharges of 3*l.* 15*s.* 4*d.* and 2*l.* 8*s.* 9*d.* respectively were not capable of identification, but those subject to the rentcharge of 10*l.* 11*s.* 4*d.* were, upon the evidence adduced before the Judge, by inspection of old plans on the documents of title, and comparison with the ordnance map, identified; and a declaration as to these lands was made by Kay, J., as appears from his judgment.

Robinson, Q.C., and A. R. Ingpen, for the plaintiffs.

Renshaw, Q.C., and W. E. Mozley, for the defendants.

KAY, J.—The plaintiff Searle seeks in this action to recover the arrears of certain rentcharges, and to have the lands charged therewith ascertained, or, if that is not possible, to have land of equal value set out to secure them. The rentcharges are three: 3*l.* 15*s.* 4*d.*, 10*l.* 11*s.* 4*d.*, and 2*l.* 8*s.* 9*d.* They were created in 1880 by three awards of enfranchisement, made by the Copyhold Commissioners, at the instance of the lord of the manor, of certain copyholds of which the defendant Cooke was then the tenant, containing respectively two acres, thirty-seven acres three rods, and eight acres. The defendant admits that he is in possession of all these enfranchised lands, but states that they are intermixed with other freehold lands of his, and that the boundaries were confused before the date of the enfranchisements. He states that this was done without any neglect or fault on his part, and that he is willing to have them ascertained at the plaintiff's expense. The rentcharges were duly paid down to the 19th of February, 1887, but not since. The defendant suggests that they may exceed the present rent of the land; but, as they are less than 7*s.* an acre, that is not probable, and has not been proved. The plaintiff Searle has acquired the rentcharges by assignment from the lord of the manor. He has executed three deeds dated the 7th of April, 1888, by which he purported to demise the land subject to the rentcharges to the co-plaintiff Paine for 500 years, upon trust by mortgage or sale to raise them, and all costs of

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so doing. The general rule is that any one asserting a claim to real estate in the possession of another must rely on the strength of his own title—in other words, the burden of making out his claim rests wholly upon him. So it must be if he claims any charge upon or interest in such real estate. But where he proves, or the landowner admits, as in this case, that he is entitled to the charge, and that the landowner is in possession of the land which is subject to it, other considerations arise. The owner of a rentcharge, so long as it is duly paid, has no power or interest to ascertain whether the land charged is kept distinct from other land of the landowner who pays him; and if that landowner confuses the boundaries, or allows them to become confused, he can hardly refuse on that ground to pay the rentcharge or call upon the owner of it to bear the expense of ascertaining such boundaries. Many of the cases on this subject occurred before the beginning of this century. I particularly refer to *Cocks v. Foley* (2), in 1685, where the grounds for relief were stated to be that it was uncertain whether two rents of two guineas and one guinea per annum, which had been purchased by the plaintiff, were rentcharge, rent service, or rent seck, and that the boundaries of the land were uncertain, so that the plaintiff could not declare with the preciseness required in an avowry, and a precedent was referred to in which the Court of Chancery decreed payment where the rent had been constantly paid. At the defendant's request an issue was directed to try whether any, and what, rent was issuing out of all or any of the lands in the bill mentioned. In *Steward v. Bridger* (3), where a rent of 8s. a year for a copyhold of the manor of Ipeing had been paid for twenty-four years to the lord of another manor, a decree was made for arrears and growing rent, it being presumed to have been severed from the manor of Ipenig by some grant or conveyance. In *Holder v. Chamberbury* (4), where the claim was for a quit-

rent of 7s., the Lord Chancellor said that a bill of that kind might be proper where the lands out of which it was claimed were wholly uncertain and the days of payment uncertain; "but then these things ought to be laid in the bill, else a lord may be vexatious to a tenant, and make him spend in his own necessary defence more than three times the value of the rent. Here it is hard for the defendant, when he does not know the plaintiff's title to the quit-rent, to admit his inheritance to be for ever liable thereto." His Lordship directed the Registrar to compute the arrears, and established the right on the ground apparently that it had been paid to Michaelmas, 1718, but without costs. The jurisdiction of equity was recognised in *The Duke of Leeds v. Powell* (5), and also that relief was given in equity only where there was no sufficient remedy at law; as where there being a usage of payment, the owner of the rent could not distrain "because the particular lands could not be fixed on from a confusion of boundaries." But the Lord Chancellor felt great difficulty what sort of decree to make, because the defendant in that case might be charged beyond what he had received, the rent charged being rent reserved in the grant of a manor of which there were no demesne lands. The great expense of a commission to ascertain boundaries was referred to by Lord Northington in *Wake v. Conyers* (6) as a reason why the Court should be reluctant to make such an order. The jurisdiction, however, is undoubted, and has constantly been exercised by ascertaining the boundaries, if possible; and if not, by setting out an equivalent quantity of the land of the defendant against whom the order is made. Moreover, as was said in *The Attorney-General v. Stephens* (7), by Lord Cranworth, L.C., "This relief is given not only against the party guilty of the neglect, but also against all those who claim under him, either as volunteers or as purchasers with notice." It is obvious

(2) 1 Vern. 359.

(3) 2 Vern. 516.

(4) 3 P. Wms. 255.

(5) 1 Ves. sen. 171.

(6) 1 Eden, 331.

(7) 6 De Gex, M. & G. 111, at p. 134; 25 Law J. Rep. Chanc. 388.

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that unless the Court were to apply this remedy with care and caution, it might be made an instrument of great oppression. If the owner of a rentcharge could say to a person in possession of land, "I claim a rentcharge as issuing out of your land, and if you resist my claim the High Court will grant a commission which will put you to great expense," it would be dangerous to resist such a claim, however ill-founded it might be. That, however, cannot be done. The owner of the rentcharge must first make out, at his own risk as to costs, that the rentcharge does issue out of land in the possession of the person from whom it is claimed. When that is made out, if, by reason of the uncertainty of the position of the particular land, or otherwise, the ordinary remedy by distress cannot be resorted to, and no sufficient relief can be had without the assistance of equitable jurisdiction, the Court will assist but cautiously and with reluctance, especially where the amount of the rentcharge is small compared with the costliness of the contemplated proceedings. If, however, as in the case before me, it is admitted that the defendant is in possession of the land charged, it seems to me that if the legal remedy be imperfect, the Court ought not to decline to interfere, but should give the plaintiff some relief. With respect to the two smaller rentcharges, it appears that the lands out of which they issue are uncertain, and I must therefore direct an enquiry, which will be conducted in my chambers, if the parties are unable to agree, what are the lands charged with these two rentcharges respectively—with a direction that if they cannot be ascertained, land of the defendant of the same extent in each case as the land so charged must be set out under the direction of the Judge in chambers. As to the larger rentcharge, the land is ascertained by the evidence before me, and I propose to declare that it consists of the field, No. 187, upon the ordnance plan marked E, which formerly consisted of two fields, Nos. 15 and 16 on the plan D, and also of 154 on the plan E, which seems to be identical with 3, 4, and 5 on plan D; and of so much of 186 on plan E as corresponds with close 13 on

plan D, the boundaries of the last-mentioned portion to be set out under the direction of the Judge in chambers, unless the parties can agree. With respect to the arrears of the rentcharges, *Thomas v. Sylvester* (8) and *Christie v. Barker* (9) seem to be distinct authorities that an action of debt may be maintained for the arrears; but if not, under the equitable jurisdiction of the Court an order must be made for payment in accordance with the cases to which I have referred. I suppose the defendant will not seriously attempt to deny that the rent of the land had been sufficient to pay the rentcharges. If he were entitled to an enquiry on that subject, which, in the absence of any *prima facie* evidence of such deficiency, I think he is not, it would be entirely at his own risk as to costs. Section 16 of 50 & 51 Vict. c. 73 gives to the owner of the rentcharge all such remedies as are given by section 44 of the Conveyancing and Law of Property Act, 1881, and under that Act he has executed the three deeds of demise, which I have already mentioned, and he asks by his pleadings for execution of the trusts of these three deeds. I think it would be premature to give that relief until the lands charged have been ascertained; but I will make the usual decree for execution of the trusts of those deeds, not to be acted on without leave of the Judge in person. As I think the non-payment of these rentcharges was not justifiable, I must order the defendant to pay the costs up to and including the trial; but all other costs I reserve specially, in order that the Court may have the means of securing that this decree may be fairly worked out, and not used in any manner oppressively. It will be sufficient to give liberty to apply as to the further costs and generally.

From this judgment the defendant Cooke appealed.

Crackanthorpe, Q.C., and *Mozley*, for the appellant.—We submit that whatever may be the right in an ordinary case, the

(8) 42 Law J. Rep. Q.B. 237; Law Rep. 8 Q.B. 368.

(9) 53 Law J. Rep. Q.B. 537.

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plaintiff, whose predecessor in title compulsorily enfranchised these lands and created a rentcharge on lands which at that date were unascertained and undefined, is not entitled, at the expense of the terre-tenant, to invoke the special jurisdiction, of this Court, in directing an enquiry to ascertain the boundaries of the lands subject to the rentcharge, still less to have other lands substituted when, under section 24 (10) of the Act of 1852, it was competent for him to have had the lands identified before the commissioners. That was the tribunal contemplated by the Act of 1852, which was the first Act that gave the lord a power of compulsory enfranchisement, and, not having taken the steps provided by the Act, he must be held to have elected to take his rentcharge on lands not capable of identification. Although, no doubt, a copyhold tenant ought to maintain the boundaries between the lord's property and his own, still it is not every copyholder who is liable to an action such as this. The relief is founded on misconduct analogous to a breach of trust, and the cases where the relief is granted are where the defendant has himself been guilty of some breach of duty, and generally where the tenant, the owner of adjoining premises, has removed fences and created the confusion, and on a very plain principle that a man is not allowed to take advantage of his own wrong—*Wake v. Conyers* (6), *Speer v. Cawter* (11), *The Marquis of Bute v. The Glamorganshire Canal Company* (12), *The Attorney-General v. Stephen* (7), and *Spike v. Harding* (13). Kay, J., has, however, based the right of the plaintiff to claim this jurisdiction, not on any wrongful act of the defendant—for it is admitted that the defendant did not personally commit any breach of duty—but solely on the defendant's admission of possession of the land and the inability of the plaintiff to distrain. But by the enfranchisement the relationship of copy-

hold tenant and lord, and all the liabilities and obligations of copyhold tenure, have been determined. The bargain between the parties is that the former copyhold tenant shall be freeholder, and the lord shall have a rentcharge. Has it ever been held that the relation between two such parties—e.g. a jointress and the owner of the lands subject to the jointure—imposes an obligation on the freeholder for all time to keep the lands subject to the jointure always marked out and capable of identification so as to preserve to the jointress the real remedy? Still less can it be so where the lord voluntarily took a rentcharge upon lands which were at its creation undefined and allowed to remain so; and the present plaintiff is not even the lord, but only a purchaser from an ex-lord. The Copyhold Act, 1887 (50 & 51 Vict. c. 73), by section 14 provides that the rentcharges, including those already created, shall be recoverable by the remedies given by the Conveyancing Act—that is, mortgage and sale—but gives no right of action for debt. In the similar provision of the Lands Clauses Act, the Legislature, by section 11, expressly gives the owner of the rentcharge created under that Act a personal remedy of an action of debt, and we submit that the enactment of certain statutory remedies excludes any other. There is nothing in a rentcharge which involves a personal liability for debt, and the recent case of *In re The Blackburn and District Benefit Building Society; ex parte Graham* (14) establishes that there is no action for debt, but that the land owes the money; and the principle of the old cases relied on by Kay, J., as shewing that the Court can make a personal order for payment of arrears, does not, we submit, apply where a rentcharge has been created under the Act of Parliament compulsorily called into existence by the act of the plaintiff's predecessor himself. There has been no admission by the defendant of a debt. The payment of money in 1880 cannot be treated as an unqualified admission of liability to pay in 1887. As to the rentcharge of 10*l.* 11*s.* 4*d.* there was no necessity for an action at all; the

(10) This section is now repealed by the Copyhold Act, 1887, which in section 42 enacts similar provisions.

(11) 2 Mer. 410.

(12) 1 Ph. 681.

(13) 47 Law J. Rep. Chanc. 323; Law Rep. 7 Ch. D. 871.

(14) *Ante*, p. 183; Law Rep. 42 Ch. D. 343.

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parcels could have been ascertained by mere inspection of the deeds. It was no part of the defendant's duty to find out and inform the plaintiff as to the area of the property charged.

Robinson, Q.C., and *Ingpen*, for the respondent.—The Act of 1852, by section 17, refers to the two recited Acts as shewing the means of enforcing payment of the rentcharges granted under the Act of 1852—namely, the Act of 1841 (4 & 5 Vict. c. 35), ss. 47 and 48, and of 1843 (6 & 7 Vict. c. 23), ss. 1 and 2. Section 2 constitutes the rentcharge created in consideration for enfranchisement a “rent service,” one of the incidents of which is a right to bring a personal action for debt; and it is obvious that, having regard to that provision, the enfranchisement cannot destroy the relationship between copyholder and lord for all purposes, and by section 17 the rights are expressly reserved “as if the land had remained unenfranchised.” The existence of statutory remedies under the Conveyancing Act does not deprive the rentcharge owner of any other legal remedies—*The Scottish Widows' Fund v. Craig* (15). *Thomas v. Sylvester* (8) shews that there is such an action now that the real remedy has been taken away. It is, we submit, clear that if the plaintiff were the lord he would have been entitled to the relief of the enquiry, and, in the alternative, a substitution of other lands—*Cocks v. Foley* (2), *The Duke of Leeds v. Powell* (5), *The Duke of Leeds v. The Earl of Strafford* (16), and *The Mayor of Basingstoke v. Lord Bolton* (17). No doubt, where plaintiff and defendant are both adjoining owners, the Court will not interfere and settle the boundaries, but will leave them to their action at law, and most of the cases cited by the appellant were cases of adjoining owners. The distinction between these classes of cases is shewn in the notes to *Wake v. Conyers* (6)—*White and Tudor's Leading Cases, Equity*, (3rd ed.), vol. 2, p. 394 *et seq.* If once it is shewn that the confusion of boundaries is

owing to the neglect of duty, then the jurisdiction of ordering the substitution of other lands follows as a matter of course. The Court proceeds on the principle applicable to the case of bailiff or agent whose duty it is to keep his own property separate from that of another—*Lupton v. White* (18). Here it is admitted the defendant is in possession. The confusion took place while the relationship of copyholder and lord was subsisting, and the enfranchisement, although determining the tenure and liabilities for the future, does not prejudice any right of either party arising from past acts. All the land having been in the possession of the defendant, the plaintiff, so long as the rentcharge was paid, had no right to enter.

They referred to *Story's Equity Jurisprudence* (10th ed.), 613, 614, and *Seton*, p. 1071.

Crackanthorpe, Q.C., in reply.

Cur. adv. vult.

COTTON, L.J.—The plaintiffs in this case are purchasers from the lord of a manor of three rentcharges granted to the lord on the enfranchisement of three copyhold tenements. The metes and bounds of the lands subject to these rentcharges were not strictly ascertained, but in the enfranchisement deeds they are referred to under the description under which the copyhold tenant was admitted on the court rolls. The enfranchisement took place in 1880, and was effected compulsorily by the lord under the powers of the Copyhold Act. Neither then nor afterwards have the particular copyhold lands been ascertained, they having been mixed up with the property of the tenant.

The lord might at the date of the enfranchisement, had he so thought fit, have, under the provisions of the Copyhold Act, procured the parcels to be set out so as to be definitely ascertained. That was not done. He apparently trusted to the tenant's paying the three charges, and in fact everything went on without difficulty till 1887. Then, in consequence of agri-

(15) 51 Law J. Rep. Chanc. 363; Law Rep. 20 Ch. D. 208, 214.

(16) 4 Ves. 180, 185.

(17) 1 Drew. 270, 288.

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(18) 15 Ves. 482.

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cultural depression, or of other causes, the owner of the enfranchised property refused to pay, and the lord had to consider what remedy he could obtain. After some correspondence, he brought this action in 1888, and sought thereby to have this property which was lately copyhold ascertained; and, if that could not be done, to have other property of the defendant set out equal in amount to the old copyhold parcels, and further sought payment of the arrears of the three rentcharges, and also to enforce the trusts of a deed executed by him for the purpose of putting in force the remedies given to the holder of a rentcharge by the Conveyancing Act. The Judge granted an enquiry to ascertain the property subject to the rentcharges 1 and 3. As to the property subject to rentcharge 2, the Judge found himself able upon the evidence before him to distinguish that property, and made a declaration to that effect; and further ordered that if it were found impossible to ascertain the property subject to the two rentcharges, property of an equal amount should be substituted for it so as to enable the plaintiff to enforce his remedy by distress, and gave judgment for the arrears.

Now, although the defendant did state that he was always ready and willing to have the property ascertained, the judgment was on every point strenuously opposed.

In the first place, was the judgment right in directing the enquiry for the ascertainment of the boundaries, and in giving the alternative relief of having other property substituted? We have not to deal with the question which arose in many of the cases which have been cited, because in this case the terre-tenant was the owner of a copyhold tenement; and, in my opinion, it has been long established that it is the duty of a copyhold tenant to maintain and preserve the boundaries of the copyhold tenement; and if he neglect to do so he is guilty of default, and not only he, but any one claiming through him.

If the defendant still remained a copyhold tenant he would be clearly answerable for the default, and the old Court of Chancery would (apart from the question

of enfranchisement to which I shall refer) have decreed, as a matter of course, to have the boundaries ascertained; and, if that could not be done, to have other property set out in substitution for the land subject to the rentcharge. The decision in *The Duke of Leeds v. The Earl of Strafford* (16) precludes any dispute upon the question as to the lord's right to enforce that remedy by action. But in this case there was an enfranchisement in 1880, and then the copyhold tenure was at an end; but it was put an end to subject to the rentcharges in question that were awarded on the enfranchisement. What is the effect of the enfranchisement? It is said that it puts an end to all duty on the part of the tenant as to preserving the boundaries. No doubt that is so as to the future, but not as to the past. The words of enfranchisement follow the form in the schedule to the Act of 1852, "to hold the said land subject to the rentcharges, unto, &c., as freehold, henceforth and for ever discharged by these presents from all fines, heriots, reliefs, quit-rents, and all other incidents whatever of copyhold or customary tenure."

It is said that that has the effect of releasing the owner of the land enfranchised from all the consequences arising from any default or neglect on his part. That, in my opinion, is only the case for the future, but it does not release such owner from the consequences of a previous neglect of duty, for such it was, while he was a copyhold tenant; and although he is relieved from the duty so far as his character of copyhold tenant is concerned, it does not put an end to any liability for breaches already committed. I think, therefore, that Mr. Justice Kay was right in holding that the lord had the same remedy as he would have had if the defendant had been a copyhold tenant who had not preserved the boundaries; and, therefore, the appeal as to that part of the judgment fails.

Then Mr. Crackanthorpe raised this point, that the lord had a right given to him by the Copyhold Act to have the boundaries ascertained at his own expense. It is true that he had that right, and did not avail himself of it. But Mr.

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Crackanthorpe says that he is confined to that right, and consequently cannot avail himself of that other right which he would have had but for that provision. In my opinion the mere fact that the Copyhold Act gave him a right of which he could have availed himself did not deprive him of another then existing right which he possessed, a right well known by the law, although that fact may affect the question of costs. But it is said that, by not availing himself of that right, he has made an election to take his rentcharge upon lands which were not ascertained. In my opinion it was no case of election; it was not that he had two rights, one or other of which he must elect, but it was an additional right given him by the Copyhold Act. He did not avail himself of it, probably trusting that the tenant would pay the rentcharges without any necessity of putting in a distress. The question of costs does not arise here, because the Judge has reserved the costs of the enquiry for ascertaining the boundaries—although he ordered the defendant to pay the costs up to the hearing, because he held that the defendant was wrong, as I think he was wrong, in not paying the rentcharge, and in saying that no enquiry should be held for the purpose of ascertaining them. On that ground again, therefore, the appeal fails.

[With reference to an objection raised by the defendant that the property subsequent to rentcharge No. 2 could have been ascertained from an inspection of the deeds, his Lordship held on the evidence that the defendant, by standing on his strict rights and declining to give the plaintiff any assistance, had compelled him to institute the action, and proceeded:]

Then we come to this. This judgment orders payment of arrears. Was that right? It is admitted that the defendant is in possession of all the property subject to the rentcharges, together with other property; and it is conceded that the rents are sufficient to pay the amount of the rentcharges; but it is said that no action could be brought for the arrears of these rentcharges. It, however, was decided—and, as I think, rightly decided—by the case of *Thomas v. Sylvestor*

(8), that such an action could be brought. In former days when a real action could be brought the personal action for debt did not lie, but after real actions were abolished the Judges all laid down that a person entitled to a rentcharge has now a right to maintain an action of debt against the terre-tenant. But it is said that in that case there was a distinct covenant to pay; but it was not the defendant's covenant, nor was it a covenant running with the land. The Judges say that there is this action for debt, entirely apart from the covenant, and apart from any question of a covenant running with the land, which they do not say that the covenant in that case was. But it is said that certain remedies are given by the Conveyancing Act to enable the lord to enforce payment of the rentcharge. But the mere fact that the Conveyancing Acts do give the owner of a rentcharge certain rights does not deprive him of a right which he had otherwise independently of those Acts.

In my opinion the judgment was right on all points, and the appeal fails.

LINDLEY, L.J.—In this case there was only one point on which I ever entertained any doubt, but I have now come to the conclusion that on that point, as well as on all others, the opinion of Mr. Justice Kay is right. It is important to consider what were the rights of the lord of the manor just before the enfranchisement. It is settled law, and is laid down clearly in *The Duke of Leeds v. The Earl of Strafford* (16), that it is the duty of a copyhold tenant to preserve the boundaries of the lands. How far that duty could be pushed in a case when the boundaries had been destroyed by some earthquake, volcanic eruption, or flood, it is not necessary for us to determine; but if that were the case, it would clearly lie on the copyhold tenant to shew it.

Then we come on sure ground, because, taking the case of *The Duke of Leeds* (16) as a guide, it is obvious that at the date of enfranchisement the lord had a right to bring an action for the purpose of ascertaining the lands, and, if it could not have been done, by getting other lands substi-

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tutel. Incidentally it was also settled that in the case of a copyhold tenant, where the boundaries are confused, if any rents are in arrear the Court of Chancery would compel payment, it would enforce the legal rights of the lord.

Mr. Crackanthorpe did, however, raise a question which, so far as I know, is new, and which deserves attention. He said that there are certain sections of the Copyhold Act which enable the commissioners to ascertain the disputed boundaries, and that when the lord might have had his boundaries ascertained he elected to take his rentcharges upon property the boundaries of which were uncertain, and that having exercised such election he cannot now recede from it. That argument depends on the construction of those sections, but they fall short of substantiating that proposition. The main section is section 24 of the Act of 1852. [His Lordship read the section and proceeded:] No doubt either the lord or the tenant could have applied to the commissioners, but neither of them did. What is the consequence of not doing it? Has the lord thereby lost the rights which he otherwise would have had? That would be going too far.

When the enfranchisement was made the relation between the lord and tenant was severed, and if the boundaries had been confused subsequently to the enfranchisement, I do not think that the old doctrine of law (as to the duty and liability of the tenant) would have applied to this case. But it is admitted that that is not the present case, the boundaries were confused before the enfranchisement. To my mind the lord has not lost the rights which he enjoyed before.

The question of costs will be material as to that point; but the whole costs of the enquiry have been reserved, and Mr. Justice Kay will have to consider what effect the failure to take advantage of section 24 has upon the question of costs.

The conclusion to which I have come is that the decision of Mr. Justice Kay was right on all points.

LOPES, L.J.—It is settled law that a tenant or copyhold tenant is bound to

keep the lands of the landlord or the lord of the manor distinct from his own lands; and if the boundaries between the two properties have become confused, it is the right of the lord of the manor, or of the landlord, to have them ascertained. If the copyhold tenant or tenant has voluntarily allowed the boundaries to become confused the case is provided for by setting out sufficient of the tenant's lands in substitution.

The law so far is clear, and but for the enfranchisement which has taken place there would have been no difficulty in it; but an enfranchisement was made in 1880, and we have to consider the effect of that enfranchisement. So far as the future is concerned, the tenant is no doubt free from all obligations and incidents of copyhold tenure; but as to the past, the enfranchisement did not destroy any rights which had then accrued to the lord.

I think, therefore, that the liability of the tenant with regard to these boundaries is the same as if no enfranchisement had taken place, because the rights had accrued to the lord before the enfranchisement.

As to the action of debt I need not say anything, because on that *Thomas v. Sylvester* (8) is a clear authority.

Appeal dismissed.

Solicitors—Beaumont, Son & Rigden, for plaintiff; Field, Roscoe & Co., agents for Josselyn & Sons, Ipswich, for defendant.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
LINDLEY, L.J.
LOPES, L.J.
1890.
Feb. 5.

In re BLUNDELL.
BLUNDELL v. BLUNDELL.

Costs — Administration Action — Summons taken out and prosecuted by leave of Judge — Right to Indemnity — Priority.

A limited company having the conduct of an administration action, with the sanction of the Court prosecuted a summons on behalf of the estate against B., C. & B., claiming payment by them of certain moneys alleged to form part of the estate. The summons was dismissed with costs. The company subsequently became insolvent and was ordered to be wound up. The balance of the estate under administration was insufficient to pay the costs of either party to the summons. B., C. & B. moved that their costs of the summons might be declared to be a charge on the balance, in priority to all other claims:—Held, that the company, having prosecuted the summons under the authority of the Judge on behalf of the estate, were entitled to be indemnified out of the estate for the costs incurred by them; and that B., C. & B., by reason of the company's right to such indemnity, had a right directly against the estate; and that by reason of the judgment dismissing the summons they were entitled to be paid their costs in priority to the costs of the company.

Decision of NORTH, J., reversed.

Appeal by Messrs. Bower, Cotton & Bower from an order of North, J.

By an order made on the 30th of January, 1885, the conduct of the action *Blundell v. Blundell*, which was an action for the administration of the estate of Thomas Blundell, was given to the Bavarian Brewery Company, who were the principal creditors of the said estate.

The brewery company, on the 27th of April, 1887, took out a summons in their own name asking that the appellants might be ordered to pay into Court to the credit of the administration action various sums, amounting to 1,148*l.*, retained by them out of the estate of Blundell for costs in relation to the estate.

It was admitted that this summons was taken out, and prosecuted at every step with the approval and under the direction of the Judge.

Judgment was given in the summons on the 1st of May, 1888, when it was dismissed with costs as against the company personally. The case is reported 57 Law J. Rep. Chanc. 730.

Under the order made on the 26th of April, 1887, on further consideration of the administration action, all the costs of the brewery company from the time when the conduct of the action had been given to them down to the date of the further consideration had been paid to the company, and the only sum representing the estate was a balance of 170*l.* 10*s.*, standing in Court to the credit of the action.

A petition for winding up the brewery company was presented on the 17th of May, 1888, and an order made thereon in the following June, and liquidators appointed. There were no assets of the company.

The costs of Messrs. Bower, Cotton & Bower of the summons had been taxed at 210*l.*, and they claimed payment of these costs out of the balance in Court so far as it would go, in priority to the costs of the company. The costs of the summons were the only costs which had not been paid.

Messrs. Bower, Cotton & Bower took out a summons before North, J., asking payment of their costs out of the balance, in priority to those of the official liquidators; but that summons was dismissed, his Lordship holding that although the proceedings taken by the company were in the event shewn to have been improper, yet, being taken under the direction and with the sanction of the Judge, the company preserved their right to be paid their costs out of the estate.

Messrs. Bower, Cotton & Bower appealed.

Cozens-Hardy, Q.C., and *Levett*, for the appellants.—The summons having been taken out by the company by the direction of the Judge for the benefit of the estate, and the company having been personally ordered to pay the costs of the appellants,

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the company would be entitled as a matter of course to be indemnified out of that estate for the costs so paid, and the appellants are entitled, by right of the company's indemnity, to go directly against the estate. The question is only one as to priority, for had there been assets sufficient for both, the company would, as a matter of course, have paid the costs and got them out of the estate.

There is no direct authority, for, as a rule, the plaintiff suing by order of the Court on behalf of an estate is solvent, and he pays the costs of the successful defendant, but he would have no remedy if the estate were insufficient to repay him. But in many cases of winding up, the Court has held that the costs of an unsuccessful litigation by or against the company should be paid out of the assets of the company in priority to the costs of administration. *In re The Bank of Hindustan, China, and Japan*; *ex parte Smith* (1) and *In re The Trent and Humber Ship Building Company*; *Bailey and Leatham's Case* (2) recognise the right of the successful litigant to payment of his costs out of the assets of the unsuccessful company; and in the case of *In re The Home Investment Company* (3) Malins, V.C., decided that the costs of proceedings taken for the benefit of the company should be paid out of the estate, and that the successful litigant should get his costs in priority to the general costs of the liquidation. That decision was followed by the Court of Appeal in *In re The Dominion of Canada Plumbago Company* (4), differing from *In re The Dronfield Silkstone Coal Company* (5). In the *Plumbago Case* (4) there was a personal order against the liquidator to pay the costs, not out of the assets, but only with a right to retain out of the assets the costs when paid; but the omission of a direction to pay or retain out of the assets does not affect the appellants'

right. The right of the liquidator to indemnity does not depend on its insertion. These cases lay down the rule as regards winding up, and the principle is that enunciated by Vice-Chancellor James in *Bailey and Leatham's Case* (2): that if an action be brought or resisted for the benefit of the estate, and unsuccessfully, then the estate—that is, the other creditors—ought, like everybody else, to be fixed with the costs to which they have improperly or unnecessarily put their opponent.

The appellants' claim to proceed directly against the estate is based on the company's right to indemnity, on the principle laid down by *In re Johnson*; *Shearman v. Robinson* (6) and *Dowse v. Gorton* (7), whereby, through the right of trustees to indemnity out of their trust estate, creditors of the trustees are, by subrogation, allowed a direct claim against the trust estate.

As between the two claimants to this fund—the company and the appellants—it is according to all justice and principle that the claimant whose costs are ordered to be paid by the other should have priority.

Everitt, Q.C., and *E. Ford*, for the liquidators.—There is no authority nor principle on which the appellants can claim a better right than ordinary litigants—that is, a personal claim against their opponent. They were content to take an order against the company; they never asked for any security, and so their only right is to come in and prove like other creditors in the winding-up. The Court always holds receivers and officers of the Court entitled to their costs of proceedings properly taken under the direction of the Court. No case can be cited where executors have been deprived of their costs of an action on behalf of the estate, if properly brought; and the company here holds a position analogous to that of an executor. In the *Dominion of Canada Case* (4) an order had been made on the liquidator to pay costs and retain them out of the assets, and he had obeyed the order, and then other solicitors came in

(1) 37 Law J. Rep. Chanc. 185; Law Rep. 3 Chanc. 125.

(2) 38 Law J. Rep. Chanc. 485; Law Rep. 8 Eq. 94.

(3) Law Rep. 14 Ch. D. 167.

(4) 53 Law J. Rep. Chanc. 702; Law Rep. 27 Ch. D. 33.

(5) 52 Law J. Rep. Chanc. 963; Law Rep. 23 Ch. D. 511.

(6) 49 Law J. Rep. Chanc. 745; Law Rep. 15 Ch. D. 548.

(7) 58 Law J. Rep. Chanc. 403; Law Rep. 40 Ch. D. 536.

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respect of other costs and asked to have the order rescinded.

All the cases cited were cases arising in the winding-up, and, the Court having the estate of the company under its control, and its own officer before it, may have a wider power. Here the summons was brought by the company when a going concern, and judgment given against the company, and so the cases in winding-up have no application. At the date of the winding-up the appellants were only ordinary creditors of the company. No case can be cited where rights of creditors at the date of the winding-up were altered by any subsequent transaction. The appellants were, like any other person, liable to an action, and the claim was a *bona fide* claim. The costs of administration have to be paid before this money can be assets of the company, and it is only as against the assets of the company that the appellants can claim. Even if the appellants' costs had been ordered to be paid out of the estate, still we submit that the company would have had priority. The doctrine of subrogation can only be called in aid for the purpose of working out the right to indemnity; but such right can only be worked out subject to payment of the costs, and there is no subrogation here, because the plaintiff company could not be compelled to claim their indemnity in priority to their costs.

C. Hardy, in reply.

COTTON, L.J.—This is an appeal from an order of Mr. Justice North. It has been fully argued; but if there were any authorities which bore directly on the question, I should have desired to look into them before giving judgment. But it has been conceded on both sides that there is no direct decision on the point raised by the appeal. Several decisions have, however, been referred to as having an indirect bearing on it, and as shewing what ought to be done, if we can do it consistently with principle.

The Judge in the administration action of *Blundell v. Blundell* gave the conduct of the action to the brewery company, which is now being wound up. And that company made a claim against Mr. Hardy's

clients, seeking to have a certain sum paid into Court to the credit of the action. It is admitted that every step taken by the brewery company in prosecuting that claim was taken with the approval of the Judge, and rightly taken; and that is shewn by the form of the order giving the company the costs of the proceedings. The proceedings ultimately failed, and the appellants obtained an order against the brewery company for the payment of their costs of those proceedings. The company has, however, gone into liquidation, and it has no assets, and the question now is this—Whether the appellants are not entitled to be paid those costs out of the assets of Blundell's estate, in priority to the costs of the brewery company in this matter, which costs have not yet been paid.

There is no question as to the costs of the brewery company incurred in getting in assets of the estate, all those costs having been already paid to them. It is only a question whether the appellants are entitled by way of indemnity to their costs out of the estate in priority to the claim of the brewery company.

The order made by the Judge was, I think, in an unusual form in allowing the brewery company to take proceedings in its own name against Messrs. Bower & Cotton in respect of a claim on behalf of the estate. That order had the effect of substituting the brewery company for the executors—therefore, as regards this question of indemnity, we must treat the brewery company as standing in the shoes of the executors, with this additional fact, that every step taken by the company was approved by the Judge. It has been urged that Messrs. Bower & Cotton elected to take an order simply against the brewery company, and therefore cannot enforce a claim to indemnity out of the estate. I do not think that they should be held barred of that right of indemnity, if otherwise entitled to it, merely by having taken the order against the company. It was not a case of election at all.

Many cases which were referred to do shew a right of such a nature, because cases were cited where a liquidator who was liable to pay costs has been held

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entitled to pay the costs out of the estate directly to the person against whom he has been litigating.

But it is said that it is unreasonable, independently of the question of election, that there should be a claim against the company personally, if I may so describe it, and also a claim by way of indemnity out of the assets of the estate. That objection fails, because there are numerous examples of such claims—for instance, where executors are authorised to carry on the trade of their testator, and to apply either the whole or a portion of the estate for that purpose. There the persons dealing with the executors are in no sense creditors of the testator—they are at law creditors of the executors. But it is well established that, although this is so, the persons dealing with the executors, in addition to their right against the executors personally, are entitled to such indemnity as the executors might have against the estate. If the amount of the estate allowed to be employed in the trade is limited, then their claim in respect of indemnity will be also limited.

I only refer to this to shew that it is not at all unreasonable that the appellants in this case should have that remedy against the brewery company, as standing in the shoes of the executors, personally, and also by way of indemnity as against Blundell's estate.

There is in this case the difficulty that Bower & Co. have only a claim through the brewery company by getting the benefit of the indemnity to which that company would have been entitled if it had paid the costs.

If this company had paid the costs of this litigation to the successful litigants, they would have been entitled to indemnity out of the estate in respect of any costs so paid by them. But here the costs have not been paid, and the company is claiming against this estate in respect of its own costs. The claim to indemnity by the company arises from this, that although Mr. Justice North thought it unnecessary to decide that they are entitled, yet, in my opinion, as they commenced proceedings under the authority of the Court, and every step in those proceedings was taken by the company under the

Court's sanction, if they had paid the costs to the appellants they would, in my opinion, have been entitled to say to the Court which was administering the estate of the deceased, "You not only ought to pay the costs incurred by us, but also the costs which have been paid by us to the successful litigants." The company, however, is insolvent, and cannot pay. But it is no unusual mode of proceeding for the person or estate liable to indemnify another for a payment if made by him to make a payment directly in discharge of the original liability. That is, in fact, the best way of getting rid of the question of indemnity. Therefore I do not think that the non-payment of the costs by the company prevents the solicitors from claiming by way of indemnity. But the question remains, which of the two would have priority or right to be indemnified out of the assets from the costs which had been received? The order is that the company do pay the costs of Messrs. Bower & Cotton. As between those two parties, which is entitled to priority? As that order against the company stands, not having been questioned within the time allowed, we have to say what is to be done, now that the company is being wound up. It is said that the appellants must stand in the ordinary position of any litigant, and that any costs incurred by them must be proved in the winding-up, and must be postponed to the costs of realisation. I do not agree with that argument, and, although it looks startling, I think the only mode of carrying out to a legitimate extent the benefit of indemnity to which the company would have been entitled, and in priority to any claim which the company would have had against the assets, is to give the solicitors a direct claim on the assets in priority to the company. I think, therefore, the order of Mr. Justice North must be reversed, and the sum which he ordered to be paid to the liquidators must be directed to be paid to the appellants.

It has been suggested that the solicitors cannot have any claim against assets of the estate, which ought to go to the general body of creditors. But we really have not to consider that question, because the question now before us is only

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as between these two parties who incurred costs of this particular litigation—one of which parties was ordered to pay the costs of the other. That the Court has power to direct what is to be done in the winding-up is clear, and I myself feel no difficulty at all. As regards the priority of indemnity, to the right of creditors of the estate, the Court directed these proceedings to be taken with a view to increasing the estate; and although, unfortunately, the proceedings were unsuccessful, that does not take away the liability of the estate to indemnify the parties who took them.

They have made an unsuccessful claim on behalf of the estate, and it must pay costs.

LINDLEY, L.J.—The question we have to decide is how to dispose of a sum of 170*l.* 10*s.* in Court standing to the credit of *In re Blundell*. All the costs of everybody incurred in producing that fund have been paid long ago, and the estate cleared of everything, and the sum represents the net balance. The difficulty which arises is attributable to a certain legal proceeding, which I will deal with shortly. It was supposed by the persons interested in Blundell's estate that Messrs. Bower & Cotton were indebted to that estate, not legally in the sense that they could be sued for the debt at common law, but on the ground that there were certain equitable demands upon them arising out of certain breaches of trust; and that if proceedings were taken, a sum of 1,100*l.* odd could be got in for the benefit of the estate.

The principal creditor of that estate—the brewery company—who had obtained the conduct of the proceedings, took out a summons with a view to get in this supposed asset, and got leave of the Judge to fight it out with Bower & Cotton. It was fought out, with the result that the summons was dismissed with costs. The brewery company acted by the direction of the Court, and nobody says that they did anything wrong, and that brings us to the point what is to be done with regard to the costs of that summons.

On the one hand, the brewery company are entitled to be indemnified out of

Blundell's estate for all the costs properly incurred by them in the proceedings on that summons. On the other hand, Bower & Cotton are entitled to be paid by the company for their costs of the litigation. It is to be observed that Bower & Cotton have a legal right against the brewery company, which could be followed up by *fi. fa.* or other proceedings. But Bower & Cotton say that they have more—that they are entitled in equity to be paid out of this fund in Court; and the first question to consider is, have they got that right?

Their equitable right to stand as creditors of the estate is got at in accordance with the principle on which *Ex parte Garland* (8) and other similar cases were decided, and which were reviewed and examined by Sir George Jessel in *In re Johnson* (6). They do not claim to be *cestuis que trust* of the fund, but they say they are entitled to be paid out of it by reason of the right of the brewery company to be indemnified out of it for what they pay. There are two claimants, and two only—and as between these two, one has been ordered to pay the costs of the other. That, to my mind, settles the point of priority. The authorities most closely referring to this point are cases of winding-up, referred to by Mr. Hardy and Mr. Levett; and taking them as guides, and applying the principle of these cases and good sense to the consideration of this case, I think that, on grounds both of good sense and good law, Bower & Cotton have priority over the company.

LOPES, L.J.—I have nothing to add; I entirely agree with the judgments of the Lords Justices. The principle applicable to this case is that which I derive from the *Home Investment Company's Case* (3) and the *Dominion of Canada Plumbago Company's Case* (4).

Solicitors—Bower, Cotton & Bower, for appellants; W. Foster, for liquidators.

CHITTY, J. }
1889.
Dec. 16. }

PRATT v. INMAN.

Sequestration to enforce Payment into Court—Death of Contemnor insolvent—Effect on Sequestration—Judicature Act, 1875, s. 10—Bankruptcy Act, 1883, s. 45.

Sequestration to enforce payment into Court is not discharged by the death of the contemnor, on the ground that the process has issued for the non-performance of a duty.

Hyde v. Greenhill (1 Dick. 106) followed.

The provisions in the Bankruptcy Act, 1883, s. 45, restricting the rights of creditors under an execution, are not imported by section 10 of the Judicature Act, 1875, into the administration of insolvent estates in the Chancery Division.

By an order of the 6th of May, 1889, made in an action to administer the trusts of a will, Mark Shephard, the defendant, was directed to pay into Court a sum of 2,000*l.*, for which he was liable in respect of a breach of trust. The order not having been obeyed, on the 21st of June a writ of sequestration issued against his real and personal estate, under which the furniture and effects in his residence were seized by the sequestrators, who, by a subsequent order, were authorised to sell the same, but delayed the sale by arrangement, on Mark Shephard's undertaking to make payments on account of his liability under the first order.

In August, Mark Shephard died intestate, whereupon a creditor's action was brought for the administration of his estate, in which Pratt was appointed receiver, and he put a man in possession of the deceased's residence and of the chattels therein.

In September the heir-at-law of Mark Shephard obtained a grant of letters of administration of his estate, and the action against the deceased was ordered to be continued against him. Judgment therein was given on the 25th of September, directing the usual accounts and enquiries, and continuing Pratt as receiver.

In October the present action was brought by Pratt and the heir-at-law of the deceased, to restrain the sequestrators from selling the furniture and chattels they had seized; and, the sequestrators having declared their intention of forthwith proceeding with the sale, the plaintiffs now moved for an injunction to restrain them from so doing.

The plaintiffs, by their statement of claim, alleged that Shephard's estate was insolvent.

Byrne, Q.C., and *Dibdin*, for the plaintiffs.—The sequestrators are not in the position of judgment creditors so as to entitle them to a sale of these assets, with the result of defeating the other creditors—*Ward v. Shakeshaft* (1) and *Johnson v. Burgess* (2). Sequestration is a personal process, and cannot be revived after the death of the contemnor. And Shephard's estate being insolvent, the sequestration, not having been completed by sale, is avoided by the Bankruptcy Act, 1883, s. 45, which section, under the Judicature Act, 1875, s. 10, is applicable to the administration of the estate in this Court—*The Mersey Steel and Iron Company v. Naylor, Benson & Co.* (3).

Romer, Q.C., and *Clydesdale*, for the sequestrators.—Where sequestration has issued for the non-performance of a duty, the process is *in rem*, and may be continued against the representatives of the contemnor—*Hyde v. Greenhill* (4), *Rowley v. Ridley* (5), *Burdett v. Rockley* (6), *Francklyn v. Colhoun* (7), and *Tatham v. Parker* (8). Nor does the Judicature Act, 1875, s. 10, make section 45 of the Bankruptcy Act, 1883, applicable to our claim, which is not that of a creditor, but of a *cestui que trust*—*Ex parte Taylor*; *in*

(1) 1 Dr. & S. 607.

(2) 42 Law J. Rep. Chanc. 400; Law Rep. 14 Eq. 398.

(3) 53 Law J. Rep. Q.B. 497; Law Rep. 9 App. Cas. 434.

(4) 1 Dick. 106.

(5) 2 Dick. 622.

(6) 1 Vern 58.

(7) 3 Sw. 276.

(8) 1 Sm. & G. 506; 22 Law J. Rep. Chanc. 903.

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re Goldmid (9) and *In re The Withernsea Brickworks* (10).

Byrne replied.

CHITTY, J. [after stating the nature of the application, continued] :—Now, in that state of things, what is the law? Sequestration unquestionably was, and is, a process of contempt. Sequestration was issued to compel a man formerly to put in an answer and the like, and sequestration also went to compel (in the words of Lord Hardwicke) a defendant to perform a duty, such as the payment of money, and such, of course, as the payment of money into Court.

Now, it was decided by Lord Hardwicke, in *Hyde v. Greenhill* (4), that the death of the defendant did not discharge the sequestration, where sequestration had been issued for the purpose of compelling him to perform a duty. Of course, if the sequestration was only to issue for the purpose of compelling him to put in an answer, and he was dead, the sequestration would have been discharged. Lord Hardwicke said, in the case of *Hyde v. Greenhill* (4): "A sequestration covered the personal estate, and the Court would direct a sale for a duty." In that case the original defendant had died, and the suit had been revived against those who represented his real and personal estate; and his Lordship declined to discharge sequestration as to the personal estate, because the sequestration was for a duty, and the suit had been duly revived; so that if this motion had been made, which it is not, in the first action, the Court, acting on that authority, which is not the sole authority on the point, would not have discharged the sequestration, and would, as Lord Hardwicke did in that case, after the death, in the presence of the persons who represented the personal estate, have ordered the sale. The result, therefore, is that any motion made in that action against the defendants, the sequestrators, must have failed.

Now on what ground is the motion supported? First, it was argued by Mr.

(9) 56 Law J. Rep. Q.B. 195; Law Rep. 18 Q.B. D. 295.

(10) 50 Law J. Rep. Chanc. 185; Law Rep. 16 Ch. D. 837.

Byrne, that, inasmuch as the order in the first action was an order for the payment of money into Court, the plaintiffs are not creditors. That is immediately conceded by the defendants' counsel on the motion—and rightly. An order for the payment of money into Court does not make a man a creditor. A man who has obtained an order for the payment of money into Court cannot take bankruptcy proceedings upon it. That has been decided.

Then Mr. Byrne's argument is, that by virtue of the 10th section of the Judicature Act of 1875, the 45th section of the Bankruptcy Act of 1883 is imported into the law of administration, because the estate of Mark Shephard is alleged to be insolvent. The plaintiffs in the first action have not come in to prove as creditors, and they are not creditors of the deceased by virtue of the order, nor are they creditors in the ordinary sense of the term. They have a demand against this estate of an equitable character by reason of the breach of trust. The 10th section of the Judicature Act, 1875, has not imported into the administration of an insolvent estate generally any of the provisions of the Bankruptcy Act which were then in force, or are in force at the present time. It has only imported them where the administration is by the Court. The bankruptcy provisions are imported into the administration of a dead man's estate by the Act of 1883 by a set of express provisions which apply to the case of the administration of the estate being in bankruptcy, and the estate being of course insolvent.

Now the 45th section of the Act of 1883 runs thus: "Where a creditor has issued execution," that is the commencement of the section. The counsel for the respondents on the motion argue that the first proposition on the part of the plaintiffs' counsel has put him out of Court, because the plaintiffs in the breach of trust action are not creditors: and that observation appears to me to be well founded.

Then supposing the word "creditor" ought to be taken in the larger sense to mean persons who have an equitable demand against the estate of a dead man, are the provisions of the 45th section im-

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ported into administration by the Court by virtue of the 10th section of the Judicature Act of 1875? I am of opinion that that is not so, and I am of opinion further that the provisions of the 45th section do not apply to the present circumstances. The section runs: "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor"—there is no question here about the trustee in bankruptcy of the debtor—"unless he has completed the execution or attachment before"—what?—"before the date of the receiving order"—there is no receiving order here—"and before notice of the presentation of any bankruptcy petition"—there is no bankruptcy petition here filed—"by or against the debtor, or of the commission of any available act of bankruptcy by the debtor"—of course, there was none in this case, and this is the argument for the plaintiffs. They must say that the 45th section is imported in order to accomplish their object, which is the bringing in of the second part or sub-section of the 45th section, which runs thus: "For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver." The important words there are: "For the purposes of this Act, an execution against goods is completed by seizure and sale"—consequently they refer to the fact of these goods not having been sold under the order giving the sequestrators liberty to sell, and say that the execution falls within this 2nd sub-section.

Now I adopt for this purpose the principle which Lord Justice James acted upon in *In re The Withernsea Brickworks* (10); whether any expression there ought to be modified or not by reason of what Lord Selborne said in the more recent case of *The Mersey Steel and Iron Company v. Naylor, Benzon & Co.* (3), I need not stay to consider. I think the principle on which Lord Justice James acted, in de-

clining in *In re The Withernsea Brickworks* (10) to import into an administration of a dead man's insolvent estate in the Chancery Division the provisions of the Act which deprive execution creditors of the fruits of the execution where the sheriff has notice of the bankruptcy within fourteen days after sale, applies entirely to the case now before me. The result, therefore, is that the 45th section is not, in my opinion, imported, and that sub-section 2 of it is not imported (I state that as a general proposition), and it certainly is not imported, in the circumstances, in this case. Therefore I refuse the motion.

[This application was subsequently by consent treated as the hearing of the action, which was set down and dismissed with costs.]

Solicitors—R. J. Witty, for plaintiffs; Coode, Kingdon & Cotton, agents for E. F. Chamier, Stratton, Cornwall, for defendants.

NORTH, J. } *In re THE BLUE RIBBON LIFE*
1889. } ACCIDENT MUTUAL AND INDUS-
Oct. 26. } TRIAL ASSURANCE COMPANY.

Life Assurance Company—Deposit—Change of Investment—Power of Court—Life Assurance Companies Act, 1870, s. 3—Life Assurance Companies Act, 1872, s. 1—Board of Trade Rules, 1872, rule 4—Rule of Supreme Court, November, 1888.

Where moneys have been deposited in Court under section 3 of the Life Assurance Companies Act, 1870, the Court has power under rule 4 of the Board of Trade Rules, 1872 (made under the Life Assurance Companies Act, 1872), to authorise the investment of such moneys in annuities Class B. of the East Indian Railway Company. But whether such annuities will be accepted by the Court for the investment of funds under its control, quære.

Petition.

This petition was presented by the above company asking for the sanction of the Court to a change of the investment of a sum of 20,000*l.* India Three per

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Cent. Stock (representing moneys which had been deposited in Court under section 3 of the Life Assurance Companies Act, 1870), into annuities (Class B) of the East Indian Railway Company. These annuities are paid by the Indian Government, and have a sinking fund, to replace, at the expiration of the annuities, the capital of the railway company, in respect of which they were created on the purchase of the railway by the Government.

By the Trust Investment Act (52 & 53 Vict. c. 32) the annuities (Class B) are authorised as an investment of trust funds.

Evidence was produced that the proposed change would be to the advantage of both the policy-holders and the shareholders.

The question was raised on the petition whether the annuities in question were included in the Rule of the Supreme Court of November, 1888, relating to the investment of trust funds under the control of the Court.

Cozens-Hardy, Q.C., and *Wurtzburg*, for the petition.

NORTH, J.—It is not necessary for me to decide whether these annuities will be accepted by the Court as a proper investment for funds under its control, since I am clearly of opinion that rule 4 of the Board of Trade Rules, 1872, made under the Act of 1872, empowers me to sanction the proposed investment. Satisfactory evidence must, however, be produced that the proposed change will be more beneficial than a change into some other investment, which would clearly be within the existing rules relating to the investment of funds under the control of the Court. Subject to the production of that evidence I will sanction the proposed investment.

Solicitors—*Sharpe, Parkers, Pritchard & Sharpe*, agents for *Coleman & Co.*, Birmingham, for petitioners.

KAY, J. }
1890.
Jan. 15, 16. }

In re BATE.
BATE v. BATE.

Administration—General Direction by Testator for Payment of Debts—Charge on Real Estate—Pecuniary Legacies—Marshalling.

Testator directed his just debts and funeral expenses to be paid as soon after his decease as convenient, and gave specific and general legacies, and specifically devised his real estate. There was no residuary bequest. The residuary personal estate was insufficient for payment of the debts:—Held, that though the direction to pay debts operated to charge them on the real estate, the whole of the general personal estate not specifically bequeathed was primarily liable for the payment of the debts, funeral and testamentary expenses, and that the general legatees had no right of marshalling against the real estate.

Adjourned summons.

Charles Spence Bate, a dentist, who died on the 29th of July, 1889, commenced his will, dated the 30th of January, 1888, by a direction that all his just debts and funeral expenses should be paid as soon after his decease as convenient; and by his said will and a codicil thereto, gave specific and pecuniary legacies (including a bequest to his son, *Charles McGuire Bate*, of all his book debts arising from his practice, or what moneys might be derivable from his practice, that might not be wanted or required to pay off any of his just debts lawfully incurred by himself or his wife), and specifically devised part of his real estate to his daughter, *Harriet Elizabeth Bate*, in fee, and the other part to his widow for her life, with remainder to his son, *Charles McGuire Bate*, in fee; and appointed his said son and daughter his executor and executrix. There was no residuary bequest.

The goodwill of the testator's business and the furniture and instruments used in the business had been sold for 950*l.*, payable by instalments.

The residuary personal estate was insufficient for payment of the testator's debts, funeral and testamentary expenses.

In re Bate.

This was an originating summons taken out by the son and daughter for the determination of the following, amongst other questions—namely (1) Whether the direction for payment of the testator's debts and funeral expenses operated to charge the same upon his real estate; (5) Whether the book debts arising from the testator's practice, or what moneys might be derivable from his said practice, included the value of the goodwill of the testator's business of a dentist; and whether the words, "that might not be wanted or required to pay off any of his just debts lawfully incurred by himself or wife," entitled the plaintiff Charles McGuire Bate to have all the general personal estate not specifically disposed of applied in payment of the testator's debts before any payment out of such book debts and other moneys; and (6) Whether the deficiency of the general personal estate for the payment of testator's debts was to be made up by contributions *pro rata* from all the specific legatees and devisees according to the value of the legacies and property bequeathed and devised to them respectively; and, if so, a direction to that effect, and that the applicants, as such executor and executrix, might be at liberty, by sale or mortgage of so much of the real and personal property specifically devised and bequeathed as might be necessary, to raise and pay so much of the debts, funeral and testamentary expenses of the testator as his general personal estate and book debts should be insufficient to pay, or, if and so far as might be necessary, administration of the real and personal estate of the said Charles Spence Bate, with all necessary and proper directions.

The defendants to the summons were the testator's widow and two other persons who were pecuniary legatees. All persons interested under the will and codicil were before the Court, except one specific legatee.

The other questions raised in the case were whether certain legacies were cumulative or not, and whether certain legacies were demonstrative legacies or not, and do not call for a report.

Renshaw, Q.C. (Stock with him), for the plaintiffs.—The general direction at

the beginning of the will would be enough to charge the real estate with the testator's debts, according to the authorities—*Jarman on Wills* (4th ed.), vol. 2, pp. 589–91, and *Clifford v. Lewis* (1). But there may be a question whether the testator has specifically appropriated his book debts for the purpose.

[KAY, J.—That property is not specifically appropriated. It is specifically given subject to its *pro rata* proportion of the debts previously charged on all the property, but the specific gift is only of what is left after payment of that rateable proportion.]

As to the fifth point, I submit that the instruments and furniture used in the business pass under the bequest.

[KAY, J.—I think everything belonging to the business would pass by that. It will include the price of the goodwill and all other effects of the business.]

As to the sixth point, the whole of the general personal estate not specifically bequeathed must be applied in payment of debts, funeral and testamentary expenses, before resorting to the real estate. The rule is laid down in *Seton* (4th ed.), p. 989, that the "general or residuary personalty not specifically bequeathed or exonerated or exempted is first liable." It is true that it is afterwards stated on page 990 that "real estates devised charged with the payment of debts" are applicable before "general pecuniary legacies"; but that statement, if applied to a case like this, is inconsistent with and contradictory of the former statement. *Seton*, p. 990, also points out that "the decision of Chelmsford, L.C., in *Hensman v. Fryer* (2), that general pecuniary legacies should only contribute rateably with residuary devises, has not been followed." *Seton*, p. 990, also refers to *Sellon v. Watts* (3), which gives the rules for marshalling between demonstrative and general legacies and real estate descended. In the present case the general legatees have no right to marshal as against the real estate.

McSwinney, for the pecuniary legatees.

(1) 6 Madd. 33.

(2) 35 Law J. Rep. Chanc. 745; Law Rep. 3 Chanc. 420.

(3) 9 W.R. 847; *Seton*, p. 951.

In re Bate.

—As to the sixth point, all the text-books lay down the order of administration in the same way as *Seton*, p. 990—namely, that real estate charged with debts is to be resorted to before general pecuniary legacies.

[KAY, J.—Can you find me an authority for it? I do not understand it. What is the meaning of putting general pecuniary legacies after real estate charged, when the first item is personal estate not specifically bequeathed?]

Jarman (4th ed.), vol. 2, p. 622, states the order of administration in the same way, and cites for the proposition *Clifton v. Burt* (4), which, however, does not seem to establish it. [He read from Lord Parker's judgment in that case.]

[KAY, J.—That does not help you. You begin by saying, as everybody knows, that the general personal estate not specifically bequeathed is the first fund for the payment of debts. Supposing the debts to be enough to exhaust it, how are the general legacies to be paid?]

Then your Lordship decides the last question by making an order that the personal estate not specifically bequeathed is to be exhausted before resorting to the real estate?

[KAY, J.—Yes.]

The order on the above-mentioned points was drawn up as follows:—

"This Court doth declare (1) that the direction contained in the testator's will for payment of his debts and funeral expenses operates to charge the same upon the testator's real estate. (5) That the said bequest of the said book debts carries with it the sum of 950*l.*, the price agreed to be paid on the sale of the furniture and goodwill of the testator's business, but that the bequest of the said book debts and of the said sum of 950*l.* are specific if and so far only as there shall be a balance thereof remaining after payment thereof of the proportion of the testator's debts, and funeral and testamentary expenses, and the costs hereinafter directed to be taxed properly payable thereout, having regard to the declaration next

hereinafter contained; (6) That the testator's debts, and funeral and testamentary expenses, and costs hereinafter directed to be taxed, are payable primarily out of his general personal estate not specifically bequeathed, and out of his book debts and the said sum of 950*l.*; and if the said general personal estate not specifically bequeathed, and the said book debts and the said sum of 950*l.* shall be more than sufficient for the payment thereof, then they are to be paid thereout *pro rata*; and if the said general personal estate not specifically bequeathed, and the said book debts and the said sum of 950*l.* shall not be sufficient for the payment thereof in full, then the deficiency thereof is to be made up by contributions *pro rata* from all the specific legatees and devisees, according to the respective value of the legacies and property respectively bequeathed and devised to them." The order also directed taxation of costs as between solicitor and client.

Solicitors—Coode, Kingdon & Cotton, agents for C. H. Benett, Devonport, for plaintiffs; Surr, Gribble & Oddie, agents for Bulteel & Rowe, Plymouth, for defendants.

NORTH, J. }
1890. } *In re GATLING GUN (LIMITED)*.
Feb. 1. }

Company—Reduction of Capital—Confirmation by the Court—Reducing Part only—Companies Act, 1867, sections 9 and 11.

There is nothing in the Companies Act, 1867, which prevents a limited company, in a proper case, from reducing some of its shares without reducing the others.

In re The Barrow Hæmatite Steel Company (58 Law J. Rep. Chanc. 148; Law Rep. 39 Ch. D. 582) *followed*.

In re The Union Plate Glass Company (58 Law J. Rep. Chanc. 767; Law Rep. 42 Ch. D. 513) *not followed*.

Petition.

This was a petition by the company for the confirmation by the Court of a special

(4) 1 P. Wms. 680. See too *Bradford v. Foley*, 3 Bro. C.C. 491*n*; and *Webster v. Alsop*, *ibid*.

In re Gaiting Gun (Lim.).

resolution for the reduction of the company's capital. The company was formed by registration under the Companies Act, 1862, with a nominal capital of 800,000*l.*, divided into 45,000 ordinary shares of 10*l.* each, and 35,000 preference shares of 10*l.* each. Of the ordinary shares 37,590 had been issued, and of the preference shares 28,559 had been issued. All the shares issued had been paid up in full. A large number of each class of shares had been originally issued, in pursuance of a duly registered contract, as fully paid up, to the vendor to the company of certain patents. In consequence of the property sold having been found to be of less value than was originally estimated, the vendor, at the request of the company, executed a deed, dated the 10th of August, 1889, whereby he surrendered to the company 16,325 of the ordinary shares, and 12,697 of the preference shares originally issued to him, to the intent that the same should be cancelled for the benefit of the company.

By a special resolution of the company, passed on the 12th of November, 1889, and confirmed on the 3rd of December, 1889, it was resolved to reduce the capital of the company to 371,270*l.*, divided into 21,265 ordinary shares of 10*l.* each, and 15,862 preference shares of 10*l.* each, and that the reduction should be effected by cancelling the 7,410 ordinary shares, and the 6,441 preference shares which had not been issued, and by accepting the surrender of, and cancelling, the shares comprised in the deed of August, 1889.

The petition asked for the confirmation by the Court of this resolution.

Farwell, for the company.—Section 9 of the Act of 1867 authorises a company to reduce its capital. It does not say the reduction must be made on all the shares equally and rateably. In the present case the proposed reduction can do no harm to any one. The shareholders whose shares are to be reduced assent to the reduction. Your Lordship sanctioned such a reduction in *In re The Barrow Hæmatite Steel Company* (1).

(1) 58 Law J. Rep. Chanc. 148; Law Rep. 39 Ch. D. 582.

[NORTH, J., referred to *In re The Union Plate Glass Company* (2).]

The decision in that case is inconsistent with your Lordship's decision in *In re The Barrow Hæmatite Steel Company* (1).

In re The Quebrada Railway Land and Copper Company (3) was also referred to.

NORTH, J.—I think I must make the order asked for. I see that Mr. Justice Kay says in *In re The Union Plate Glass Company* (2) that he cannot find the smallest intimation that the Companies Act, 1867, gives a company power to reduce certain of its shares without reducing the others; but I, on the other hand, cannot find anything in the Act which prevents a company from reducing certain of its shares without reducing the others. I still adhere to what I said in *In re The Barrow Hæmatite Steel Company* (1)—namely, that there is nothing in the Act which requires that the reduction should be spread either equally or rateably over all the shares of the company; and I think that if it is a proper case for assenting to the reduction, there is nothing in the Act which prevents me from so doing. I think the present application is a reasonable one, and I therefore make the order asked for.

Solicitor—E. F. B. Harston.

(2) 58 Law J. Rep. Chanc. 767; Law Rep. 42 Ch. D. 513.

(3) 58 Law J. Rep. Chanc. 332; Law Rep. 40 Ch. D. 363.

KAY, J. } *In re* THE METROPOLITAN COAL
1889. } CONSUMERS' ASSOCIATION
Dec. 9, 11, } (LIMITED); *ex parte* WAIN-
16, 19. } WRIGHT.

Company — Prospectus — Statement of Names of Council of Administration — Provisional Consent — Subsequent Withdrawal — Rescission — Return of Deposit — Interest on — Rate of.

A prospectus stated that there would be a council of administration of the company of not less than twenty-five members, from whom would be selected a committee of not more than ten nor less than five members, which committee would constitute the board and have all the powers of directors; and under the heading "council of administration" gave seventeen names. The applicant, on the faith of those names, and especially of three of them, applied for and was allotted shares in the company. It was not the fact that these three persons were members of the council, but they had before the company was formed provisionally consented to become members, but had not authorised the public issue of the prospectus with their names thereon even as proposed members. Shortly after the allotment to the applicant was made, these persons withdrew their consents to become members of the council:—Held, that the representation that these persons were members of the council was substantially untrue, and that the applicant was entitled to have the contract to take shares rescinded, and to a return of the deposit paid on his shares, with interest at the rate of four per cent.

This was a motion under the Companies Act, 1862, section 35, by Mr. Wainwright to remove his name from the register of shareholders in the Metropolitan Coal Consumers' Association (Limited), on the ground of misrepresentation in and suppression of material facts from the prospectus of the company, and for a return of the deposit paid on his shares. The prospectus, dated the 7th of February, 1889, stated in red letters on the outside that the company was incorporated on the 31st of January, 1889, and then in black type gave the names of seventeen gentlemen as the council of administration. On the top of the first page it was stated in

red type that a considerable portion of the capital had been privately taken up, and subscriptions were invited for the balance. The material statement which was said to be inaccurate was this:—

"Extract from the articles of association.—There shall be a council of administration of not exceeding twenty-five members of the association, from whom shall be selected an executive and finance committee of not more than ten nor less than five of such members, which committee shall constitute the board and shall have and exercise all the powers commonly vested in directors.

"The members of the executive and finance committee also receive remuneration for their services.

"Council of administration."

Then followed the same seventeen names which were printed on the back, including those of Lord Brabourne, Sir Stuart Hogg, and Rear-Admiral Mayne. The applicant received a prospectus on the 11th of February, and on the faith of these persons being members of the council, on the same day applied for twenty-five preference shares, paying a deposit of 12*l.* 10*s.*, and for 250 ordinary shares, on which he had paid 5*l.*, and which were allotted to him on the 15th.

By the articles of association no one could be appointed a member of the council who was not a shareholder, and article 99 required the appointment of the members to be in writing under the hands of four or more subscribers to the memorandum of association. It appeared that before the incorporation of the company the three above-named persons had provisionally consented to become members of the council, but that they never were actual shareholders in the company, and at the date of the allotment to the applicant were not even formally appointed members of the council in the manner prescribed by article 99, though a document purporting to appoint them was afterwards (on the 19th of February) signed pursuant to that article; that they had never authorised the issue of their names to the public even as proposed members of the council; that they immediately complained of this being done, and shortly after the date of the allotment to

In re Metropolitan Coal Consumers' Assoc. ; ex parte Wainwright.

the applicant they formally withdrew their respective consents to become members of the council, and had never acted as such.

Marten, Q.C., and *George White*, for the motion.—The persons named in the prospectus had given no authority to place their names on it, and, in fact, they were not members of the association or of the council. These are material misrepresentations entitling the applicant to rescind—*Derry v. Peek* (1), *The New Brunswick Railway Company v. Muggerridge* (2), *In re The Life Association of England (Limited)*; *Blake's Case* (3), *In re The Scottish Petroleum Company*; *Anderson's Case* (4), and *In re The Scottish Petroleum Company*; *Wallace's Case* (5).

The Solicitor-General (Sir E. Clarke, Q.C.), *Sir Horace Davey, Q.C.*, and *Henry Terrell*, for the association.—Admitting that these persons were not properly appointed members of the council on the 15th of February, the date of the allotment to the applicant, still the statement in the prospectus was not a substantial misrepresentation which would entitle him to rescind his contract to take shares—*Hallows v. Fernie* (6). The object of the prospectus was to invite subscribers to complete the share capital of the company, and the statement merely meant, "These persons have consented to act on the council; and it is expected, when the company is completely formed by the subscription of its share capital, that they will be on the council, subject to any accidents in the meantime." That was true. The fact that these persons were not shareholders is immaterial, as the consent to become members of the council involved, to their knowledge, the necessity of becoming shareholders—*Porter v. Emmens* (7), *In re The North Kent*

Railway Company; *Kincaid's Case* (8), and *In re The Teme Valley Railway Company*; *Forbes's Case* (9). And the fact—if it be the fact—that they did not intend their names to be published is also immaterial so far as the applicant is concerned, for though publication might be a breach of faith between these persons and the issuers of the prospectus, that could not affect the truth of the fact. We submit, therefore, that the applicant's case fails, quite independently of the circumstance whether these persons were ever validly appointed members of the council or not.

[They also contended that these persons were validly appointed, and called evidence on the point.]

Marten, Q.C., in reply, cited *In re The London and Southern Counties Land Company* (10), *In re The Homer District Gold Mines*; *ex parte Smith* (11), and *In re The Portuguese Consolidated Copper Mines (Limited)* (12).

Cur. adv. vult.

KAY, J. (on December 16), stated the facts in great detail, and continued :—The statement in the prospectus of the names of noblemen and gentlemen of position as the council of administration from which the board of directors was to be chosen was undoubtedly a strong, and probably the chief, inducement to the public to take shares. I have no doubt that any intending shareholder who read the prospectus would understand from it that those seventeen gentlemen had been duly appointed; also he would understand that they were members of the association. The extract from the articles which precedes their names states distinctly that the council of administration is to consist of not exceeding twenty-five members of the association, and that five to ten of them would be the board of directors,

(1) 58 Law J. Rep. Chanc. 864; Law Rep. 14 App. Cas. 346.

(2) 1 Dr. & S. 363; 30 Law J. Rep. Chanc. 242.

(3) 34 Beav. 634; 32 Law J. Rep. Chanc. 278.

(4) 50 Law J. Rep. Chanc. 269; Law Rep. 17 Ch. D. 873.

(5) Law Rep. 23 Ch. D. 413.

(6) 36 Law J. Rep. Chanc. 267; Law Rep. 3 Chanc. 467.

(7) 46 Law J. Rep. C.P. 179; Law Rep. 1 C.P. D. 664.

(8) 40 Law J. Rep. Chanc. 19; Law Rep. 11 Eq. 192.

(9) 44 Law J. Rep. Chanc. 356; Law Rep. 19 Eq. 353.

(10) 55 Law J. Rep. Chanc. 224; Law Rep. 31 Ch. D. 223.

(11) 58 Law J. Rep. Chanc. 134; Law Rep. 39 Ch. D. 546.

(12) 58 Law J. Rep. Chanc. 491, 813; Law Rep. 42 Ch. D. 160.

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and an executive and finance committee. Neither of these statements as to the council of administration was true. To deal with the three names which are now in question, none of them was a member of the association ; nor had any of them, at the time when the applicant's shares were allotted to him, been duly appointed a member of the council. In fact, such an appointment was impossible, because no one could be so appointed who was not a member of the company. But it is argued that, as they had consented to become members of the council, the statements in the prospectus were justifiable. That cannot excuse the statement if it was untrue. If B. makes an untrue statement concerning A. which induces C. to enter into a contract, it is no answer to C., when he seeks to rescind the contract, that the untrue statement was made with A.'s consent. But the attempt is to shew that the alleged consent made the statement true. I do not agree with the argument. A statement that certain persons are members of the council, which involves their being shareholders also, is a very different thing from a statement that persons who are not shareholders have consented to become members of the council, which is the utmost that ought to have been stated in the prospectus. Moreover, the evidence satisfies me that the signatures of the consents before the company was formed were not intended to be advertised to the general public without an opportunity being given to the persons who had so assented of meeting in council and advising with respect to the formation and launching of the company. I gather that no proper meeting of the council or of those who were willing to act upon the council was ever called, and I quite understand the surprise which some of these gentlemen expressed when they found their names advertised to the public as actual members of the council. With respect to the gentlemen upon whose names Mr. Wainwright particularly relied, the proper statement in the prospectus would have been that before the formation of the company they had provisionally consented to become members of the council. But even this statement ought not to have been

issued to the public without their permission. All that they had really assented to was the private issue of the prospectus before registration of the company to the patrons of the intended company, with their names as proposed members of the council. Mr. Wainwright was not one of such patrons ; there was no authority to issue the prospectus to him. This is not an action of deceit. The question is not whether in publishing this prospectus the promoters were guilty of fraud—the only question is, Was the representation substantially untrue ? If it was, it is no answer to the applicant's claim for rescission of his contract that an untrue statement was made in good faith and without any intention to deceive, or that in making it the promoters were not guilty of any moral delinquency. All that may be admitted. The question remains, Was it so materially untrue as to be calculated to deceive ? In my opinion it was. I have come to the conclusion that the obvious meaning of this prospectus was contrary to the facts, and that the misstatement was material. I have no doubt that the applicant understood that the gentlemen named were members of the association and members of the council of administration. They were not members of the association nor members of the council. At most, as I have said, they had only provisionally consented before the formation of the company to become members of the council. They ought to have had ample opportunity of meeting and considering, and they ought to have become shareholders before they could be duly appointed on the council. Their authority to publish to the world this statement would not have made it true ; but, in my opinion, they did not give such authority. I must order that Mr. Wainwright's contract to take shares be rescinded and the deposits repaid to him. The company must pay the costs of the motion.

Dec. 19.—By special order the question was now argued whether the applicant was entitled to interest on his deposits ; and, if so, at what rate.

Marten, Q.C., and George White, for the

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applicant.—The applicant is entitled to interest on his deposits, having sustained special damage from being deprived of his money—*Palmer's Company Precedents* (4th ed.), p. 527, referring to *Gibb v. The Great Southern Mysore Gold Company* (13). Interest was also allowed in *Kent v. The Freehold Land and Brickmaking Company* (14) and in *The Directors of the Central Railway Company of Venezuela v. Kisch* (15), and the principle is stated in *De Bernales v. Wood* (16) and *Farquhar v. Farley* (17). The interest should be allowed at the usual mercantile rate of five per cent., as in *Capel & Co. v. Sims Ship's Commission Company* (18) and *Kent v. The Freehold Land and Brickmaking Company* (14).

[The cases of *Ross v. The Estates Investment Company* (19) and *Henderson v. Lacon* (20), where the orders for repayment were silent as to interest, were also referred to.]

Henry Terrell, for the association.—The matter is in the discretion of the Court. The Court has the power to allow interest on the deposit by way of special damage, but the applicant has not shewn special damage. At any rate, four per cent. is quite as much as he would have got if he had employed the money.

KAY, J.—I think the applicant is entitled to interest by way of special damage. It has been the course of the Court to give interest in similar cases, and the case is one in which the Court may now give interest if it thinks fit. I quite agree that there ought to be evidence of special damage, but I cannot help inferring special damage from the fact that the applicant has been deprived of his money, which has remained in the coffers of the company. Therefore

(13) Unreported.

(14) 37 Law J. Rep. Chanc. 653; Law Rep. 4 Eq. 588, 601; Law Rep. 3 Chanc. 493.

(15) 36 Law J. Rep. Chanc. 849; Law Rep. 2 E. & I. App. 99; affirming the Lords Justices, 3 De Gex, J. & S. 122; 34 Law J. Rep. Chanc. 545.

(16) 3 Camp. 258.

(17) 7 Taunt. 592.

(18) 57 Law J. Rep. Chanc. 713, 718.

(19) 36 Law J. Rep. Chanc. 45; Law Rep. 3 Eq. 122; affirmed on appeal, 37 Law J. Rep. Chanc. 873; Law Rep. 3 Chanc. 682.

(20) Law Rep. 5 Eq. 249.

I think it is clearly a case for interest. I do not, however, agree that I am bound by a hard and fast rule as to the rate of interest. Interest at five per cent. has been allowed because that was considered to be the mercantile rate of interest. But it is very hard to say now that that is the mercantile rate of interest when from real bona fide security you cannot get more than three per cent. I think, therefore, four per cent. is quite sufficient, and allow interest at that rate on the sums paid by the applicant by way of deposit.

[—

Solicitors—W. A. Colyer, for applicant; Claxton & Hamilton, for the association.

STIRLING, J. }
1890.
Feb. 6. }

In re SMITH.
KEELING v. SMITH.

Will — Construction — Marriage with Consent—Implied Consent.

Bequest in trust for testator's son absolutely from and after his marriage with the consent of two of the trustees for the time being. In reply to a verbal request by the son to the trustees for such consent, one of the trustees said that they had no objection; but they required him to make an application in writing. In reply to his written application, the trustees wrote that they were prevented for the present from acceding to his request, as they understood that the lady had rejected his suit. The marriage took place without any further consent. The trustees deposed that at the time of the son's first application they had no objection to the lady, but that they objected to his marrying at that time:—Held, that the trustees had substantially given their consent, and that the son was entitled.

Theophilus Smith, who died on the 22nd of December, 1882, by his will dated the 11th of December, 1882, appointed the plaintiffs, G. R. Keeling, John Trevarthen, and John Tann the younger, executors and trustees; and he directed the trustees

In re Smith.

to hold his residuary estate as to one moiety, upon trust to pay the income arising therefrom to his son, the defendant, Henry Weston Smith, by equal quarterly instalments, without power of anticipation, during his life or until his marriage; and the will proceeded as follows: "And from and after the marriage of my said son, with the consent of at least two of the trustees for the time being, then I declare that my trustees or trustee shall stand possessed of the said moiety or equal half part in trust for my said son absolutely." In the event of the son dying without having been married, the trustees were to hold such moiety upon the trusts thereafter declared concerning the other moiety.

Mr. H. W. Smith was married on the 2nd of March, 1885, to Mrs. Elizabeth Harris.

A summons was taken out by the trustees to determine the question whether there had been any consent by the trustees within the terms of the residuary bequest.

The evidence on the question of consent consisted of an affidavit of two of the trustees, the third, Mr. Keeling, being unable to give evidence in consequence of ill-health, and an affidavit of Mr. H. W. Smith.

The affidavit of the trustees contained the following statements:—

"9. Speaking positively as to ourselves, and to the best of our knowledge, information, and belief as to the said G. R. Keeling, we say as follows: None of us gave any consent to the said marriage of the defendant Henry Weston Smith, unless a consent thereto is to be inferred from the circumstances hereinafter stated; but we have never refused to give our consent to the marriage. We have not any objection to the marriage, and at the time when the defendant Henry Weston Smith applied to us as hereinafter stated we had no objection to the lady. We were, however, of opinion that it was not at that time desirable that the said defendant should marry, or should be put in possession of the capital of his share under the said testator's will. We were not aware that if the said defendant married without consent the trust for payment of the income might be affected, or that it was requisite that the consent should be given before marriage. We did not consult our solicitor nor have any

legal advice upon the matter until some time after the marriage."

"12. On or about the 20th of December, 1884, the defendant Henry Weston Smith attended one of our periodical meetings as such trustees as aforesaid at the Greyhound Hotel, Croydon, and received a cheque for the income then due to him, and stated that he contemplated marrying the said Elizabeth Harris, and asked for our consent thereto, and we desired him to make his application in writing."

With reference to this meeting, Mr. Smith deposed as follows:—

"The plaintiff G. R. Keeling, on the occasion therein mentioned, said to me after I had asked the trustees for consent to my marriage, 'We see no objection; but we should like you to make your application in writing,' leading me thereby to suppose that the writing was merely a matter of form."

On the 5th of January, 1885, Mr. Smith wrote a formal letter to the trustees asking their consent to his proposed marriage.

On the 13th of January the trustees sent a reply to this letter, which was as follows:—

"Dear Sir,—We have received your letter of the 5th, but are prevented for the present taking any action in the direction you have requested us to do, by the fact that the lady whose name you have mentioned told Mr. Keeling not very long since that she had positively declined your proposal to marry her, &c.—We are, dear sir, yours faithfully, Geo. R. Keeling, Jno. Trevarthen, John Tann, junr."

After some further correspondence the marriage took place on the 2nd of March, 1885, as above stated.

Gregson, for the trustees.

Graham Hastings, Q.C., and *Eastwick*, for the defendant Smith.—The trustees may not have acted in a very businesslike way; but they stated that they had no objection to the marriage, and they never refused their consent. Where no formalities are prescribed, and the trustees have expressed no disapproval, and have by their conduct induced the marriage, they must be taken to have tacitly assented—*Berkley v. Ryder* (1), *Campbell v. Lord*

(1) 2 Ves. sen. 533.

In re Smith.

Netterville (2), *Creagh v. Wilson* (3), *Mesgrett v. Mesgrett* (4), *Daley v. Desbouverie* (5), *Reynish v. Martin* (6), *Burleton v. Humfrey* (7), and *Clarke v. Parker* (8).

Buckley, Q.C., and *F. H. Colt*, for persons entitled under the gift over and as next-of-kin of the testator.—We submit that there never was any active or passive consent by the trustees, and they state their reasons for not consenting. When the matter was first brought before them they considered it undesirable that the marriage should take place at that time; and on the second occasion they did not consent because they believed that the lady was not entertaining the gentleman's proposal. As to the authorities, we admit that the Court has struggled not to deprive people of the benefits given to them; but the cases do not go so far as has been contended. It is essential that there should be a previous approbation of the marriage. In *Berkley v. Ryder* (1) Lord Hardwicke says: "Where no precise form of consent is required in such a trust, the Court will receive evidence of implied consent; but in all the cases cited it is positive evidence of a previous approbation—not of a previous consent to be inferred from acts of subsequent approbation." This is recognised in *Burleton v. Humfrey* (7), where the decision turned upon the construction of the words "consent or approbation." *Campbell v. Lord Netterville* (2) goes no further. *Mesgrett v. Mesgrett* (4) turned upon fraud. In *Daley v. Desbouverie* (5), according to the view of the Court, there was an active present consent. *Burleton v. Humfrey* (7) was questioned in *Clarke v. Parker* (8), where it was held that the Court must see whether the condition has been complied with.

STIRLING, J. [after reading the bequest, and stating the facts as to the marriage, continued:] The question I have to decide is whether the son has married with the con-

sent of at least two of the trustees for the time being, so that he is entitled to the moiety of the testator's estate. It is to be observed that the testator prescribes no particular form or manner in which the consent is to be given. It is enough that there should be the consent of two of the trustees for the time being. I also observe that from an early period the Court has treated the consent in cases of this kind not as a matter of form, but as a matter of substance; and where a consent is given substantially, it has not looked very minutely into the form in which it is given. No case shews that more conclusively than *Daley v. Desbouverie* (5), which was decided so far back as the year 1738, by a very great Judge, Lord Hardwicke. In that case Lady Ann Burke was entitled under a deed of appointment to certain freehold estate in remainder; but in case she should marry without the consent of the trustees of the deed, Sir Edward Desbouverie, John Manley, and Thomas Ward, or the major part of them, she was to forfeit all her right to the property, which in that event was to go over to the person next entitled in remainder. In 1734, a treaty of marriage was proposed between Lady Ann and Mr. Daley, who acquainted Sir Edward Desbouverie with his intentions, and made a proposal for a settlement. A meeting of the trustees was then held, at which they agreed not to consent, unless the proposed settlement was altered in a particular way. Then Mr. Manley, at the request of the other trustees, transmitted the proposal by letter to Mr. Taylor, who was the guardian of the Earl of Clanricarde, Lady Ann's brother. The letter commenced as follows: "We take the liberty to give you some further trouble in relation to Lady Ann, who we find has an inclination to marry the son of Mr. Dennis Daley; the young gentleman has sent the enclosed proposals to Sir Edward Desbouverie. As we are entire strangers to Mr. Daley, we desire you may enquire into his circumstances, and how far he is able to make the settlement proposed by his son; and if his father should desire to treat, it is our opinion my Lord's counsel should be consulted thereupon." Then followed a description of Lady Ann's for-

(2) Cited in *Berkley v. Ryder*.

(3) 2 Vern. 572.

(4) 2 Vern. 580.

(5) 2 Atk. 261.

(6) 3 Atk. 330.

(7) 1 Amb. 256.

(8) 19 Ves. 1.

In re Smith.

tune, and the letter continued as follows: "This is all the influence we have over Lady Ann, and she might with her fortune marry much better; yet, if Mr. Daley's father will make the settlement proposed, we believe the young folks are too far engaged for us to attempt to break off the match, and therefore we shall be obliged to consent to it." That letter was signed by Manley only, but it contained a postscript to the effect that the letter was prepared for all the trustees to sign, but that Sir Edward Desbouverie, going out of town in a hurry, had requested Mr. Manley to forward it. That letter is not in its terms a letter expressing any present consent at all, and is only an expression of a future consent upon condition. Then followed some negotiations which did not come to anything, and the lady and gentleman were married by John Gaynam, the famous Fleet parson—so that it was a secret marriage. The question whether that was a marriage with consent came before Lord Hardwicke, and he deals with the case in this way. He says, "It is manifest both from the letter and disposition of Mr. Manley, one of the trustees, that he agreed to the proposal and gave his consent that it should be a match; and the letter is likewise evidence that the trustees in general approved of the person, behaviour, and quality of Mr. Daley; and it is also evidence of their consent to the marriage, provided Mr. Daley, the father, will make the settlement he proposed. The words in the letter, 'We shall be obliged to consent' mean from the necessity of the thing, and for the happiness of the lady, and ought to be construed a present consent that if the father would make the settlement they would not break the match," and he held that the marriage was substantially with the consent of the trustees. I cannot find that that case has been in any way overruled. On the contrary, in *Clarke v. Parker* (8), Lord Eldon was not at all inclined to depart from it, because in the very last paragraph of his judgment he says: "There are so many cases in which the Court has thought itself at liberty to conceive consent to have been given substantially, though not in terms, that I do not think it right to decide this case with-

out directing enquiries with a view to bring fully before the Court matter which is in some degree before it." The matter there referred to related to the question whether a substantial consent could be inferred from the acts of one of the trustees who had not given any formal consent. That, therefore, is the principle on which I am to deal with the present case. [His Lordship then referred to the evidence set out in the statement, observing with reference to paragraph 9 of the trustees' affidavit that that paragraph shewed that the trustees consented to the marriage provided it took place at the proper time. His Lordship next referred to the letter of the 13th of January, and expressed his opinion that the letter merely amounted to a statement on the part of the trustees that, inasmuch as the lady had no intention of marrying Mr. Smith, it was unnecessary for them to give any formal consent. His Lordship concluded as follows:] It is said that the evidence shews that the trustees never considered the matter, and never really gave their consent. I do not so read it. They did consider the substance of the matter—they considered the question whether the marriage was a suitable one, and they came to the conclusion that it was, but they attached to that the proviso that it should take place at the proper time. That appears to me to bring the case within the principle of *Daley v. Desbouverie* (5). I, therefore, hold that the consent of the trustees has been substantially given, and that the son is entitled absolutely to a moiety of the testator's estate.

Solicitors—Wynne-Barter & Keeble, agents for J. S. Streeter, Croydon, for plaintiffs; Prior, Church & Adams, agents for Drummonds, Robinson & Till, Croydon, for defendant Smith; H. Tyrrell & Sons, agents for J. M. Head, Reigate, for other defendants.

STIRLING, J. } *In re* THE GREAT NORTHERN
1889. } SALT AND CHEMICAL WORKS
Nov. 7. } (LIMITED); *ex parte* KEN-
1890. } NEDY.
Jan. 11, 23. }

*Company—Contributory—Allotment—
Directors—Appointment, Validity of—
Companies Act, 1862 (25 & 26 Vict. c. 89),
Table A, articles 52, 53, 55, 58, 61, 62,
and 66.*

*In a company regulated by Table A, where
the subscribers to the memorandum of as-
sociation all concur in appointing first di-
rectors, it is not necessary that they should
meet for the purpose.*

*Dictum of LORD HATHERLEY in Hallows
v. Fernie (36 Law J. Rep. Chanc. 267,
273; Law Rep. 3 Eq. 520, 536) followed
and approved.*

*D'Arcy v. The Tamar, Kit Hill, and
Callington Railway Company (36 Law J.
Rep. Exch. 37; Law Rep. 2 Exch. 158)
distinguished.*

*All the subscribers to the memorandum
of association of a company regulated by
Table A, signed a document appointing
four persons directors. At the statutory
general meeting of the company, a resolution
was passed continuing in office three of the
four persons so appointed:—Held, that the
original appointment was valid, and that
the resolution of the general meeting was a
sufficient compliance with the requirements
of Table A, and that allotments made by the
continuing directors were binding.*

This was an application by the official liquidator in the winding-up of the Great Northern Salt and Chemical Works, Limited, to settle Mr. Colin Kennedy on the list of contributories in respect of 500 1l. preference shares which were standing in his name in the books of the company. Of these shares 200 were allotted on the 20th of August, 1888, and 300 on the 29th of September, 1888.

Mr. Kennedy admitted that he applied for the shares, and that he received notice of allotment in each case; but he disputed the validity of the allotments, on the ground that the persons who purported to allot the shares were not duly appointed directors of the company.

The company was incorporated on the

3rd of April, 1888, under Table A, with a capital of 150,000l., of which 50,000l. were 1l. 8 per cent. preference shares.

The material provisions of Table A are as follows:—

52. The number of the directors and the names of the first directors shall be determined by the subscribers of the memorandum of association.

53. Until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors.

55. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing Act or by these articles required to be exercised by the company in general meeting, subject, nevertheless, to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

58. At the first ordinary meeting after the registration of the company the whole of the directors shall retire from office, and at the first ordinary meeting in the subsequent year one-third of the directors for the time being, or if their number is not a multiple of three, then the number nearest to one third, shall retire from office.

61. The company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

62. If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place; and if at such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the ordinary meet-

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ing in the next year, and so on from time to time until their places are filled up.

66. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think fit, and determine the *quorum* necessary for the transaction of business.

The memorandum of association was signed by seven persons, named John Woolnaugh Jillings, Walter Molyneux, George Ruddock, Henry Parry, William Jenkinson, Thomas Fenwick, and Albert O'Dell. The company was formed for the purpose of purchasing from Thomas Fenwick a salt mine near Middlesboro', Yorkshire.

On the 12th of May, 1888, a meeting, purporting to be a meeting of the subscribers to the memorandum of association, was held at which two only of the subscribers were present, and they affected to appoint certain persons directors. In the record of the meeting it was stated that Mr. Fenwick would join the board after allotment. At a board meeting held on the 12th of July, 1888, resolutions were passed in effect suspending all further operations of the company, and the directors expressed their intention of resigning. It did not appear that the directors ever formally resigned; but on the 16th of July, 1888, a second meeting of subscribers was held, at which three of them were present, and they purported to appoint four persons directors.

It was conceded that the appointments of the 12th of May and the 16th of July were invalid, because in neither case did a majority of the subscribers attend the meeting.

On the 19th of July, 1888, Mr. Fenwick went to consult Mr. Greenip, the solicitor to the company, about the affairs of the company, and Mr. Greenip then prepared a draft document, which he sent to be engrossed. The document was as follows:—

"The Great Northern Salt and Chemical Works (Limited).—We, the undersigned, being the subscribers to the memorandum of association of the above company, do hereby nominate and appoint D. Smith, Esq., manufacturer, 39 Emperor's Gate, South Kensington, S.W., Henry Parry, Esq., East India merchant, Leadenhall Street, E.C., J. W. Jillings, Esq., 36 St. James's Place, Pall Mall, S.W., and T. Fen-

wick, Esq., director of the Extended Electro Metal Company (Limited), 9 Mincing Lane, E.C., to be the first directors of the said company.

According to the evidence of Mr. Greenip he handed the engrossment to Mr. Fenwick on the 27th of July, 1888, and he received it back from Mr. Fenwick on the 30th of July, signed by all the subscribers.

The genuineness of the signatures was disputed, but the Court held upon the evidence that the document was in fact signed by the subscribers of the memorandum of association as it purported to be.

On the 30th of July, 1888, a board meeting was held. The persons present at the meeting were thus described in the minute: "Directors: Messrs. D. Smith, Henry Parry, and J. W. Jillings; in attendance Mr. Fenwick, the vendor, and Mr. Greenip, the company's solicitor"; and it was there stated that the directors had been duly appointed by the subscribers to the memorandum of association. At a board meeting held on the 2nd of August, 1888, Mr. Fenwick was again described as the vendor, and not as a director. It was then resolved "that, until otherwise arranged, the business of the company may be conducted by a quorum of two directors at any board meeting."

On the 20th of August, 1888, two meetings were held—a meeting of the members of the company, being the first statutory general meeting, and a meeting of the directors. At the general meeting it was resolved "that the appointment of other or any further directors be in the option of the directors appointed by the subscribers to the memorandum of association, which directors are hereby authorised and requested to continue to act for the present—namely, D. Smith, H. Parry, and J. W. Jillings." At the board meeting, which was stated to be held at the same hour, Mr. D. Smith was in the chair, Mr. Parry was present as a director, and in attendance was Mr. Fenwick, with Mr. Jenkinson as secretary *pro tem*. It was then proposed by the chairman, seconded by Mr. Parry, and carried: "That the 2,046 shares as per detailed list below be, and are hereby, allotted to the various applicants." In that list there appeared the

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name of Mr. Kennedy as an applicant for 200 shares. Then at the same meeting a resolution was passed appointing Mr. Thomas Fenwick managing director of the company. It was then resolved "that Mr. D. Smith (chairman) and Mr. Fenwick be, and are hereby, authorised to allot all shares as applied for." With respect to the 300 shares alleged to be allotted on the 29th of September, there was no evidence of the circumstances under which the allotment was made, as the minutes of the company had ceased to be kept after the 20th of August. It appeared, however, from the allotment book that they were allotted to Mr. Kennedy on the 29th of September, 1888. The company was ordered to be wound up on the 24th of November, 1888.

Graham Hastings, Q.C., and Bramwell Davis, for the official liquidator.—The question whether there has been any valid allotment turns upon the question whether there were any properly appointed directors. We submit that the document of the 27th of July, 1888, operated as a valid appointment of first directors under article 52, and that it is not necessary that the subscribers should meet for the purpose of appointing directors, if they all concur—*Hallows v. Fernie* (1).

It has been held, even in the case of directors, that they may concur in an act within their powers, without meeting—*In re Bonelli's Electric Telegraph Company (Limited)*; *Collie's Claim* (2). Then it may be said that at the general meeting the directors ought to have gone out of office; but we submit that they must be presumed to have been re-elected, or, if not, that they continued in office under article 62.

Oswald, for Mr. Kennedy.—I submit that the subscribers are directors, under article 53, until the appointment of first directors, and that they must meet in order to appoint directors—*D'Arcy v. The Tamar, Kit Hill, and Callington Railway Company* (3). In *Hallows v. Fernie*

(1) the point was not argued, and not decided. In *Collie's Claim* (2) the contest was between the company and an outside person, and that has no bearing on the present case. If persons act as directors, as between the company and outside persons the acts of such *de facto* directors will bind the company; but in matters of internal administration acts done by persons purporting to act as directors are not binding on the shareholders—*Buckley on Companies Acts*, p. 179 (note to section 67 of the Companies Act, 1862). Assuming that there was originally a valid appointment, the directors were bound to vacate their offices at the first general meeting, and then the shareholders ought to have appointed new directors. I submit, therefore, that there were no properly appointed directors after that meeting. At all events, the proceedings of the directors were so irregular that they ought not to be binding on the company—*In re The Homer District Consolidated Mines; ex parte Smith* (4). Further, with regard to the 300 shares, there is no evidence of allotment.

Hastings, Q.C., replied.

Cur. adv. vult.

STIRLING, J. [having dealt with the evidence relating to the 200 shares, and having come to the conclusion that the four persons mentioned in the document of the 27th of July, 1888, were thereby appointed directors subject to the question of law as to the validity of the appointment, but that Mr. Fenwick was only to take his seat upon allotment, continued as follows:—] A question is raised as to the validity of the document of the 27th of July in law as a nomination of first directors; and it is said that it is invalid, on the ground that, for the purposes of making a valid election, the subscribers to the memorandum of association ought to meet. That turns upon the provisions of table A. [His Lordship read articles 52, 53, 55, and 66.] Now, admitting to the full that the directors in order to transact business must meet, and that the subscribers to the memorandum of association if they

(1) 36 Law J. Rep. Chanc. 267, 273; Law Rep. 3 Eq. 520, 536.

(2) 40 Law J. Rep. Chanc. 567; Law Rep. 13 Eq. 246, 258.

(3) 36 Law J. Rep. Exch. 37; Law Rep. 2 Exch. 158.

(4) 58 Law J. Rep. Chanc. 134; Law Rep. 39 Ch. D. 546.

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choose to act as directors are under a like obligation, still it does seem to me that it is not provided by table A that if the subscribers to the memorandum choose not to act as directors, but to nominate others to that office, they are under any obligation to meet for the purpose. What is required of them is that they shall determine the number of directors, and it seems to me that if they do in point of fact shew their determination in any way on that subject, that ought to be treated as valid. This appears to have been the opinion of Lord Hatherley, when Vice-Chancellor, in *Hallows v. Fernie* (1); he says: "I very much doubt whether it is necessary that these persons should meet together. If any one of the subscribers to the contract"—that is, the memorandum of association—"raises a question, he may be entitled to say, 'I will not have this decided without a meeting of us all'; but if they all concur (as in this case) it seems to me hypercritical to say the appointment was irregular." That seems to me, if I may say so, excellent sense, and, unless there is some authority which compels me to another conclusion, I should be ready to follow it. Now, the authority which is relied on on the other side is the well-known case of *D'Arcy v. The Tamar, Kit Hill, and Callington Railway Company* (3). That was a case in which there being more than three directors, three constituted a quorum, and the secretary, in order to affix the seal of the company to a document which was to bind the company, got three of the directors to attest the affixing of the seal, they not having met together, but being casually picked up one after the other. It was held that that would not do; but, to my mind, that case is clearly distinguishable, on two grounds. First of all, there only a quorum acted, and that is open to very serious observation. It was pointed out by Lord Bramwell, who took part in the decision, that if a quorum of three, not meeting together and not being regularly summoned, were to act, another quorum of three might meet in a different place and come to exactly an opposite conclusion, and therefore the government of the company by means of quorums so picked up would be impossible. It is also open to this serious

observation, that the minority have no means of stating whether they assent or dissent to the act proposed, and have no means of bringing their views before their colleagues if they dissent. These are very serious objections to the validity of the procedure where only a quorum assent to the act; but where the whole body of directors act, or assent to the act, even though they do not meet, the validity of the act is not open to the same objections. Besides that, the reasoning of the various members of the Court is based upon this, that they found from the Companies Clauses Act, 1845, an obligation upon the directors acting as directors to meet and act jointly as a board. I find here in table A no such obligation as regards the subscribers to the memorandum of association.

Then another objection is taken to the validity of the appointment. It is prescribed by article 58 of table A, that at the first ordinary meeting after the registration of the company the whole of the directors shall retire from office; and it is said, therefore, that on the 20th of August at the general meeting, which for this purpose I assume to have preceded the board meeting of the same date, they did retire. Well, what is the result of that? Article 61 provides that the company at the general meeting at which any directors retire, in manner aforesaid, shall fill up the vacated offices by electing a like number of persons. What took place? I have read the resolution, and that seems to me to be a resolution which at all events is valid to this extent, that it continued in office the then present directors. It may be that part of that resolution was invalid, and that the directors could not be validly entrusted by a general meeting with the appointment of other or further directors in cases to which table A did not apply; but it does seem to me that that is a sufficient expression of the will of the meeting that the then present directors who are named in that resolution should continue in office. Besides that, there is this further observation to make. By article 62 it is provided that if at any meeting at which the election of directors ought to take place, the places of the vacating directors are not filled up, the meeting

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shall stand adjourned till the same day in the next week at the same time and place; and if at such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up.

Now it is quite true that an adjourned meeting did not take place here, supposing that the resolution of the 20th of August was ineffective. But it seems to me that that portion of article 62 might very fairly be read as being a clause of that nature which is commonly described as directory only, and that the meaning of it is, that if for any reason either the first meeting or the adjourned meeting at which the election of directors ought to take place does not proceed validly to fill up the place of the vacating directors, then they are to continue in office. I think, therefore, that three directors were validly in office on the 20th of August. Those three made the allotment of the 200 shares, and it appears to me, therefore, that that allotment is binding.

Then the question with regard to the 300 shares is this. Mr. Kennedy admits that he applied for them and received an allotment letter. That is confirmed by the allotment book of the company, which is evidence against him, I having held that he is a contributory to the extent of 200 shares, under section 154 of the Companies Act, and that book shews that the allotment was made on the 29th of September. That is *prima facie* evidence. It is true that there is no record of any board or committee meeting having been held on that day; but the minutes ceased to be kept after the 20th of August. The admission of Mr. Kennedy, coupled with the entry in the book, constitute *prima facie* evidence of the allotment, although there is no record of a board or committee meeting; and it has been held in *In re The North Hallenbeagle Company; Knight's Case* (5), among other cases, that the entry of a resolution in a minute is not essential to the validity of the resolution which is proved *alunde*, even in a case which re-

lates to forfeiture, and which, as is well known, must be proved in the strictest manner. It seems to me that in that state of things the burden of proving that a valid allotment was not made falls on Mr. Kennedy. It appears to me that he has not fulfilled that obligation. All that he has done is to point to the resolution under which Messrs. Smith & Fenwick were authorised to allot the shares as applied for. There is no evidence that that resolution was acted on, and there being at the time, at all events, three validly elected directors who were competent to make the allotment of 300 shares in September, I think that the onus which is thrown on the respondent has not been discharged by him. I hold, therefore, that he must be settled on the list as a contributory in respect of the 500 shares.

Solicitors—Trinders & Co., for liquidator; W. H. Smith & Son, for respondent.

KEKEWICH, J. { VAN GELDER, APSIMON AND
1890. { COMPANY v. THE TOWER-
Jan. 16, 17. { BY BRIDGE FLOUR SOCIETY
(LIMITED).

Patent—Infringement—Injunction and Damages—Parties to Action—Mortgage of Patent—Proprietor—Register—Patents &c. Act, 1883, sections 23 and 87—Patents &c. Act, 1888, section 21.

The holder of a mortgage of a patent, whose name is entered in the register of patents, is a proprietor of the patent, and an action for an injunction and damages in respect of alleged infringement of the patent cannot be maintained by the mortgagor without the mortgagee as a co-plaintiff.

The plaintiff company claimed an injunction and damages in respect of the alleged infringement of letters patent, 1878, No. 2470, for "improvements in apparatus for separating substances by means of sieves, and in the mode of operating parts of the same," granted to P. van Gelder, who had assigned the

(5) 86 Law J. Rep. Chanc. 317; Law Rep. 3 Chanc. 821.

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patent to the plaintiff company. The assignment to them was registered on the 22nd of February, 1886, and on the same day a mortgage of the patent by the plaintiff company to the Halifax Joint-Stock Banking Company was also registered. The mortgage was in the form of an absolute assignment subject to redemption, with a proviso that the mortgagor should not be at liberty to grant licences.

Four other mortgages were also subsequently registered, each of them being by way of assignment. It was objected, as a defence to the present action, that the plaintiffs were not entitled alone to maintain the action, as they were not the registered proprietors.

Aston, Q.C. (*Bousfield* and *Neill* with him), opened the case.

Sir R. Webster (*The Attorney-General*) and *Warrington, Q.C.* (*Moulton, Q.C.*, *Carpmael*, and *Roskill* with them), for the defendants.—The plaintiffs are not the persons entered on the register as the proprietors of the patent, and have not power to deal with it—*Patents &c. Act*, 1883, section 87 (1), *Patents &c. Act*, 1888,

(1) The sections under discussion are as follows:—

Section 23: “(1) There shall be kept at the Patent Office a book called the Register of Patents, wherein shall be entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licences under patents, and of amendments, extensions, and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed.

“(2) The Register of Patents shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein.

“(3) Copies of deeds, licences, and any other documents affecting the proprietorship in any letters patent or in any licence thereunder, must be supplied to the comptroller in the prescribed manner for filing in the Patent Office.”

Section 87: “Where a person becomes entitled by assignment, transmission, or other operation of law to a patent, or to the copyright in a registered design, or to a registered trade mark, the comptroller shall, on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the patent, copyright in the design, or trade mark, in the register of patents, designs, or trade marks, as the case may be. The person for the time being

section 21. The mortgagees are assignees, and, being registered, are to be regarded as proprietors—*Patents &c. Act*, 1883, section 23 (1). The mortgagees would not be bound by a judgment in an action to which they are not parties. The mortgagors alone are not entitled to recover damages.

Aston, Q.C., and *Bousfield*, in reply.—The plaintiffs are mortgagors in possession, and have control over the property and an interest to maintain the patent, and can obtain the relief asked. They are protecting their property from trespass. “The registered proprietor” means the person registered as the substantial owner; in this case the mortgagors are the substantial owners.

If necessary, the plaintiffs should be allowed an opportunity of amending.

KEKEWICH, J.—The question falling for decision is one of considerable importance, though I confess, to my mind, it is one free from all reasonable doubt. Before expressing my opinion upon it, I wish to make two preliminary observations closely connected together. In the first place, I desire to take the opportunity of repeating my regret that there is not some better way, and better means, than there is at the present under our practice, of trying these preliminary questions before trial, before all the expense has been incurred, at the cost of great labour and trouble in bringing the case to trial; and I am the more bold to express that from the Bench, because I have heard other Judges do the same, particularly Lord Justice Lush, who, as I know some of us at the time hoped, intended to give his

entered in the register of patents, designs, or trade marks, as proprietor of a patent, copyright in a design, or trade mark, as the case may be, shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licences, or to otherwise deal with the same, and give effectual receipts for any consideration for such assignment, licence, or dealing. Provided that any equities in respect of such patent, design, or trade mark may be enforced in like manner as in respect of any other personal property.”

Patents &c. Act, 1888, section 21: “In section 87 of the principal Act, after the words ‘subject to’ shall be added the words ‘the provisions of this Act and to.’”

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personal attention to making some rules that would enable such questions to be tried. But, secondly, I think it right to add that under the system as at present existing, there would have been not the slightest difficulty in trying the question long before any expense had been incurred, that is to say, immediately after the defence had been delivered. This first objection which I am now considering is *in limine*. It is the objection which the defendants put forward as the first to be tried, and which they say prevents the necessity of any other question being tried. It was not for them to bring it forward, though they might have done so. I think the plaintiffs might at once have brought forward, by summons or application to the Court, this question, and asked the Court to decide it, irrespective of any other question in the action, and, if so, we should have been saved all this time to-day. Without wishing to unduly blame any one, I cannot forbear from adding that I think it would have been more satisfactory if I had been told yesterday afternoon: "Before we go into any other questions; before we consider the details of this patent, the machinery, and so forth, there is a question of law which, if it is decided against the plaintiffs, will make all further consideration unnecessary." However, that course has not been taken, and great costs have been consequently incurred, which must, more or less, according to my view of the law, fall on the plaintiffs, who, it is suggested, are not so particularly well able to bear them. Now, as regards the real question, it is simply this. The plaintiffs sue as patentees—that is to say, they sue as assignees of the patent, which was not granted to them originally—or, if you will, as proprietors of the patent. That is their title, and they seek for the ordinary relief in a patent case. To that the defendants say, in the plainest possible language, "You are not the proprietors"—and that is the question to be tried. What is the result, if they are not the proprietors, is a subordinate question. The first question is, Are they proprietors? There is produced to me a mortgage, properly executed and properly registered. I say a mortgage, because, though I do not forget that there

are several others behind it, it is convenient for the present purpose to bear in mind only the mortgage of the 31st of December, 1885, registered on the 22nd of February, 1886, to the Halifax Joint-Stock Banking Company. That is a mortgage in a form with which all conveyancers are familiar—a mortgage to a banking company to secure an account current, modified according to the later form of the Conveyancing Act, by making the patentees, the plaintiffs, assign as beneficial owners so as to abbreviate the parchment. There is a covenant to pay, and then there is an absolute assignment of the patent, subject only to redemption. The redemption is on payment of the amount secured by the covenant, that which the plaintiffs from time to time owe to their bankers; but in the meantime, and until redeemed, the Halifax Joint-Stock Banking Company (Limited) are the owners by assignment of the patent. That is no new law. A patent has always been assignable, and has been one of those things which, not being land, or an interest in land, has always, by force of the patent law, been assignable at law as well as in equity. The legal estate, as conveyancers have it, passes by the deed, which of course has to be properly registered. The Attorney-General says that there is some little inaccuracy in speaking of a mortgagor of a patent in possession. That is so—there is a little inaccuracy; but I cannot help thinking it is a convenient phrase nevertheless, because we all know what a mortgagor in possession is, and a mortgagor, I think, may be in possession of a patent for some purposes. What it exactly means is, I admit, not so easy to define, but there it is on the register. It is registered in the manner which the rules provide. The deed professes to pass, and does pass, what I call the legal estate in the patent for want of a better phrase; and it seems to me that though as between the parties themselves there are rights which interfere with the absolute ownership, there is the power of redemption, there is a right to an account and so on, still, the proprietor is the mortgagee who has had the patent assigned to him. Then does the register in any way inter-

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fere with that? The bank have been registered as mortgagees. It may be convenient so to register them, and there cannot in my view be any injury done by so registering them, because the deed is necessarily referred to. The deed is on the file, which must, I think, be taken to be part of the register; and any person having notice of the assignment—that is to say, of the mortgage—from the register, has notice also, of course, and is told of the deed, and it is his fault if he does not ascertain the exact nature of the deed. But it deserves great consideration at the hands of those whose duty it is to look after such things, whether any assignee ought not to be registered as mortgagee simply, and not as an assignee by way of mortgage. With that, however, I have nothing now to do.

Now is there anything in the Act which in the slightest degree interferes with it? I have put it in that way, because it seems to me that if I find an assignment by the proprietor to a person reserving some rights still in the patent, there being an absolute assignment, and that assignment registered, I am bound to regard the person to whom the assignment is made as the owner of the legal estate, unless the Act says something to the contrary. Mr. Aston endeavoured to prove that there is something in the Act to the contrary. To my mind, if the Act be looked into, these sections having been canvassed both by him and by the Attorney-General, they all point the other way. The 85th section must not be forgotten, which excludes trusts. The 87th section, which only speaks of “assignment, transmission, or other operation of law,” does not speak of any such rights as of a mortgagor subject to redemption. They all point, to my mind, to the ordinary rule of law holding good, and that an assignment is an assignment, although there may be an equity of redemption behind. Therefore, as regards that, it seems to me that the plaintiffs cannot pretend to be proprietors of the patent which they have assigned to the Halifax Joint-Stock Banking Company. “But then,” says Mr. Aston, “notwithstanding that, I am entitled to sue. I am a mortgagor in possession, and I am entitled to protect my rights.” That, no

doubt, is the reason why the inaccurate expression “mortgagor in possession” is objectionable. What rights has he? I do not say he has none, and I am not called upon to decide the question whether under this particular mortgage he can grant licences for his own benefit; nor how far the mortgagee can control a power of granting licences without, so to speak, taking possession—an inaccurate expression again—of the patent. But the mortgagee has full power under this deed to grant licences. He has full power under this deed to sell—fettered, of course, by the provision between the two parties that those powers shall not be exercised unless and until certain defaults have occurred, and until certain notices have been given, but not so as to prevent a good title being made to the purchaser or licensee, who is not bound to enquire whether the provided events have happened or the provided notices have been given. It follows that the mortgagors, the plaintiffs, are really in the position, so far as they have any estate at all, of strictly fettered owners—persons who are not able to act for themselves, and they are not in possession of—to use a doubtful phrase again—the estate, so as to assert any rights of ownership over it. They may have some rights, and they may have a right to sue for some purposes, and Mr. Aston says, “Surely I am entitled to sue for an injunction to prevent trespass; surely I am entitled to sue for damages, and to have damages assessed, though they may not be payable to me.” As regards the assessment of damages, and equally as regards much else, how can the damages be assessed when the damage is not to the plaintiffs, but to some other persons whose patent is infringed? An injunction is a wide term. Whether they can sue for an injunction or not, I am not called upon to determine. But to talk of damages and an injunction, as if that were the object of the action, is to put the subordinate relief first, and to forget the substance? What is the substance? The substance is that the plaintiffs say that they are entitled to the benefit of certain letters patent. They ask the Court in substance to declare that they are entitled to those letters patent. The Court would be stultifying

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[IN THE COURT OF APPEAL.]

COTTON, L.J.

LINDLEY, L.J.

LOPES, L.J.

1890.

Jan. 27.

In re MUSTHER.
GROVES v. MUSTHER.

itself to make any declaration of the kind, either in form or in substance. They ask the Court to decide that the letters patent are valid. The Court might decide that, according to the plaintiffs' contention, in the presence of the plaintiffs and the defendants, and have to try it over again the very next day between the plaintiffs and one of their mortgagees, who would not be bound by any such decision. The question of validity, of course, involves novelty, and, therefore, all these questions of anticipation. Some one of these mortgagees may have satisfied himself that he has an excellent title, because he is able to give an answer to some claim of anticipation which may not be known to counsel, or the solicitors who instruct them. Any of the mortgagees would be entitled to say the next day, "True, the Court has held this patent to be invalid, because it was anticipated by such and such a patent or such and such a publication, but I have got a complete answer to that, and you must try the question over again with me." To ask the Court, in the presence of the mortgagors, to decide all these questions, without any power of binding the mortgagees, would be contrary to the whole course of judicial practice, and, to my mind, would be a monstrous absurdity. I think that it is impossible for the plaintiffs to maintain this action, standing alone, and that the first objection is a fatal one.

On a subsequent day the case was again in the paper, when the plaintiffs' counsel stated that the mortgagees refused to join as co-plaintiffs, and thereupon judgment was given for the defendants, with costs on the higher scale, but no certificate was granted in respect of their particulars of objections.

Solicitors—Walker & Whitfield, agents for Humphreys & Hirst, Halifax, for plaintiffs; Wilson, Bristows & Carpmael, for defendants.

Will — Construction — Substitution — Legatee dead at Date of Will.

Testatrix directed her residuary estate to be equally divided between her nephews and nieces not before named, "but should any of them be dead before me I then direct that his or her share shall be equally divided between his or her children":—Held, that the children of nephews and nieces dead at the date of the will were not entitled to take under the bequest.

Christopherson v. Naylor (1 Mer. 320) *approved and followed.*

This was an appeal from a decision of Kay, J., in chambers.

Jane Dale Musther, spinster, by her will dated the 12th of June, 1884, after appointing executors, made various pecuniary bequests in favour of several of her nephews and nieces by name, and the will then proceeded as follows: "I direct that after the payment of my funeral and other necessary expenses, all the rest and residue of my property of whatever description be equally divided between my other nephews and nieces, sons and daughters of my late brothers George, John, William, and Christopher, not before named, but should any of them be dead before me I then direct that his or her share shall be equally divided between his or her children."

The testatrix died on the 24th of December, 1888, leaving several nephews and nieces her surviving.

One of her nieces and two of her nephews who would have been entitled to participate in the residuary bequest, if living, died before the execution of the will, leaving children living at the death of the testatrix.

A summons was taken out by the executors to determine whether such children were entitled to share in the residue. Kay, J., held that the case was undistin-

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guishable from *Christopherson v. Naylor* (1), and that the children of parents dead at the date of the will were not entitled. The children appealed.

Marcy, for the appellants.—*Christopherson v. Naylor* (1) was not followed in *In re Smith's Trusts* (2). I submit, apart from the authorities, that the more reasonable construction is to let in the issue of parents dead at the date of the will. In *re Sibley's Trusts* (3) shows that a testator might have an intention in favour of a class of persons some of whom were dead at the date of the will. If the language had been, "the share which the parent would have taken," it could not be disputed that the children of parents dead at the date of the will would take, and there is no substance in the distinction—*Loring v. Thomas* (4), *Phillips v. Phillips* (5), *In re Potter's Trust* (6), and *Adams v. Adams* (7). In the last two cases Malins, V.C., expressed his dissent from *Christopherson v. Naylor* (1). Very slight circumstances have been held sufficient to exclude the rule in that case—*Jarvis v. Pond* (8) and *Gowling v. Thompson* (9).

Christopherson v. Naylor (1) is distinguishable on two grounds—first, because there the gift was to every child, &c., "which shall be living at the time of my death"; secondly, because the word used in the gift over was "legacy," not share, and it has been considered impossible that a testator could have intended to give a legacy to a dead person.

In *In re Chinery; Chinery v. Hill* (10), the last case in which *Christopherson v. Naylor* (1) was followed, the interests were life interests only, and in that case Stirling, J., expressed his own preference for the view of the late Master of the Rolls in *In re Smith's Trusts* (2).

(1) 1 Mer. 320.

(2) 46 Law J. Rep. Chanc. 388n; Law Rep. 5 Ch. D. 497n.

(3) 46 Law J. Rep. Chanc. 387; Law Rep. 5 Ch. D. 494.

(4) 1 Dr. & S. 497; 30 Law J. Rep. Chanc. 789.

(5) 10 Jur. N.S. 1173.

(6) 39 Law J. Rep. Chanc. 102; Law Rep. 8 Eq. 52.

(7) Law Rep. 14 Eq. 246.

(8) 9 Sim. 549; 8 Law J. Rep. Chanc. 167.

(9) Law Rep. 11 Eq. 366n.

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H. S. Theobald, for the executors and for parties interested under the residuary bequest, was not called upon.

COTTON, L.J.—Mr. Justice Kay has decided this question on the ground that it was covered by *Christopherson v. Naylor* (1). I think it is, but I am not inclined to go into all the cases which have followed that decision. It is sought to distinguish *Christopherson v. Naylor* (1) from the present case by some slight differences, but I do not think that it can be fairly distinguished. It is enough for me to say that *Christopherson v. Naylor* (1) has almost always been referred to with respect. It is true that it was not followed in *In re Smith's Trusts* (2); but in the most recent case on the subject, *In re Chinery; Chinery v. Hill* (10), Mr. Justice Stirling felt unable to treat *In re Smith's Trusts* (2) as a binding authority, because it was not in accordance with *Christopherson v. Naylor* (1). But let us look at the words of the will. [His Lordship read the clauses set out in the statement, and continued:] As I read that bequest, the gift is one to nephews and nieces of the testatrix who are capable of taking—that is, to nephews and nieces who were living at the date of the will—and those nephews and nieces were only intended to take provided they survived the testatrix, for the gift over provides for the event of any of them dying after the date of the will and before the death of the testatrix. In my opinion, that is the *prima facie* and natural meaning of those words; and no intention can be attributed to the testatrix of providing for what had happened before the date of the will. I think that Mr. Justice Kay was right, and that this case is covered not only by the decision in *Christopherson v. Naylor* (1), but also by the reasoning there given.

LINDLEY, L.J.—I am of the same opinion. I do not think we gain much assistance in construing a will from looking at the cases. They rather confuse than assist me; although where cases lay down some general rule they may be useful. I have long been familiar with *Christopherson*.

(10) 57 Law J. Rep. Chanc. 804; Law Rep. 39 Ch. D. 614.

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son v. Naylor (1). That decision has often been criticised, and occasionally disapproved, and in particular by Vice-Chancellor Malins in the case that has been cited of *Adams v. Adams* (7). But I cannot agree with him in his criticism. Personally, I approve that decision, and I have always understood it to be good law. But, leaving *Christopherson v. Naylor* (1) alone, let us examine and deal with the language of this will. The testatrix directs that the residue of her property is to be equally divided between her other nephews and nieces, the sons and daughters of certain deceased brothers. Now, in making that bequest, is the testatrix leaving her property to somebody dead before the will is made? I cannot conceive a woman intending to leave her money to a person who is dead before the date of the will. *Prima facie*, when a man leaves his money to people, he means live people, not dead people. That, to my mind, is the key to the problem. Taking that as our starting-point, how does the will go on? "But should any of them be dead before me." Now who are the persons referred to as "them"? Surely not the people deceased at the date of her will. She must have been referring to the people living at the date of her will, to whom she had already given her money. I think the appeal fails.

LOPES, L.J.—I am content to look at the words of the will, and to read it as I find it. The material words are these: "but should any of them be dead before me, then I direct, &c." Whom does the testatrix mean by "them"? Surely she means those nephews and nieces who are then living, and she intends to provide for such of them as shall die in the interval which shall elapse between the date at which she is speaking and her death. There is no capacity in nephews and nieces dead at the date of the will to be members of the class to whom she gave shares. The appeal fails.

Solicitors—J. R. Eldridge, agent for C. J. Archer, Stockton-on-Tees, for all parties.

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

KAY, J.
1889.
Nov. 27.
COTTON, L.J.
LINDLEY, L.J.
LOPES, L.J.
1890.
Feb. 15, 17.

In re RHODES.
RHODES v. RHODES.

Lunatic not so found—Maintenance—Necessaries—Implied Contract.

The law implies an obligation on behalf of a lunatic, though not so found by inquiry, to pay for necessities supplied.

Dictum in In re Weaver (Law Rep. 21 Ch. D. 615, 619) *dissented from.*

Per THE COURT OF APPEAL:—Where a lunatic is maintained at a cost and in a manner suitable to his condition in life, the fact that he might have been maintained at a less cost is not an answer to a claim for necessities.

Claim for necessities against the estate of a deceased lunatic not so found disallowed on the evidence.

Decision of KAY, J., affirmed.

This was an appeal from a decision of Kay, J. In 1885 an action was commenced for the administration of the estate of Charlotte Rhodes, a person of unsound mind not so found by inquiry, by some of the next-of-kin of the deceased, against Arthur Charles Rhodes, who was the administrator of her estate. The object of the action was to determine the question whether the defendant was entitled to retain out of the estate sums amounting to 1,110*l.*, for expenses incurred in the maintenance of the lunatic. The circumstances under which this expenditure was incurred were as follows: The lunatic was kept in a private asylum from 1855 until her death in 1881, at an annual cost of 140*l.* The annual income of the lunatic amounted on an average to 86*l.* The deficiency was supplied first by her brother Charles Henry Rhodes, and after his death, which occurred in 1875, by the defendant Arthur Charles Rhodes (who was a son of Charles Henry Rhodes), and his brother and sisters.

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The claim of the defendant was made partly as executor to his father, and partly on behalf of himself and his brother and sisters. The defendant and his brother and sisters were some of the next-of-kin of the lunatic. The lunatic was a person of good social position, and there was evidence to shew that her maintenance at the asylum was suitable to her station in life. The chief clerk disallowed the claim. He, however, found that the payments made by the defendant and his sisters were not made with the intention of making a gift to the lunatic. With regard to the payments made by the defendant's father and brother, he found that the evidence was insufficient to shew with what intention they were made. He also found that there were no debts due from the lunatic's estate. A summons was then taken out by the defendant to vary the certificate by allowing the claim.

Renshaw, Q.C., and *Phillipotts*, for the summons.—The extra payments were for necessities, and the Court will imply a contract on the part of a lunatic, whether so found or not, to pay for necessities—*Howard v. Digby* (1), *In re Gibson* (2), *In re Marman's Trusts* (3), *In re Weaver* (4), *In re Webster*; *The Guardians of the Derby Union v. Sharratt* (5), *Wentworth v. Tubb* (6), *Baxter v. Lord Portsmouth* (7), *Nelson v. Duncombe* (8), *Manby v. Scott* (9), and *Williams v. Wentworth* (10).

[*KAY, J.*, referred to *Chester v. Rolfe* (11) and *Vane v. Vane* (12).]

The Statute of Limitations does not bar a claim by an administrator—*Thompson v. Cooper* (13).

Millar, Q.C., and *Curtis Price*, for the

plaintiffs, the respondents, were not called upon.

KAY, J.—In my opinion the chief clerk's certificate is perfectly right. There is a question of considerable interest and importance, whether any person who supplies necessities for a lunatic can recover the costs of those necessities at law or in equity as a debt against the lunatic, on the ground of there being an implied contract on the part of the lunatic that there should be such repayment. Now, I confess for myself that I do not feel the difficulty. An infant cannot enter into any binding contract at all, and yet the law implies a contract on the part of an infant where necessities are supplied. It is, therefore, not an answer to say that a lunatic cannot himself contract. But this question has been considerably argued and discussed, and there is a considerable body of authority upon it which is of great weight. Take, first of all, the case of *Howard v. Digby* (1), in the House of Lords. The lunatic had been so found by inquisition, but the claim made was for necessities supplied before the lunatic was so found. Lord Brougham in that case said: "Upon what ground are all these allowances made? Not from kindness, not from charity, not for the convenience of the parties, but because they are debts; because in the eye of that Court, be it a Court of law or of equity, or the Chancellor sitting in lunacy, they are valid debts incurred by the insane person, and are discharged by the justice of the Court." The point came before Lord Justice Knight-Bruce, when Vice-Chancellor, in *Wentworth v. Tubb* (6), where a bill was filed by the plaintiff, as administrator and creditor of the lunatic, against the heir-at-law of the lunatic, who was also a lunatic, and his committee, praying payment out of a certain real estate which had descended from the deceased to the defendant, the heir-at-law, there being no personal assets. This claim was founded on a report made by the Master in the lunacy of the deceased, by which he found that the deceased had been maintained and provided with necessities at the sole expense of the plaintiff from the issue of the commission in

(1) 2 Cl. & F. 634, 663.

(2) Law Rep. 7 Chanc. 52.

(3) Law Rep. 8 Ch. D. 256.

(4) Law Rep. 21 Ch. D. 615.

(5) 54 Law J. Rep. Chanc. 276; Law Rep. 27 Ch. D. 710.

(6) 1 You. & C.C.C. 171; 6 Jur. o.s. 980; 2 You. & C.C.C. 537; 12 Law J. Rep. Chanc. 61.

(7) 5 B. & C. 170.

(8) 9 Beav. 211; 15 Law J. Rep. Chanc. 296.

(9) Sid. 109, 112; 2 Sm. L.C. 466, 476.

(10) 5 Beav. 325.

(11) 23 Law J. Rep. Chanc. 233.

(12) 45 Law J. Rep. Chanc. 381; Law Rep. 2 Ch. D. 124.

(13) 1 Coll. 81, 85; 13 Law J. Rep. Chanc. 416.

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lunacy to the death of the lunatic. Vice-Chancellor Knight-Bruce said: "The debt, if it is one, became due from the lunatic by operation of law; or, in other words, upon a contract raised by implication of law. If I were satisfied that there could be no such contract, that there could be no liability so raised, it would be my duty to dismiss the bill; but I am not so satisfied." He, therefore, directed an enquiry, and the case came before Lord Lyndhurst on appeal, and is reported in the 6th *Jurist* (o.s.), p. 980. The Lord Chancellor said during the argument, "If a party applies money for the benefit of a lunatic, with his consent and without fraud, it is a debt which can be enforced against the lunatic. The law constitutes it a debt for the benefit of the lunatic, and if he dies, it is payable out of his estate. The rule applies only to necessities, and there are several decisions to that effect which have always been acquiesced in." That is open to this observation, that the words "with his consent" can hardly have been used by the Lord Chancellor, because the consent of a lunatic would have been a nullity. He is also reported to have said: "Where necessities are furnished to a lunatic, and no fraud or imposition is practised upon him by the party furnishing them, the lunatic is bound to pay for them, as being a debt due from him to such party, and, if a debt upon his decease, his estate is chargeable with it." Then, referring to the words of Lord Brougham which I have read, he says: "He, therefore, considers them as debts due from the lunatic, and, if debts, they are a charge upon the estate." And he dismissed the appeal. In the case of *Williams v. Wentworth* (10), this matter came before Lord Langdale, who said: "It was argued in this case that, however beneficial to the lunatic the expenditure may have been, yet as the lunatic was incapable of contracting, no debt could be constituted; but I am of opinion that in the case of money expended for the necessary protection of the person and estate of the lunatic, the law will raise an implied contract, and give a valid demand or debt, against the lunatic, or his estate, and that under the circumstances of this case a debt was constituted, and that payment of it

may be obtained out of the real estate, if the personal estate be insufficient. Any other conclusion would, as it appears to me, be extremely dangerous, as well as contrary to the principles upon which several cases have been decided. That which is necessary for the protection of the person and estate of the lunatic may well be subjected to question and consideration; but when a demand is made in respect of a necessary of that kind, I do not see how it is to be distinguished in principle from a demand arising in respect of the supply of food and clothing. A debt is constituted by reason of a contract, which, in such cases, the law will supply, and it rests, as I conceive, on a far better foundation than the rule which has sometimes been referred to, that a man shall not be allowed to stultify himself."

The point came before Vice-Chancellor Knight-Bruce again in the same suit of *Wentworth v. Tubb* (6), where the costs on an unsuccessful traverse of an inquisition of lunacy were allowed out of the lunatic's estate. The Vice-Chancellor says: "I apprehend the law to be that if a man is alleged to be a lunatic, whether truly or not, he may employ (as far as he can be said to exercise volition on the subject) a solicitor, not only to resist the commission, but afterwards for the purpose of traversing it, and that, although the proceedings fail, the lunatic's estate is liable for the costs, subject to this—that if anything fraudulent or unfair, or perhaps I may go as far as to say frivolous or litigious, appears to have taken place on the part of the solicitor, the Court may say that no debt arises." There is a later case of *Nelson v. Duncombe* (8), where Lord Langdale says: "The objection is made to the jurisdiction. It is said that as no lunacy has been found there can be no implied contract, and in the absence of contract the Court has no jurisdiction to adjudicate upon the claim. It is, I think, true that in all cases of implied contract which have been decided there has been a lunacy actually found; but it has not been determined that this Court will not take notice of what is done in respect of the property of persons lunatic though not so found, or that a contract may not be im-

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plied for the supply of necessities to such persons." Then there is the case of *In re Gibson* (2), in which Lord Justice Mellish says: "A lunatic cannot contract for his maintenance, so whoever maintains him becomes a creditor by implied contract."

I have read a considerable body of authority in support of that proposition. It is supported by the authority of Lord Brougham and Lord Lyndhurst in the House of Lords, as well as by the authority of Vice-Chancellor Knight-Bruce and Lord Langdale. But in the case of *In re Weaver* (4) the late Master of the Rolls, sitting in the Court of Appeal, commenting on the statement of Lord Justice Mellish, which I have read, said: "That is only an interlocutory observation. It is difficult to see how there can be an implied contract with a lunatic if he is incompetent to make an express contract. It is not always safe to report interlocutory observations of Judges, they are very liable to be misunderstood." If I may respectfully say so, the reporter ought to have remembered that before he reported that interlocutory observation of the late Master of the Rolls. In giving judgment the Master of the Rolls said: "It is not necessary to decide the question whether there could be a legal debt in this case. For myself, I reserve my opinion on that point, which appears never yet to have been distinctly decided." Lord Justice Brett says: "A question has been flushed, if I may use the word, in this case which it is not necessary to decide—namely, whether, if a person supplies necessities to a lunatic, knowing of the lunacy at the time, a contract on the part of the lunatic to pay for them can be implied. I give no opinion upon that point. It has not been fully argued to-day, and it appears to me to involve a very difficult point of law, which I do not think has ever been settled by authority. For my own part, I should doubt whether, in favour of a person who knows of the lunacy, you can imply a contract to pay for a supply of necessities to a lunatic." But in a later case—*Brockwell v. Bullock* (14)—a medical man brought an action in the County Court against a lunatic in respect of services rendered on an enquiry

(14) 58 Law J. Rep. Q.B. 289; Law Rep. 22 Q.B. D. 567.

into the state of the defendant's mind, but was non-suited on the ground that he could not recover such charges without an order under section 11 of the Lunacy Regulation Act, 1862. The plaintiff gave evidence on the enquiry in order to prove the sanity of the defendant. The defendant, however, was found a lunatic; and then the medical man brought an action for his charges against the lunatic and his committee. The County Court Judge non-suited the plaintiff because of section 11 of the Lunacy Act, 1862, holding that the action was not maintainable, and the Queen's Bench Division dismissed an appeal from the County Court. Then the case came before the Court of Appeal, and the Master of the Rolls, Lord Esher, said that section 11 did not take away any right of action which would otherwise have existed, and then he says: "Under these circumstances the only question for us seems to be whether, assuming that the defendant was not a lunatic at the time of the plaintiff's employment, or that such employment of the plaintiff was a necessary, the action might be maintained. It seems to me that before the statute the action might in either of these cases have been maintainable." That is a distinct authority that an action would lie for necessities supplied to a lunatic against the lunatic and his committee. Then later on he says: "If it be shewn that the defendant Bullock was a lunatic when the plaintiff was employed, then I think that, in order to succeed, the plaintiff must shew that his employment was a necessary, a matter which may give rise to difficult questions."

I can only say of these authorities that the large preponderance is in favour of the principle that any one who supplies necessities for a lunatic may maintain an action even at law for those necessities, and that upon an implied contract with the lunatic, a contract which the law will imply notwithstanding the lunacy. But in this case the real question is, Are these necessities? What happened was this. This lady was a lunatic, and she had certain property of her own which produced a small income, and her brother placed her in an asylum at 140*l.* a year. She might have been maintained for much less

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than that; but her brother thought it right to pay a larger sum, and after the death of her brother, his son, with other members of the family, continued the maintenance of the lunatic at this larger sum. But now a claim is made before me that the extra expense was a necessary for the lunatic. It was very generous of her brother to place her in this asylum, and he might, had he lived, very probably have continued to maintain her there. But that the extra expense was a necessary is not proved at all to my satisfaction. Another thing is this. The allowance made by her brother and other members of the family seems clearly to have been an allowance which they never expected to be repaid. There is no evidence which satisfies me that any of these parties expected any repayment. How far a feeling of kindness towards their relative may have actuated them I do not know; but there is nothing to shew that they had the smallest expectation of being repaid, or of making this a debt against the estate of the lunatic. This summons must be dismissed, with costs.

The applicant appealed from this decision.

Renshaw, Q.C., and *Phillpotts*, for the appellant.—Assuming the claim to be good, the appellant, as the legal personal representative both of the lunatic and of his father, is entitled to retain the amount of the claim, notwithstanding the Statute of Limitations—*Thompson v. Cooper* (13) and *Stahlschmidt v. Lett* (15). The charge for the maintenance of the lunatic was not unreasonable, having regard to her social position, and, if reasonable, it is no answer to a claim for necessities that she might have been maintained for a less sum. As was held by the Court below, the estate of a lunatic may be made liable for necessities, notwithstanding the *dictum* in *In re Weaver* (4).

[They cited the cases referred to in the Court below.]

Millar, Q.C., and *Curtis Price*, for the respondents.—The appellant can only claim as creditor; but he has made no attempt to disturb the finding of the chief

clerk that there were no debts due from the lunatic's estate. That finding must, therefore, be taken to be correct. Where the relatives of a lunatic not so found maintain him at a cost exceeding his income, they cannot recover—*Carter v. Beard* (16).

[COTTON, L.J.—I doubt the law in that case.]

The cases cited in support of the claim are either cases in which the alleged debtor has been found a lunatic, or else cases in which the advances were made by a direct trustee of the lunatic. The maintenance of the lunatic at the increased cost was not a necessary, nor was there any intention on the part of her relatives to create a debt.

Phillpotts, in reply.—*Carter v. Beard* (17) is explained by Knight-Bruce, V.C., in *Wentworth v. Tubb* (6), and it is not law.

COTTON, L.J.—This is an appeal against a decision of Mr. Justice Kay refusing to allow a claim made by the defendant on behalf of himself and his brother and sisters, and as the legal personal representative of his father, for several sums expended in support of the lunatic in excess of what was provided by the income of her own property. The case raises several questions, one of which is of considerable importance; and although in the view which we take that question is not necessary to the decision of the case, yet, as it has been fully argued, we think we ought to express our opinion upon it. That question is whether there can be an implied contract on the part of a lunatic not so found by inquisition to repay out of her property sums expended for necessities supplied to the lunatic. Now the term "implied contract" is a most unfortunate expression, because there cannot be a contract by a lunatic. But whenever necessities are supplied to a person who, by reason of disability, cannot himself contract, the law implies an obligation on the part of such person to pay for such necessities out of his own property. It is asked, can there be an implied contract by a person who cannot contract? The

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answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessaries. I think the expression is erroneous and very unfortunate, and in one case which was before the Court of Appeal we did not decide the question whether there could be what has been called an implied contract by a lunatic, and one of the Judges did express a doubt whether there could be an implied contract on the part of a lunatic, or any other person who was himself incompetent to make an express contract. We all agree with the view that I have thus expressed in order to prevent any doubt arising in consequence of our having declined to settle the question in the case to which I have alluded.

But, then, though there may be an implied obligation on behalf of the lunatic, the necessaries must be supplied and paid for under circumstances which would justify the law in implying an obligation to repay the money spent upon them.

I have no difficulty as to the question of the expenditure being for necessaries, for the law is well established that when the necessaries supplied are suitable to the position in life of the lunatic, an implied obligation to pay for them out of his property will arise. But then the provision of money or necessaries must be made under circumstances which would justify the law in implying an obligation.

[His Lordship then discussed the evidence, and came to the conclusion that the relatives of the lunatic, in making the payments for her maintenance, did not intend to constitute themselves creditors against her estate.]

LINDLEY, L.J.—The question we have to decide is whether a sum of 1,110*l.* is payable as a debt out of the assets of the deceased lady. The claim is made on the ground that the money has been properly expended for necessaries. I think that the facts are all in favour of the money having been reasonably and properly expended for necessaries. Against that it is said that the lady might have been supported at an expense which her own income would have been sufficient to meet; but as, in the case of a claim made for

necessaries against the estate of an infant, the claimant is not always bound to shew that he sent the infant to the cheapest school that could be found, so in this case the fact that some cheaper place of residence might possibly have been found for this lady is not necessarily an answer to this claim assuming that it can be made. The question whether an implied obligation arises in favour of a person who supplies a lunatic with necessaries is a question of law, and in the case of *In re Weaver* (4) a doubt was expressed whether there was an obligation on the part of the lunatic to repay. I confess I cannot participate in that doubt. I think that that doubt has arisen from the unfortunate terminology of our law, owing to which the expression "implied contract" has been used to denote an obligation implied by law, which is not a contract at all. Obligations of this class have also been called *obligationes quasi ex contractu*. But that a lunatic's estate may be made liable for necessaries has been settled, at any rate, as far back as *Manby v. Scott* (9), where the learned Judges, after holding that an infant might be bound for necessaries provided for him, proceeded: "And what has been said of an infant is applicable to an idiot in case of house-keeping." I do not doubt that the cost of necessaries can be recovered against a lunatic's estate in a proper case. [His Lordship then dealt with the evidence, and agreed with the conclusion arrived at by Cotton, L.J.]

LOPES, L.J.—If a person finds necessaries for a lunatic, and intends to be repaid for so doing, and to constitute a debt against the lunatic's estate, I do not doubt that the law implies an obligation on the part of the lunatic's estate to repay the amount spent on such necessaries. It seems to me strange that the law to this effect could be doubted. I have known several cases in the Queen's Bench Division of this kind—action brought for goods sold and delivered, plea insanity, replication necessaries—and I have never heard any doubt expressed that that was a perfectly good replication. [His Lordship then discussed the evidence, and came to the same conclusion as the other members of the Court.] Then the question arose whether

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these payments could be necessities. I should not myself have felt any difficulty as to that, because necessities have to be determined according to the circumstances of each particular case, and things may well be necessities in one case which would not be so in another. The question what are necessities must always be considered with reference to the reasonable requirements of the person under disability, having regard to his means and station in life. The appeal fails, and must be dismissed, with costs.

Solicitors—Grover & Humphreys, for appellant;
Spencer, Gibson & Co., for respondents.

NORTH, J. }
1889. } FAITHFULL v. WOODLEY.
Dec. 14. }

Practice—Foreclosure—Motion for Judgment in Default of Pleading—Allegation of Amount due—Admission by not pleading—Form of Judgment—Rules of Supreme Court, 1883, Order XIX. rule 13; Order XXVII. rule 11.

On a motion for judgment in default of defence in a foreclosure action, the plaintiff (an equitable mortgagee of leaseholds) asked for a personal judgment against the defendant, the mortgagor, for the amount which the plaintiff, by his statement of claim, alleged to be due, on the ground that the defendant, by not putting in a defence, had admitted that that amount was due from him. The plaintiff had not asked for a personal judgment by his statement of claim. The defendant did not appear at the hearing:—Held, that the defendant's admission by not pleading could only be treated as made for the purpose of the relief asked by the statement of claim. The Court, therefore, merely directed an account of what was due to the plaintiff for principal and interest under his mortgage.

Motion for judgment.

This was a foreclosure action. The plaintiff was the equitable mortgagee of certain leasehold property; the defendant

was the mortgagor. The mortgagor had covenanted to pay the mortgage debt, with interest, and, upon the request of the mortgagee, to execute a mortgage to the plaintiff of the leasehold hereditaments by way of underlease or of assignment of the residue of the original term, as security for the debt and interest, and that meanwhile the property should be charged with the payment to the mortgagee of the mortgage debt and interest. No mortgage had been executed. The plaintiff, by his statement of claim, alleged that a sum of 175*l.*, with interest from a day named, was due to him, and claimed an account of what was due to him by virtue of his mortgage; payment of the amount found due; and, in default of payment, to have his security enforced by foreclosure or sale, and an assignment of the property for the residue of the term, and possession thereof.

The defendant did not put in any defence.

The plaintiff now moved for judgment in default of pleading. The defendant did not appear at the hearing.

J. G. Wood, for the plaintiff.

[NORTH, J.—Why is the application not made by summons?]

Because rule 5*a* of Order LV. does not enable the Court, upon summons, to make an order for conveyance of the legal estate in the mortgaged property.

[NORTH, J.—It is not necessary for me to decide now whether the Court has jurisdiction to order a conveyance on summons, but I shall give no special decision as to costs.]

Wood.—I now ask for a personal judgment against the mortgagor for the debt and interest, in the alternative form settled by the Court of Appeal in *Farrer v. Lacy* (1) as applicable to a case in which the amount due on the mortgagor's personal covenant is admitted or proved at the trial.

The defendant, by not pleading, must be taken to have admitted the allegation in the statement of claim of the amount due—Order XIX. rule 13.

[NORTH, J.—There can be no admission, because the defendant does not appear.]

(1) 55 Law J. Rep. Chanc. 149; Law Rep. 31 Ch. D. 42.

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The allegation in the statement of claim as to the amount due is not denied, therefore it is admitted.

[NORTH, J.—You do not by your statement of claim ask for personal judgment.]

It was not asked for in *Farrer v. Lacy* (1). I ask for the relief I am entitled to on my statement of claim.

NORTH, J.—As the defendant does not appear, I cannot give the plaintiff any relief which he has not asked by his statement of claim. The plaintiff might have asked by his statement of claim for judgment for the sum which he alleges to be due, but he has not done so. The defendant's admission by not pleading can only be treated as made for the purpose of the relief which is asked by the statement of claim. The judgment, therefore, will be in the form given in *Farrer v. Lacy* (1) for the case in which the amount of debt and interest is not admitted.

Solicitors—Faithfull & Owen, for plaintiff.

STIRLING, J. }
1890.
Feb. 5, 12. }

In re REES.
WILLIAMS v. DAVIES.

Will—Legacy—Construction—Next-of-kin of Person dead at date of Will—When Ascertained—Statute of Distributions—Lapse.

Testatrix bequeathed a sum of money "to such person or persons as would have become entitled to my said husband's personal estate under or by virtue of the Statute of Distributions had he died intestate and without leaving any widow him surviving":—Held, that the persons to take, and the shares and proportions in which they were to take, were to be ascertained at the death of the husband, and that the share of one of the husband's next-of-kin who predeceased the testatrix lapsed.

Mary Rees, who died on the 18th of October, 1888, by her will dated the 20th of December, 1881, recited that she was

entitled, under the will of her late husband, the Rev. Josiah Rees, to a life interest in her said husband's personal estate, and was also absolutely entitled, as his widow, under the Statute of Distributions, to one-half of the corpus of his residuary personal estate, and that her said husband died on the 18th of July, 1881, and that his personal estate at the time of his death, after payment of debts, amounted to about 12,000*l.*, and that she was anxious that the property of her late husband should return to his own family. She then gave and bequeathed 4,800*l.* (which she stated was equivalent to the moiety of her husband's estate to which she was absolutely entitled, after deducting therefrom the amount of an advance which she had made to him in his lifetime) and certain plate "to such person or persons as would have become entitled to my said husband's personal estate under or by virtue of the Statute of Distributions, had he died intestate and without leaving any widow him surviving." Then, after certain other dispositions, she gave her residuary real and personal estate unto and to the use of the plaintiff, Elizabeth Williams, and the defendant Thomas Rhys Saunders absolutely in equal shares; and she appointed the defendant Henry Harries Davies and another person, who did not act, to be executors of her will. By a codicil dated the 17th of September, 1885, the testatrix gave a pecuniary legacy, and in all other respects she ratified and confirmed her said will. She afterwards made another codicil, not material to be stated.

The statutory next-of-kin of the Rev. Josiah Rees at the time of his death were, exclusive of his widow, his sister Mary, the wife of George Saunders, and his niece, the defendant Rosanna Rees. Mrs. Saunders died on the 16th of June, 1882, in the lifetime of the testatrix, though after the date of her will, a widow and intestate, leaving the defendants Thomas Rhys Saunders and Eliza Saunders, her only children, her surviving; and they, together with Rosanna Rees, were the sole statutory next-of-kin of Josiah Rees at the time of the death of the testatrix.

The question arose, at what period the

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persons entitled under the legacy of the 4,800*l.* were to be ascertained; and, further, whether there was a lapse as to any part of the legacy. Accordingly this summons was taken out by Elizabeth Williams, one of the residuary legatees, for a declaration that upon the true construction of the will and in the events which had happened there was a lapse as to one moiety of the legacy.

Graham Hastings, Q.C., and *Peck*, for the summons.—We submit that there is a lapse as to one moiety. First, we say that the time for ascertaining the persons to take is the death of the husband. A gift to the statutory next-of-kin of a given person means the next-of-kin at the death of such person, and it is immaterial whether the ancestor is the testator himself or somebody else—*Bullock v. Downes* (1), *Mortimore v. Mortimore* (2), and *In re Ham's Trust* (3). *Philps v. Evans* (4) may be cited against this construction; but that case is distinguishable, because there was not there any reference to the statute.

Secondly, we say that the persons entitled under the legacy take as tenants in common by reason of the reference in the legacy to the Statute of Distributions. The statute regulates not only the persons to take, but the shares and proportions in which they are to take—*Bullock v. Downes* (1). Two other constructions are suggested. One is that the gift is to a class, and that the survivor takes the whole; but upon that construction the survivor would take more than she is entitled to under the statute. The recital that the testatrix intends the property to go to the husband's relations may be relied upon as excluding a lapse, but a similar recital occurred in *In re Ham's Trust* (3), where it was held that there was a lapse. The other is that those who are the next-of-kin of the husband at the death of the testatrix are the persons en-

titled; but that construction is excluded by the language of the gift.

Eyre, for the executor and for the remaining residuary legatee *T. R. Saunders*, took no part in the argument.

Beale, Q.C., and *Waggett*, for *Rosanna Rees*.—We adopt the argument for the plaintiff as to the time for ascertaining the class. No doubt the general rule in the case of a bequest to the next-of-kin of a person dead at the date of the will is that the class is to be ascertained at the death of the testator; but the rule only applies where there is nothing in the context to take the case out of the rule, and here the language of the bequest is conclusive as to the time—*Wharton v. Barker* (5). But we say that the plaintiff is not entitled to read in the reference to the statute to shew the shares and proportions in which the beneficiaries are to take. This is a gift to a class, and consequently there is no lapse, but the survivor takes the whole, unless there is something in the terms of the gift to negative this construction. In *In re Ham's Trust* (3) there were words of severance in the gift, and *Kindersley, V.C.*, expressly says that without those words he would have held that the gift was to a class.

Buckley, Q.C., and *T. C. Wright*, for *Eliza Saunders*.—We submit that those persons who would have been the next-of-kin of the husband assuming him to have died immediately before the death of the testatrix, are the persons entitled. Where there is a gift to the next-of-kin of a person dead at the date of the will, the principle is to ascertain the class in the same way as if the gift were to the testator's own next-of-kin.

The general rule laid down in *Wharton v. Barker* (5) is founded on *Philps v. Evans* (4), which governs this case, unless the absence of any mention of the statute distinguishes it.

They also referred to *Vaux v. Henderson* (6) and *In re Philps's Will* (7).

Hastings, Q.C., in reply, referred to *In re Ranking's Settlement Trusts* (8).

(1) 9 H.L. Cas. 1.

(2) 48 Law J. Rep. Chanc. 470; Law Rep. 4 App. Cas. 448.

(3) 2 Sim. N.S. 106; 21 Law J. Rep. Chanc. 217.

(4) 4 De Gex & Sm. 188.

(5) 4 Kay & J. 483, 502.

(6) 1 Jac. & W. 388.

(7) Law Rep. 7 Eq. 151.

(8) Law Rep. 6 Eq. 601.

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STIRLING, J., stated the facts and continued:—At the death of the widow some of the persons entitled to the husband's estate under the Statute of Distributions were different from those entitled under the same statute at his own death, and the question is, whether the persons to take under the gift are to be ascertained at the death of the husband or at the death of the widow. The rule applicable to this case is stated thus by Lord Hatherley, when Vice-Chancellor, in *Wharton v. Barker* (5): "According to *Philps v. Evans* (4), a bequest to the next-of-kin of a person who is dead at the date of the will must, under ordinary circumstances, receive an interpretation analogous to that adopted in the case of a bequest to the testator's own next-of-kin as regards the period of ascertaining who are the persons intended; and if there be nothing in the context to make the words applicable to a class to be ascertained at any other time than at the testator's death, those who at the testator's death are the next-of-kin of the deceased person named in the will would naturally be the persons to take." This view of the law appears to be in accordance with the decision of Sir William Grant in *Vaux v. Henderson* (6), and of Lord Romilly in *In re Philps's Will* (7).

I have, then, to consider whether there is anything in the present case to take it out of the general rule, and it appears to me that the words "without leaving any widow him surviving" are sufficient to do so. One test appears to me to be conclusive. If the testatrix really contemplated that the class should be ascertained at her own death, it ought to be possible to insert in the gift words expressly defining this period, without making the language of the testatrix inaccurate as regards the grammar, or repugnant or inconsistent as regards the meaning, and I invited counsel to do so. The first suggestion was to insert the words "at my death" after "would," so that the clause would run: "to such person or persons as would at my death have become entitled to my said husband's personal estate under or by virtue of the Statute of Distributions, had he died intestate and without

leaving any widow." Now, this is not grammatically accurate. Strictly, it ought to run, "to such persons as would at my death become entitled." A more serious objection, however, is this, that the words "without leaving any widow him surviving" become unmeaning. The testatrix was her husband's widow, and at her death there would be no widow entitled to share under the statute upon an intestacy. It was then suggested that the clause ought to be read thus: "to such person or persons as would have become entitled to my said husband's personal estate under or by virtue of the Statute of Distributions, had he died immediately before me intestate and without leaving any widow."

This hardly mends the matter, for in the first place it appears to me to add something to the language of the testatrix, and in the next place to make it really inconsistent. The testatrix was her husband's wife at the time of his death, and what she is really thus made to say is, "had he died immediately before me intestate and without leaving me his widow him surviving." If the words "immediately after me" were inserted after "died," then no doubt the language would be consistent; but the words "without leaving any widow" would be superfluous, for it can hardly be supposed that the testatrix contemplated the possibility of her husband marrying in the brief interval between her own death and his.

On the other hand, if the words "at my husband's death" are inserted, so that the clause is read, "to such person or persons as would at my late husband's death have become entitled to my said husband's personal estate under or by virtue of the Statute of Distributions, had he died intestate and without leaving any widow," the language of the will becomes grammatical and self-consistent, and every word has its natural force and meaning.

I am of opinion, therefore, that the persons to take are to be ascertained at the husband's death.

Now it is laid down in *Bullock v. Downes* (1) that, where there is a gift to persons entitled under the Statute of Distributions, the statute regulates the in-

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terest taken as well as the parties to take. That case related to a gift to persons entitled under the Statute of Distributions to the personal estate of the testator, and no case has been cited in which it has been applied to a gift to the statutory next-of-kin of a person dead at the date of the will, but I can see no valid ground for drawing any distinction between the two cases. In my opinion, therefore, the gift must be read: "to such persons as would at my husband's death have become entitled to his personal estate under the Statute of Distributions, had he died intestate and without leaving any widow him surviving, in the shares and proportions in which they would have taken under that statute."

I think, therefore, that, as was held in *In re Ham's Trust* (3), and for the like reasons, there is a lapse as regards the share of that one of the husband's next-of-kin who died in the lifetime of the testatrix.

It was, indeed, suggested that the first codicil revived the will, or operated as a fresh gift in favour of the next-of-kin then living. Even if the language of the will admitted of such a construction (which I do not think it does), there is no evidence that the testatrix knew who her husband's next-of-kin were, or that any of them had died.

I make a declaration as asked by the summons.

Solicitors—G. L. P. Eyre & Co., agents for Morgan-Richardson, Cardigan, for plaintiff and remaining residuary legatee and executor; Clarke, Rawlins & Co., agents for Barker, Morris & Barker, Carmarthen, for other defendants.

NORTH, J. }
1890.
Feb. 18, 19. } COLLEY v. HART.

Patents, Designs, and Trade Marks Act, 1883, s. 32—Action to restrain Threats—Action for Infringement by Patentee "prosecuted" and discontinued—"Due Diligence."

In September, 1888, C. brought an action (under section 32 of the Patents, Designs, and Trade Marks Act, 1883) against H. to restrain him from issuing circulars threatening legal proceedings. H. then commenced an action against C. for infringement of his patent. In November, 1889, H. discovered (from a report made by an expert under an order of the Court) that the articles sold by C. were not an infringement of H.'s patent, and H. thereupon discontinued his action:—Held, that as H. had "with due diligence commenced and prosecuted" his action down to the time of discontinuance, he was exactly in the same position (with regard to the protection afforded by the proviso) as if he had prosecuted his action to trial, and then failed; and that, as the proviso applied, C. had no cause of action under section 32.

Action with witnesses.

This was the trial of an action by W. W. Colley (a manufacturer of toilet paper) for an injunction to restrain M. Hart (who carried on a similar business), the owner of a patent, from threatening legal proceedings in respect of alleged infringements of his patent.

On the 15th of September, 1888, the defendant (the patentee) issued the following circular, and sent it to (among other persons) some of the plaintiff's customers:—"It has come to my knowledge that W. W. Colley, late in my employ, is offering to the trade perforated toilet rolls, which is an infringement of my patent 1885, No. 9106. . . . His proceedings are therefore a distinct breach of my rights under both patent and trade mark, and I think it right to inform you that I intend to commence proceedings forthwith against any person whom I find in any way dealing in any perforated toilet paper manufactured in breach of

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my patent rights under the above patent, or under my trade mark."

On the 22nd of September, 1888, the plaintiff commenced this action to restrain the issue of the circular, and for damages.

On the 3rd of October, 1888, the plaintiff gave notice of motion (for the 10th of October) before the vacation Judge for an injunction. The vacation Judge adjourned the hearing of the motion until the 2nd of November; and on that day North, J., granted an interlocutory injunction.

On the 6th of December, 1888, the defendant (the patentee) commenced an action for infringement of his patent against the plaintiff.

On the 8th of February, 1889, the plaintiff delivered a statement of claim in this (the threats) action. By it he denied that he had infringed the defendant's patent; and he claimed an injunction to restrain the defendant from issuing the above circular, and from threatening the plaintiff, or his customers, or otherwise interfering with the plaintiff's trade.

On the 9th of March, 1889, the statement of defence in this (the threats) action was delivered.

On the 13th of May, 1889, the defendant (the patentee) delivered a statement of claim in his (the infringement) action.

In January, 1889, the defendant had issued a summons in this (the threats) action for inspection; and ultimately, on the 13th of June, 1889, an order was made for inspection of the process by Mr. Ellis, an expert, who was to report to the Judge.

On the 9th of July, 1889, Ellis made a written report to North, J., of the result of his inspection, stating that, in his opinion, the plaintiff's process was not an infringement of the defendant's patent. In August, 1889, an order was made that the counsel and solicitors on each side should see the report. The report was handed, in the first instance, to the plaintiff's solicitors, and was not handed over by them to the defendant's solicitors until the 6th of November. The defendant thereupon discovered that the articles sold by the plaintiff were not an infringement of the defendant's patent, and that, there-

fore, it was hopeless for him to proceed with his infringement action. Accordingly, on the following day, the defendant, by notice in writing, wholly discontinued his (infringement) action, and paid the plaintiff's taxed costs of that action under Order XXVI. rule 1.

The plaintiff's (the threats) action now came on for trial.

Section 32 of the Patents, Designs, and Trade Marks Act, 1883, is as follows:—"Where any person, claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats: Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

Aston, Q.C., and *Roger W. Wallace*, for the plaintiff.

Cozens-Hardy, Q.C., and *J. C. Graham*, for the defendant, took the preliminary objection that, as the defendant had "with due diligence commenced and prosecuted an action for infringement of his patent," within the above proviso, the plaintiff's action must be dismissed with costs.

Cozens-Hardy, Q.C., and *J. C. Graham*, for the defendant.—The defendant commenced his infringement action on the 6th of December, 1888 (less than three months after the issue of the writ, and before the delivery of the statement of claim in the threats action). He, therefore, commenced his action with due diligence. And the dates shew that he prosecuted it with due diligence, at any rate down to the 7th of November, 1889, when he discontinued his action.

After the defendant had seen Mr. Ellis's

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report it became quite useless for him to continue his action; if he had gone on to trial, his action would only have been dismissed with costs.

The plaintiff (in an infringement action) does not lose the protection of the proviso simply because he does not go to trial, where, as here, the action is brought *bona fide*.

They referred to *Sugg v. Bray* (1).

Aston, Q.C., and *Roger W. Wallace*, for the plaintiff.—Hart did not commence his infringement action with due diligence—*Herrburger v. Squire* (2). He certainly did not prosecute his action with due diligence, because he discontinued it on the 7th of November, 1889, and paid the costs of it.

[NORTH, J.—Do you say that to “prosecute with due diligence” means “to prosecute to a successful result” ?]

It means to prosecute so as to justify; and a plaintiff can only justify his action by shewing two things—first, that his patent was valid; and secondly, that it had been infringed.

They also referred to *Challender v. Royle* (3).

[*Cozens-Hardy, Q.C.*, was only called upon to reply as to the effect of discontinuing his action.]

Cozens-Hardy, Q.C., in reply.—The proviso does not go on to say—must prosecute and “establish his right.” Mr. Hart ought not to be in any worse position than if, instead of discontinuing, he had allowed his action to go on to trial, and then, when it was called on, had said that he did not propose to open it.

NORTH, J. (on Feb. 19).—I postponed deciding this case last night, not because I felt much doubt about it, but because it raises a point which, so far as I know, is not yet covered by any decision or *dictum*. [His Lordship, after reading the circular letter of the 15th of September, 1888, continued:]

Now there is no evidence before me at

(1) 2 Pat. Off. Rep. 223.

(2) 5 Pat. Off. Rep. 581; on appeal, 6 Pat. Off. Rep. 194.

(3) 56 Law J. Rep. Chanc. 995; Law Rep. 36 Ch. D. 425.

present that that circular was published maliciously; and, therefore, there is no right of action, unless it is given by section 32 of the Patents, Designs, and Trade Marks Act, 1883. And I also think it clear that that was a letter which would have given a right of action under the 32nd section if there had been no proviso in it.

Now it is said that the defendant's action for infringement was not commenced with due diligence; and, in particular, a case before Mr. Justice Charles is relied upon upon that point. Before referring to that case I must say that, in my opinion, it is quite impossible to fix any time within which an action must be commenced. It must depend altogether upon the circumstances of each particular case. It is impossible to lay down any general rule.

Now, looking at the order of things in that action, *Herrburger v. Squire* (2), as stated by Mr. Justice Charles, what I find is this: There was some threat in 1885, which, as I understand, he puts out of consideration altogether. Then on the 21st of October, 1886, there was a certain threat published to the trade; and Mr. Justice Charles says, “At the time he issued that circular he must have become aware, I suppose, that the plaintiffs, amongst other persons, were selling the damper with the arrangement of the arm attached to the body of the damper; but he took no step. He states that he intends to take legal proceedings; but he took none, and a whole year passed away.” Now Mr. Justice Charles, in his judgment, proceeds upon the footing that the party had known of the state of things existing for a year, during which no proceedings were taken. He goes on to say, “The next step which was taken by him was this: on the 1st of September, 1887”—I said a year, it is practically a year afterwards—“another advertisement, to the same effect, was published.” Then he goes on to say, “Now what did the defendant do? All September passed, and nothing was done. All October passed, and nothing was done by the defendant. But something was done by the plaintiffs. The plaintiffs on the 12th of October issued their writ under section 32. Even then the defendant did

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nothing; and it was not until the 14th of November that he instituted two actions against two persons who had purchased the plaintiffs' check action with this armed damper, and then in due time in December he counter-claimed." Then he asks whether that is due diligence; and says, "I cannot say so." Then he says, "He says he intended to do it in 1886, but he does absolutely nothing. I must assume that he must have known that sales were going on of these armed dampers in England; otherwise, I do not see why he should have issued the circular of 21st of October, 1886. He does nothing for nearly a twelvemonth. At the end of the twelvemonth, in September, 1887, he returns to the charge, and he gives another notice in the *Music Trades Journal* that he intends to commence an action in the Chancery Division of the High Court of Justice against any one infringing; but he does nothing; and it is not until more than a month after the plaintiffs have commenced their action under section 32, that he does institute two actions against two other persons for the infringement of his patent. I cannot think that is due diligence; and, therefore, I do not think that he has brought himself within the proviso." Then a little further on he says: "He has not, having regard to all the circumstances of the case, in my opinion, with due diligence commenced and prosecuted an action for his patent." Of course, the facts of that case are different from the facts in this case; but I look to find what principle I can in it to assist me in coming to a conclusion upon the facts of the case before me, and I do not find anything which really helps me, because I find that the learned Judge relied upon the fact that no proceedings were taken for a certain time after the writ was issued, having regard to the fact that the infringement had been going on for fourteen months before that time, to the knowledge of the party who did not take any proceedings. That is a totally different state of things from anything that I have here. Therefore that case really does not give me any assistance.

Then I find great difficulty in attempting to fix within what time an action

must be brought to be commenced with due diligence. I will just put this case: Suppose a man gets his patent complete at the end of 1885; I assume that it is a good patent, and a valuable patent, and it is perfectly certain that there will be infringers, and he is on the look-out for them. At the end of 1886 he finds A. is infringing, and he writes a warning letter to him, which warning letter, according to the cases, would be a threat. A. receives it, and A. submits unconditionally. The threat is not prosecuted; no proceedings are taken against A., for the best of all reasons, that there is nothing to sue him for, because he has submitted unconditionally. At the end of 1887 the patentee finds B. infringing; and he is about to take proceedings against him, when B. dies insolvent, before he can bring any action. At the end of 1888 he finds C. infringing; and (I will suppose) C. submits unconditionally. At the end of 1889 he finds D. infringing, and he writes a warning letter to him. D. does not submit; but replies by commencing an action at once for threats; whereupon the patentee immediately issues his writ in an action for infringement against D. "Oh," says D., "you are too late, these threats have been going on for three years; for no less than three years have you known that there were infringers, and you have never brought an action at all; and it is only now, after more than three years, that you seek to set up an action commenced now, as an answer to my action for threats." In that case I cannot doubt for a moment that the action commenced against D. would be commenced in due time. That only shews how impossible it is to attempt to fix any definite time within which such an action must be brought.

Now the only case I know of in which (other than the case before Mr. Justice Charles) anything has been laid down as bearing upon time is *Challender v. Royle* (3). I think I should be doing great injustice to the remarks of Lord Justice Cotton in that case, if I thought he was intending to lay down any rule as being applicable to all cases; and I do not refer to his remarks for that reason,

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but I refer to them by way of illustration. In that case he says: "Was it (the action) commenced with due diligence? Mr. Bousfield contended that the action must be commenced with due diligence from the time when the defendant first knew that the plaintiff was doing what the defendant alleges to be an infringement. I cannot agree with that view. In my opinion an action must be held to be commenced with due diligence if commenced within a reasonable time after the threats have been made, for the threats are the only matter complained of. Now, assuming the threats to have been made in March, the action against the Manchester Plumbing Company was, in my opinion, commenced with due diligence after the time when the defendant first issued these threats, for I think that the interval between March and June is not an unreasonable time for a man to take to consider whether he should bring an action in respect of a supposed infringement of his patent." That is to say, three months is a reasonable time to take. Now I do not apply those remarks as deciding this case; but I give them as an illustration to shew what Lord Justice Cotton thought, under the circumstances, would be a reasonable time within which an action might be brought. In the present case I find that the threats having been uttered on the 15th of September, the action for infringement was commenced on the 6th of December—that is to say, within three months.

Again, I do not attempt to lay down a rule applicable to all cases; but, as a *prima facie* rule applicable to most cases, I do not think it can be said that a man is guilty of undue delay if he waits to see—where the person who is plaintiff in the threats action is the alleged infringer—whether he cannot combine the two subjects of action in one action; in other words, if he waits a reasonable time to have the statement of claim delivered to him, and brings his counter-action, not by a separate action, but by counter-claim in the threats action. In the present case the defendant was justified, in my opinion, in refraining for some time after the 2nd of November to see whether he

could not bring his action for infringement in the threats action, instead of commencing a new action; or, in other words, he was justified in waiting for some time, at any rate, to have the statement of claim delivered. I find here, although the action was commenced on the 22nd of September, that it was not until the 8th of February, 1889 (two months after Mr. Hart had commenced his action), that the statement of claim was delivered. I come to the conclusion, therefore, that there was no want of due diligence in commencing the action.

Then the proviso requires that the action is not only to be commenced, but also to be prosecuted with due diligence. As regards the prosecution, I will draw a line between what did happen, and what did not happen, before the 7th of November, 1889, the date of the discontinuance. Now, during that time, I have nothing to shew that the action was not being prosecuted with due diligence. I have nothing before me but certain dates of proceedings taken in the actions; and I have to deal with the matter simply upon those dates. I do not find anything to shew that the proceedings in the action, down to the time of discontinuance, were wanting in due diligence. I do not find that that point was really raised by counsel for the plaintiff; because, although Mr. Cozens-Hardy gave me a list of all these dates, neither Mr. Aston nor Mr. Wallace were able to put their finger upon any point in the course of these proceedings, and say that there was any undue delay there. I cannot, therefore, say that there was any undue delay in prosecuting the action down to the 7th of November, 1889.

But then the plaintiff says (and this is really his point upon the want of due diligence) that there was not due diligence in prosecuting the action from that time onwards, because the action was discontinued. On the 7th of November, 1889, Mr. Hart discontinued his action for infringement. A report had been made, upon which he came to the conclusion that he could not prosecute his action with success; at that point, therefore, he discontinued his action, and paid the costs. Now, was that discontinuance a want of due prosecution?

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Mr. Aston says that the proviso in the section that the person making the threats shall "with due diligence commence and prosecute an action for infringement," means shall prosecute it down to a successful result. Now, in the first place, the section does not say so; and I should find great difficulty in understanding it, if it did. I do not quite know what a "successful result" would be, considering the multiplicity of points raised in patent actions. But suppose I take other words, and make the section read thus (as I understand it was suggested I should do), that he must with due diligence commence and prosecute, "and recover judgment in" an action for infringement—because that is the way it would have to be tested. I do not find any words of that sort in the section; and it would be a strong addition for me to make to treat the section as containing such words as these. The point cannot have escaped attention; nothing would have been easier than to have put in these words, if the section was intended to be read as having them in; and when I do not find such words there, I do not feel at liberty to add them.

Then there is another thing. I do not believe that that was the intention of the section; and I think it might produce a very unjust result, if the words suggested had been there. Suppose, for instance, an action was commenced with due diligence, and while it was being prosecuted with due diligence the infringer died insolvent. It would be impossible to prosecute such an action as that to a successful result. You could not sue the infringer's executors; there would be no benefit gained by the estate which you could follow against them; and, of course, the personal tort would have come to an end. It would be impossible for a man to go on with an action of that sort.

To put another case, suppose the infringer became bankrupt, with large liabilities and very small assets—could it be said that an action commenced with due diligence, and prosecuted with due diligence down to that time, failed to be an action within the proviso, because it was not prosecuted to judgment after that? I do not think it would be possible to say so.

Again, the defendant to the action for infringement might submit, and pay damages. Is it to be said that a man has not commenced and prosecuted an action with due diligence, because, having got all that he could get, he leaves the matter there, and does not go on to recover judgment? I do not think it possible to put such a qualification upon the action required by the section, as to say that the plaintiff is bound to prosecute such an action to judgment, although he has got the full benefit, which he seeks in the action, offered to him before judgment.

Moreover, a failure to succeed in the action would not, necessarily, be a fair test as to whether the patentee was justified in making the threats. The patent might be perfectly good, but the action for infringement might fail. The plaintiff might have lost valuable witnesses by death, or they might fail to attend at the trial; and the plaintiff might fail to recover judgment solely on that ground. Or, on the other hand, they might attend; and it might turn out that the evidence given by them did not come up to what the plaintiff had been told they would give; and the plaintiff's case might break down through the infirmity of his witnesses.

Again, there might be a very serious and difficult question, whether what had been done by the defendant was really an infringement or not in point of fact. The jury might hold that it was; the Divisional Court might hold that it was; the Court of Appeal might take the same view; but the House of Lords, in the end, might say that there had not been any infringement at all. It would be a very strange thing if the right to utter the threats in the first instance is to be tested by an action of that sort.

I might give another instance: suppose the person bringing the action for infringement is not the patentee, but an assignee, and among the defences set up by the infringer there was this defence, that he was not infringing, because he held a licence from the patentee before the assignment took place. The plaintiff (the assignee) may know nothing of that defence, he may not believe it, he may see the patentee, and be told that it is un-

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true; and the plaintiff may go on with his action; but, at the trial, it may turn out that the patentee had not told the truth, and that the defendant in the action had a licence from the patentee, and was justified in what he had done.

Many other illustrations might be given. Failure to succeed in an action for infringement would, in many cases, be an unfair test as to whether the plaintiff in the infringement action was justified in making the threats.

Therefore, not only do I not see my way to add such words to the section as to read it, "with due diligence commence and prosecute and recover judgment in an action for infringement;" but I see that, if I were to add such words to the section, I might be doing something which would be a great injustice.

I hold, therefore, that it is not necessary—for an action to come within the proviso—that the action should be prosecuted to the recovery of judgment by the party bringing it. And, therefore, a man who has commenced and with due diligence prosecuted an action is within the proviso, although, at the trial, judgment is given against him; and the fact of his being within the proviso prevents there being any right of action, existing under the earlier part of section 32, in the plaintiff in the threats action.

Then, in the present case, the action having, in my opinion, been commenced with due diligence, and prosecuted with due diligence down to the 7th of November, 1889 (the date of the discontinuance), the plaintiff in it would have been protected by the proviso if he had continued the action from that time down to trial, and had then failed to prove any infringement. If that is so, how does the matter stand? Mr. Hart, in November, 1889, ascertained that his action must fail; and he, thereupon, like a wise man, at once discontinued his action, and paid the costs of it. In my opinion he was not under the obligation—in order to make his action successful, as a defence to Mr. Colley's action, under the proviso—to prosecute a hopeless action until trial, and then undergo the penalty of having it dismissed with costs. As soon as he found out that his

action was hopeless, it was his duty to put an end to it at once, and not go on to trial. I do not say that it is a duty of very perfect obligation; but I think that Mr. Hart did owe a duty to his adversary not to proceed with a hopeless litigation against him after he had ascertained that it was hopeless; and I think that he owed a duty to the Court not to waste time by the trial of an action in which he felt that he could not possibly succeed.

Under these circumstances, in my opinion, Mr. Hart—having discontinued a hopeless action before trial—is in exactly the same position as he would have been in if he had prosecuted it up to trial, and then failed. And, as failure at the trial would not have prevented his action from being within the proviso, so, in my opinion, the discontinuance before trial does not put him in a worse position than if he had carried it on to trial. He is, therefore, within the proviso; and the plaintiff has no cause of action under section 32.

[The action was then heard on the question whether Mr. Hart's infringement action was brought *bona fide*, and whether Mr. Hart made the threats complained of without reasonable and probable cause. After evidence had been given, and counsel heard on behalf of the plaintiff, Mr. Justice North dismissed the action with costs.]

Solicitors—Truefitt & Gane, for plaintiff; Linklater, Hackwood & Co., for defendant.

[IN THE CHANCERY DIVISION AND IN
THE COURT OF APPEAL.]

KEKEWICH, J.

1889.

July 9, 10.

COTTON, L.J.

BOWEN, L.J.

FRY, L.J.

Dec. 14, 16.

MYERS v. CATTERSON.

*Easement — Light — Implied Grant —
Railway Company — Injunction.*

A railway company sold a house in fee to the plaintiff and retained the adjoining land; and the conveyance recited that the whole of the land so retained would be actually required for the construction of the railway. The windows on the ground floor and basement of the house derived their light through one of the arches of a viaduct over which the railway ran. The defendant subsequently acquired through the company an interest in the adjoining land and the arch, which he blocked up:— Held, that there was an implied obligation on the part of the railway company not to interfere with the plaintiff's lights except so far as required for the construction of the railway, and that the plaintiff was entitled to an injunction.

Decision of KEKEWICH, J., affirmed.

This was an appeal from a decision of Kekewich, J., restraining the defendant from obstructing the plaintiff's lights.

In 1863 the London, Chatham, and Dover Railway Company agreed to sell to Solomon Myers a piece of land, being part of the surplus lands of the company, on which he built a house, now known as 89 Newington Causeway.

The sale was carried into effect by an indenture of the 31st of December, 1863, whereby the railway company granted to Myers in fee-simple the said piece of land and the house then standing thereon, with all the rights, easements, and appurtenances thereunto belonging or appertaining, or therewith used or enjoyed. The deed contained a recital to the effect that the whole of the land retained by the railway company would be actually required by the company for the construction of their railway. It contained no express covenant as to lights. Myers re-

sided in the house from 1863 until his death in March, 1888, and it had since been occupied by his widow, the present plaintiff. It was used partly as a dwelling-house and partly as a shop.

The house was situated on the south-west side of the London, Chatham, and Dover Railway, which here ran over a series of brick arches. It was originally about 27 feet distant from the railway, but the distance was subsequently reduced to 8 feet, in consequence of the company having widened the viaduct for the purpose of doubling their line. Some of the windows of the house, including the window of a small sitting-room on the ground floor and the window of the kitchen in the basement, derived their light through the opening of one of the arches to which they were substantially opposite. This arch was 58 feet long, 25 feet wide, and 18 feet high.

On the 19th of December, 1872, the company leased to Isaac Jacobs seven of their arches, including the arch in question, and the land on either side of the arches, for a term of fifty years, subject to any rights of light to which Myers was entitled in respect of his house.

By two indentures of the 31st of December, 1872, the company leased the said arches to Lewis Isaacs, who was a nominee of Jacobs, for a term of 1,000 years, subject to the lease of the 19th of December, and conveyed to him the freehold of the land comprised in the lease of the 19th of December subject thereto, and subject to all rights and easements, if any, affecting the same.

By an indenture of the 12th of February, 1873, the said land and arches were transferred to Jacobs; and by an indenture of the 29th of July, 1887, the said premises were conveyed and assigned to the defendant, Samuel Prince Catterson.

From 1873 the arch opposite the plaintiff's house had been used for the storage of heavy machinery, which to a certain extent obstructed the access of light through it.

In November, 1887 the defendant erected a warehouse on the north-east side of the viaduct at a short distance from the railway, and facing the arch in question; and in December, 1887, he

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blocked up the arch on the side nearest the plaintiff's house—the south-west side—with a wooden hoarding.

Myers immediately commenced an action for an injunction to restrain the defendant from permitting any building or hoarding to remain erected on any part of the land formerly belonging to the London, Chatham, and Dover Railway Company, so as to obstruct the ancient lights enjoyed by the plaintiff's house, and for damages. After Myers's death the action was continued by his widow as his legal personal representative.

Warmington, Q.C., and Swinfen Eady, for the plaintiff.

Barber, Q.C., and E. Knowles Corrie, for the defendant.—Looking at all the circumstances of the case, there is no implied obligation on the part of the company not to block up the arches. The purchaser must be taken to have known that the arches might be used as storehouses—*The Birmingham, Dudley, and District Banking Company v. Ross* (1).

[KEKEWICH, J.—That case depended on *Palmer v. Fletcher* (2) and *Allen v. Taylor* (3).]

KEKEWICH, J.—I do not intend to deal at large with the question, which has been argued as a serious as well as a novel one, respecting light coming through a house or through a building instead of over one or over a vacant space. I can see that there is much room for argument with reference to circumstances which do not exist here, whether the claim to access of light is made under contract express or implied, or under statute. It seems to me unnecessary to pursue that subject here, because I am not dealing with a building in the vulgar sense of the word, and certainly not with a house. What I am dealing with is a tunnel—that is to say, a railway built upon arches, making a hollow space underneath, through which light can be conveyed. It happens that this is a line in the neighbourhood of London, and

rather broad, with double lines; and, consequently, this archway—if that is the correct expression—extends to something like 58 feet. But assuming—as undoubtedly is the case—that light can pass through it from one end to another so as to illuminate more or less the space on the other side, there can be no difference between an archway of 58 feet deep and an archway a few inches or feet deep. It would seem to me monstrous to hold that a man is not entitled to shut out light when it comes over a vacant space, and yet that he would be entitled if the light came through his neighbour's building between two columns with a lateral bar placed on the top; and unless the defendant is prepared to insist that light coming in that way cannot be protected, his argument as regards this particular case, to my mind, is worthless. I regard the light as coming through this archway in such a way as that, and I think that common sense will find a limit to the protection of light under such circumstances. After a certain point there is a natural limit; and if I found that light would not be conveyed through the archway or tunnel, then there would be no ground for applying for protection. Putting that out of the way, I also at the same time set aside the statute. The plaintiff has a claim under the statute to which reference has been made. I set that aside, not as being immaterial, nor as being a claim which, as at present advised, I should be disposed to say was unfounded; but because I think that the other first ground put forward is, I will not say stronger, but is sufficiently strong to support the plaintiff's case without reference to the statute. That ground is this—that Mr. Catterson, the defendant, or rather his immediate predecessor in title, took his property subject to an obligation not to interfere with the light coming to the plaintiff's house. It matters little, but it is a fact that the conveyance to the predecessor in title was made expressly subject to any right of light which Mr. Myers might have. That, of course, was not an admission that he had any right, not a statement that he had any right, but it was a statement that the defendant's predecessor in title took the property subject to what right there was, leav-

(1) 57 Law J. Rep. Chanc. 106; *ibid.* 601; Law Rep. 38 Ch. D. 295.

(2) 1 Lev. 122.

(3) 50 Law J. Rep. Chanc. 178; Law Rep. 16 Ch. D. 355.

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ing it open to Mr. Myers to make his own claim and to support it at the proper time if he thought fit. It has been truly said that the law on this subject is to be found expounded in the late case of *The Birmingham, Dudley, and District Banking Company v. Ross* (1). I apprehend that the law is found there stated fully, for the purposes of the present case, in the judgments of the Court of Appeal. I, of course, do not wish to refer to my own judgment; but I refer to a passage which I quoted from Sir George Jessel's judgment in *Allen v. Taylor* (3), where he says: "Where a man grants a house in which there are windows, neither he nor any one claiming under him can stop up the windows or destroy the lights." That is his statement—forcible, as his statements usually were—of the law applicable to such a case as the present. I do not observe a single word in either of the judgments of the Judges in the Court of Appeal which in the slightest degree diminishes the force of his language. They repeat the same proposition in their own language.

But then it is said that the case of *The Birmingham, Dudley, and District Banking Company v. Ross* (1) adds this restriction—that a man must take the house which is granted to him, as the house was granted, subject to any such use of his neighbour's land—the grantor's land—as he might reasonably anticipate. That is stated in several passages of the judgments of the Court of Appeal; but I think, perhaps, for the present purpose, it is more concisely and clearly stated in the judgment of Lord Justice Bowen than elsewhere. He says: "This presumption arises, that the grantor intends the grantee to enjoy so much light, unobstructed, as must under the circumstances have been assumed by both parties to be reasonably necessary for the fair and comfortable use of the premises which are the subject of the grant." There is nothing in that judgment to say that there is any absolute reservation, there is nothing to say that the implied obligation to preserve the grantee's light is to be impaired otherwise than the circumstances render reasonable as a matter of inference, so that any one looking back would be able to say this must have been intended or contemplated

as between the parties. That seems to me what they intended, and what was meant by the Lords Justices. In that particular case the inference was drawn that the corporation, who were the common grantors, intended to build to any height that might be convenient, having regard to the situation, and the first grantee was unable to complain that the second grantee had used that power in such a way as to interfere with his lights. What is the argument here? That the grantee here, Mr. Myers, must have assumed that as his house with the particular windows in question was opposite to a railway arch, the railway company intended sooner or later, by themselves or their tenants, to block up the light coming through the railway arch; and witnesses have been called to tell us, what I suppose we all know, although perhaps it might be thought that one could not take judicial notice of it, that there are many railway arches let to tenants, who block them up, and convert them to purposes of trade by so blocking them up, and putting up hoardings with and without windows, and so forth. Was there any reasonable presumption that that would take place? Was Mr. Myers reasonably bound to assume that the railway company intended to deal with their arches in that way? That the practice was common then may be a fact—the evidence goes to shew that it was; that it is still more common now is also a fact; but that is not the question. The question is whether the railway company must be understood to have reserved that right. I see no covenant to that effect. I suggested to Mr. Barber the possibility of a restriction on the railway company's powers of dealing with their arches for purposes other than those of their own undertaking—a point which may perhaps hereafter have to be further considered. But, apart from that, looking at it from what I venture to call the common-sense point of view, although Mr. Myers may have ventured to guess that the railway company, or their tenants, might be attempting to do such a thing, I think that there was no reasonable necessity for supposing that this was within the contemplation of the parties. It might very well be supposed that the

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arch would always be left vacant, or, at any rate, only used in such a way as not to interfere with the access of light through it.

Getting rid of that point, and finding, as I do, that the implied obligation—I will take care to avoid the use of the words “implied grant”—the implied obligation on the part of the railway company, and those claiming through the railway company, including, of course, the present defendant, is not restricted by any such presumption as I have mentioned, I have then to see what the facts of the case are.

[His Lordship then examined and commented on the evidence, observing that he preferred the evidence as to the facts to the scientific evidence, and came to the conclusion that there had been an interference with the access of light to the plaintiff's windows, and that her right to relief was not barred by acquiescence; and his Lordship granted an injunction as regards the hoarding, and directed an enquiry as to damages as regards the warehouse.]

The defendant appealed.

Neville, Q.C., and *Russell Roberts*, for the appellant.—We submit that the plaintiff is not entitled to relief either on the ground of implied grant or under the Prescription Act.

In considering the question of implied grant, there is a difference between a railway company and an ordinary landowner, because the railway company can only hold land for the purpose of their undertaking. The Court will not imply an obligation on the part of the company to allow the plaintiff so much light as they do not require to obstruct, because the company are the sole judges of the extent of the obligation. Such an obligation is, in its nature, too uncertain to arise by implication of law. Further, the recital in the conveyance to the late plaintiff that the whole of the land was required by the company for the construction of their railway, is strong to shew that there was no intention on the part of the company to confer any right to light; and in determining such intention the truth or falsehood of the recital is immaterial. Moreover, the doctrine of implied grant will

not be extended. Then, as to prescription, the right of the plaintiff is lost by the interruption occasioned by the storage of heavy machinery. *Presland v. Bingham* (4) is distinguishable, because there the obstruction was of a much more serious character than in this case. Further, the plaintiff is not entitled to relief in the case of light beyond the angle of 45 degrees—*The City of London Brewery Company v. Tenmant* (5) and *Clarke v. Clark* (6). At any rate, there is no such obstruction as will justify the interference of the Court. Lastly, the plaintiff is barred by acquiescence.

Warmington, Q.C., and *Swinfen Eady*, for the plaintiff, having waived the claim to an enquiry in the case of the warehouse, were not called upon.

COTTON, L.J., stated the facts and continued:—The first question we have to consider is this: Is there under the circumstances which I have stated any obligation on the railway company not to obstruct the plaintiff's lights?

Now, if a person who is the owner of two plots of land, on one of which a house has been built, sells the plot with the house on it and retains the other, then from the position in which he has placed himself towards the purchaser there is an implied obligation, or contract, or covenant (call it which you will), on his part not to interfere with the lights of the house which he has sold; and if this were the case of an ordinary landowner, that would be the obligation which, unless rebutted, would *prima facie* result from the position of the parties. Here the vendors were a railway company, and the difference, as it is argued, is this—that a railway company will not be presumed to do anything which would interfere with the construction of their railway. And, no doubt, that is so. Here it is clear upon the face of the conveyance that there was a limitation on the implied contract entered into by the vendors (that is, the railway company) that they were not to be restricted from

(4) Law Rep. 41 Ch. D. 268.

(5) 43 Law J. Rep. Chanc. 457; Law Rep. 9 Chanc. 212.

(6) 35 Law J. Rep. Chanc. 151 Law Rep. 1 Chanc. 16.

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doing what was necessary for the purposes of constructing their railway. That, in my opinion, is the true nature of the obligation here. But then it is argued that this really makes the obligation entirely dependent on the will of the railway company, and that that is quite inconsistent with, and is repugnant to, the grant of the house to the purchaser through whom the plaintiff claims. But that is not so. I think the true view is this, that the limitation of the obligation contracted by the railway company is not entirely dependent on the will of the railway company. They may do anything which is required for the construction of their railway; and the engineer will determine, subject to the directors, what is necessary for the construction of the railway. That, therefore, is not a matter left entirely to the will of the company, but certain definite purposes are pointed out for which alone the railway company are entitled to use the land retained in such a way as to interfere with the obligation entered into by them as regards the light to the plaintiff's windows. I, therefore, hold that the railway company, as owners, not only of the land sold, but of the land adjoining, entered into an implied obligation not to do anything on the adjoining land to interfere with the plaintiff's reasonable enjoyment of the land sold, except that which was necessarily required for the construction of the railway.

Therefore, the first question we have to consider resolves itself into this, whether this hoarding which is complained of by the plaintiff was required for the construction of the railway? In my opinion, it certainly was not. It is not as though the railway company in making an alteration of their line had put up this hoarding; but the facts are, that the company have granted to the defendant a lease or interest under which he is in occupation, and for the purpose of making that occupation profitable to himself—and, indirectly, possibly to the company by enabling them to obtain a larger rent for the archway—he has put up the hoarding which is complained of. That is either for his own pecuniary benefit or for the benefit of the railway company—I care not which—take it that it is for the pecuniary benefit of the

railway company. It is not for the purposes of the construction of their line, for which only are they entitled to deviate from or be relieved from their obligation as regards the plaintiff's house. That obligation is not to interfere with the light except in doing what is required for the construction of the railway.

It is said that in the case of such an implied covenant the Court will not grant an injunction unless there is a substantial interference with the light of the plaintiff. With that I agree. It was argued also on behalf of the defendants that there could be no implied obligation in a case where, upon the evidence, the angle of light as it came to the house was less than of 45 degrees. In my opinion, that is entirely wrong. The Court will not interfere by injunction where it sees there is still a reasonable access of light of sufficient extent to the person complaining; but the obligation would be implied quite as much where there was no obstacle existing at the time opposite the house sold—no difficulty arising from anything there was on the land of the plaintiff, or the adjoining land. Take, for example, a house on Salisbury Plain, without anything to interfere with the light which came from the horizon—could it be said that the vendor of such a house in retaining adjoining land did not subject himself to the implied obligation not to do anything thereon which would interfere with the access of the light to the house which he has sold? It may be that, if he put up something which only diminished the light in an infinitesimal degree, it would not be held to be such an obstruction as to call for the interference of the Court; but that does not affect the question whether or not an obligation is entered into by the vendor. Now, in dealing with the question whether or not there has been such a breach of the obligation as to justify or require the interference of the Court, it must be borne in mind that the position of the house and windows is such that a very small diminution of the light to the access of which the plaintiff had a right would be prejudicial. The railway is close to the house, only eight feet off, and any interference with the light which came to it before the acts complained of would

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produce a serious effect. The learned Judge, after seeing and hearing all the witnesses, relied upon the witnesses of experience in opposition to the scientific witnesses, and I cannot differ from the conclusion at which he has arrived. One knows, and instances might be given, how frequently scientific witnesses of the greatest experience and skill have been shewn by the light of subsequent events to have been wrong in their conclusions.

Then there is one remaining point which was pressed upon us, that of acquiescence. But how has there been acquiescence? There has been no acquiescence in the thing complained of, because that has not been done until recently. There was, no doubt, a non-interference by the late plaintiff with the temporary obstruction of a small amount of light caused by the storage of some machinery. But there has been no acquiescence in the putting up of the hoarding by the defendant, and, in my opinion, this appeal fails.

BOWEN, L.J.—I am of the same opinion. As to the question of fact involved in the appeal, I shall really add nothing to what the Lord Justice has said, with this slight exception, that I do not consider that in a case of this sort we ought to review the decision of the Judge below, who has seen the witnesses, just as if we had seen the witnesses ourselves. So far as I can judge from the paper evidence before me, I do not say that I should not have arrived at the same conclusion as the learned Judge. But as to the point of law, which is, perhaps, of more general importance, I will add one or two words. Here a piece of land is in the ownership of a railway company along a portion of which the railway is conducted and is intended to be constructed. Then the company allow a purchaser to enter on the residue of the land, close to the place where the line will ultimately be carried, to occupy it under an agreement, and to build a house upon it, which house they finally convey to him.

Now what is the implied obligation that the company come under as regards the use of so much of the land as they retain for the purposes of their own railway? As

in the case of all other implied covenants or implied obligations, in order to see what the measure of the obligation is, we must look at the reason of the thing, and at the surrounding circumstances, in order to ascertain, if we can, what is the obvious intention of the parties, so as to give to the transaction between them that minimum of efficacy and value which, upon any view of the case, it must have been their common intention that it should have. Supposing this were the case, not of a railway company, but of an ordinary landowner who has two pieces of land which either adjoin or are so near to one another that the enjoyment of the one, perhaps, for all purposes, or at any rate for some purposes, depends upon the use to be made of the other piece of land. What is the obligation which the law assumes to arise between the parties as soon as the conveyance has been made and comes into effect? The owner of a piece of land which is not sold is selling a piece of adjoining land, the full enjoyment of which depends upon the use which he makes of the portion which is not sold. Surely it must be in the contemplation of the parties that, in the absence of any express agreement one way or the other, the vendor shall not so use that land which he retains as to preclude any possible use of the building or land which he sells, or to prevent that use of it for which he knows he is selling it to the purchaser. It would be contrary to common notions of justice and fair dealing if it were otherwise; and the truth is that the law in such a case, when the parties have entered into the relation of vendor and purchaser, assumes from the circumstances an obligation on the part of the vendor not to do anything with his own land which would defeat the known and obvious intention of both parties upon the sale. Now apply that to a house. Suppose I have a large piece of land, on one part of which is standing a house; that house may be a mere congeries of bricks, never intended to be used as a house, but which may be pulled down and carted away so as to be sold as bricks. If I sold a house merely as bricks, of course the transaction would be different; but if I sell a house which is standing on part of

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my land, as a house, with windows in it, to be used as a house, and the windows in it to be used as windows, the least that the law implies from the necessary reason of the thing is that I am not, upon the remainder of my land which I keep back, immediately I have sold the house and its windows, to do something which prevents all use of the house as a house, and all use of the windows as windows. The law imposes that obvious duty, in the form of what it calls an implied obligation or implied covenant or contract on the part of the vendor who is selling one portion of his property and retaining the other, under circumstances like this, that he will not on the property which he retains use all his rights as owner with respect to the property which he retains, but will only use such of his rights of ownership as can be used consistently with the convenient and reasonable enjoyment of the house he has sold as a house. That is the ordinary implication. But as it is clear that this implication depends upon what one gathers from observing the transaction and trying to find in it a clue to the intention of the parties, as soon as you add facts which make it obvious that the intention of the parties was one way or the other, then a colour is given to the inference which the law draws, and these additional facts may have the effect of lessening the obligation which otherwise would be supposed to have arisen. I keep a piece of land, and sell the house as a house. The obvious intention, in the absence of anything else, is that I intend it to be used as a house. But if at the time I make it clear to the person who is taking the house, or supposing the circumstances of the case make it clear to him, that although I sell it to him as a house, I am intending, nevertheless, to use the remainder of the land which I keep, in a way which may interfere in some degree with the full enjoyment of the house as a house—then you get a new element introduced into the case, which shews that the intention of the parties was a limited one; and that it was not intended by the parties that the full use of the house as a house, or the full enjoyment of the windows as windows, should be the essence of the transaction.

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Now here it is said that at the time the railway company sold this house as a house, with its window lights to be used as lights, the purchaser had notice that the railway company intended to use the remainder of the land in a particular way which would necessarily interfere with the enjoyment of the light to the windows, and would, so to speak, modify the ordinary implication which the law would extract from the transaction.

Therefore it becomes necessary to look at what was the exact character of the conveyance, and at what the purchaser of the house was told at the time he made the purchase. It is clear that he was told that the railway company intended to construct their line on a portion of the remainder of the land. I neglect for the purpose of this judgment any consideration of what the exact terms would be about anything else except this part of the land which immediately fronts the windows of the plaintiff; but the purchaser was told what it was most material for him with reference to his window lights to know, that the railway company, when they sold him the house and gave him the windows, required the remainder of the land for the construction of the railway. Now to what extent did that modify the obligation which the law would infer? I think it would modify it to this extent, that the vendor would no longer be bound to leave the window lights intact, but he would have a right to diminish the light to the windows and to interfere with the enjoyment of the land so granted, so far as he required to do so for the purposes of constructing the line, but no further. Subject to any modification of the intention of the parties arising from the circumstances of the case, the broad rule applies, that the person who gives a thing to be enjoyed intends that it is to be enjoyed, and has no right afterwards to do anything which defeats the enjoyment to which he has consented, and which is the creature of his own gift.

I think, therefore, that the appellant's argument breaks down, because although the purchaser clearly could not complain of the railway company interfering with his windows in the construction of their line, yet if the interference was one which

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went beyond the construction of the line, then the ordinary presumption of the law would not be ousted. It seems to me that this hoarding is certainly not for the purpose of the construction of the line, but goes beyond it. We put it on the broad ground that the vendor cannot derogate from his own grant, but is bound to allow the premises which he has sold to be enjoyed so far as they reasonably can be enjoyed, limiting the enjoyment only by the kind of user of his own land which he must be taken to have desired to preserve.

So much for the law of the case. The appeal fails, and the decision of the Court below must be affirmed.

FRY, L.J., concurred.

Solicitors—Saffery, Huntley & Son, for appellant; Hicklin, Washington & Pasmore, for respondent.

CHITTY, J. }
1890. }
March 25. }

JOHNSON v. WILD.

Landlord and Tenant—Assignment—Underlessees—Payment of Rent by One—Contribution by Others.

A tenant of part of the land comprised in a lease, holding under an assignment by the original lessee of the whole term therein at an apportioned rent, paid, under threat of distress, the entire rent to the lessor, and sought to obtain contribution thereto from the tenants of another part of the land who held under an underlease by the original lessee at an apportioned rent, which rent they had afterwards bought up from their underlessor:—Held, that there being no one entitled to sue the defendants for their share of the rent, the parties were not liable to a common demand so as to give rise to a right to contribution.

Special Case, stated by consent under Order XXXIV. to determine whether the defendants were liable to contribute in

respect of payment of rent made by the plaintiff to the landlord under threat of distress.

The plaintiff and defendants were occupiers of portions of a plot of land which, by an indenture of lease of the 27th of May, 1878, had been demised to Minor for 999 years at the yearly rent of 11*l.* 7*s.* 8*d.*

By an indenture of mortgage dated the 8th of April, 1879, Minor assigned to Adams a portion of this land for the residue of the term of 999 years at an apportioned rent of 3*l.* 17*s.* 8*d.*, with a proviso for redemption, and Minor thereby covenanted to pay the entire yearly rent and to indemnify Adams, his executors, administrators, and assigns, against the same.

The plaintiff was the assignee of this mortgage, under which he had entered into possession of the land therein comprised.

By an indenture of underlease of the 21st of May, 1879, Minor, in consideration of a premium of 20*l.*, demised to Ann Whittaker another portion of the land, for the residue of the term of 999 years save the last ten days thereof, at an apportioned rent of 6*l.* 6*s.* 6*d.*, with a covenant by Minor to pay the entire rent reserved by the lease, and keep Ann Whittaker, her heirs, executors, administrators, and assigns, indemnified against the same; and, by an indenture of the 28th of September, 1880, Minor, in consideration of 118*l.*, assigned and released to Ann Whittaker, her executors, administrators, and assigns, the yearly rent of 6*l.* 6*s.* 6*d.* reserved to him by the former indenture.

The defendants were the executors and trustees of Ann Whittaker's will, and were in possession of the land comprised in this underlease, which was used as a garden. The plaintiff's portion of the land had buildings erected thereon, and Minor having made default in paying the rent reserved by the original lease, the lessor applied to the plaintiff to pay the entire rent of 11*l.* 7*s.* 8*d.*, which he did under threat of distress, and then brought an action against the defendants for contribution in respect of this payment.

Levett (Romer, Q.C., with him), for the

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plaintiff.—Underlessees are liable to contribute towards rent paid by one of them—*Webber v. Smith* (1). A payment made for the benefit of several should on equitable grounds be contributed to by all—*Story Eq. Jur.*, *plac.* 493. The effect of the plaintiff's payment was to preserve the defendants' property, as otherwise the lessor could have recovered by ejectment.

Maclean, Q.C., and *Swinfen Eady*, for the defendants.—An underlessee paying the whole rent cannot recover any proportion of it from another underlessee—*Hunter v. Hunt* (2); nor can a tenant in common recover against his co-tenant—*Leigh v. Dickson* (3). The right to contribution arises only where there is a common liability, but there is no one entitled to sue the defendants for their proportion of the rent.

Levett replied.

CHITTY, J. [after stating the above facts, went on to say :]—Now this claim of the plaintiff is not made against a person liable jointly with him to a common demand. Such a liability would have given rise to a right to contribution in favour of the plaintiff. But the defendants are not liable for this rent; there is no one entitled to sue them for it. And no authority can be found for this claim. Co-sureties are liable to a demand by their principal for the whole, or a part, as the case may be, of the debt, and as between them there exists a right, both at common law and in equity, to contribution. Moreover, the kind of question raised in this case must have presented itself repeatedly during the centuries during which mortgages by sub-demise have existed to the second, third, fourth, or even tenth degree; and if this claim were to be acceded to, and there were a series of underlessees, it would be necessary to pursue the series to the last of them, which would be manifestly absurd. The plaintiff is no doubt in an unfortunate position, but I can find neither principle nor authority to justify this claim. The result is that his case fails.

(1) 2 Vern. 103.

(2) 1 Com. B. Rep. 300; 14 Law J. Rep. C.P. 113.

(3) 54 Law J. Rep. Q.B. 18; Law Rep. 15 Q.B. D. 60.

The decision on the Special Case being treated as the judgment in the action, the same was accordingly dismissed with costs, including the costs of the Special Case.

Solicitor—Robbins, Billing & Co., agents for Johnson & Johnson, Stockport, for plaintiffs; A. J. Nash, agent for F. & T. Drinkwater, Hyde, for defendants.

[IN THE COURT OF APPEAL.]

COTTON, L.J.

LINDLEY, L.J.

LOPES, L.J.

1890.

Jan. 22.

WARD v. LAWSON.
LAWSON v. WARD.

Solicitor—London Agent and Country Solicitor—Interest on Costs.

As, according to the "usual agency terms" between a country solicitor and London agent, the London agent is only entitled to payment in full of all out-of-pocket expenses and to a share (one half or one third, as may be agreed) of the profit charges, he is not, in the absence of special agreement, entitled to share in any other profits made by the country solicitor in the business, or in interest paid to the solicitor on unpaid costs.

An agreement by a country solicitor with a London solicitor, that the London solicitor should be his London agent on the usual agency terms, but that the London agent should not call upon the country solicitor to pay any of his agency bills until he had obtained payment of his bill of costs from his client, does not entitle the London agent to share in interest paid to the country solicitor on unpaid costs.

Decision of CHITTY, J., reversed.

This was an appeal from a decision of Chitty, J.

The original plaintiff, Ward, was a solicitor at Sheerness, and in the year 1856 he was appointed solicitor of the Sittingbourne and Sheerness Railway Company, a company formed for the purpose of constructing a railway between Sittingbourne and Sheerness.

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In 1859 Ward entered into an arrangement with Messrs. Eyre & Lawson, solicitors, London, that they should be his London agents on the usual agency terms. In the year 1860 Ward entered into a further arrangement with Messrs. Eyre & Lawson that the bills of costs for business transacted by Eyre & Lawson as the plaintiff's agents in respect of the railway company should be kept separate from Ward's general agency bill, and that they should not call upon Ward to pay any of their agency bills until he had obtained payment of his bill of costs from the company.

In 1867 Eyre & Lawson dissolved partnership, and thereupon Lawson acted alone as the agent of Ward in business connected with the company, and in a suit of *Coutts v. Acworth* upon the terms before stated.

In or about 1872 Ward brought a suit against Lawson, and by the bill alleged the above agreement, and charged that Lawson the defendant falsely alleged that the agreement was not for agency, but for partnership in the particular business, and prayed that Lawson might deliver his bills of costs as Ward's agent, and also for a general account of all dealings and transactions between them. This case is reported on demurrer, *Ward v. Lawson*, 42 Law J. Rep. Chanc. 273; Law Rep. 8 Chanc. 65.

In 1872 Ward commenced an action against Eyre & Lawson, claiming an account and taxation of the bills of costs between them. This case is reported *Ward v. Eyre*, 49 Law J. Rep. Chanc. 657; Law Rep. 15 Ch. D. 130.

By a decree made in *Ward v. Lawson*, dated the 26th of June, 1874, the following accounts were directed—first, an account of all money paid or advanced by the defendant to or for the use of the plaintiff in relation to matters of business transacted by the defendant for or on behalf of the railway company; secondly, an account of all moneys received by the defendant for the plaintiff in relation to the matters aforesaid; thirdly, an account of all dealings and transactions between the parties in relation to the matters aforesaid.

The railway company did not pay these costs for some years, and after some time

Ward brought an action against the company, and after litigation for eleven years obtained judgment against them for the amount due, with interest at four per cent., which had since been paid.

Ward died, but the action of *Ward v. Lawson* was revived, Ward's representatives being made parties to it. The action was then set down as *Lawson v. Ward*, the conduct of the action being given to Lawson, as Ward's representatives declined to proceed with it. On the accounts being taken in chambers, Lawson claimed to have the interest paid by the railway company brought into account. Chitty, J., held that the representatives of Ward must account for the interest.

The representatives of Ward appealed from this decision.

Byrne, Q.C., and *Chadwyck Healey*, for the appellants.—The London agent is not entitled to share in the interest paid on costs. It is well established that, except in the case of special agreement, there is no question of interest between a country solicitor and his London agent. Here the agreement between the parties was that the business should be transacted on the usual agency terms, subject to this, that the London agent was not to call upon Ward to pay him until Ward had himself been paid. There is nothing in the agreement, either express or implied, that the London agent was to be entitled to share in interest on unpaid costs. The relation between the parties was that of principal and agent, not of partners, and therefore, in the absence of special agreement, the London agent is not entitled to have a share in the interest.

Komer, Q.C., and *B. Eyre*, for the respondent.—This case is entirely different from the ordinary case of a country solicitor and London agent. There was a special agreement between the parties, which provided, *inter alia*, that Lawson should not call upon Ward to pay him until Ward had been paid. It follows that if Ward received interest on such unpaid costs, then Lawson would be entitled to share in it. Lawson was, moreover, solicitor to the railway company, and he transacted some business for them direct and received money for it. He could have

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sued the company. He was solicitor to the company as well as Ward. There is a very grave difference between a London agent seeking to make a country solicitor personally liable to costs. Here the interest claimed is interest which has been paid to Ward on costs in which Lawson would have been entitled to share; and can there in such a case be any difference between *corpus* and interest?

[The Court consulted Mr. Ryland, one of the Taxing Masters, as to what were "the usual agency terms" with regard to sharing costs between country solicitors and London agents; and Cotton, L.J., said: "Mr. Ryland says the London agent is entitled only to the full amount of his expenses out of pocket, and to a share of half or a third, as may be agreed, of the profit charges, and that he has no right to share in any other profit the country solicitor may make out of the business."]

We submit that Lawson is entitled to share in this interest under the special agreement, and under the directions contained in the decree. Interest has been actually paid him, and therefore the decision of Chitty, J., is right.

They cited *De Haviland v. Bowerbank* (1) and *Rhodes v. Sugden* (2).

COTTON, L.J.—This is an appeal from a decision of Mr. Justice Chitty made in a matter which has arisen in taking the accounts between these parties, and though it does not in terms state that the plaintiff is to pay to the defendant (the plaintiff being now dead), yet I think it does imply not only that he is to account, in the sense of saying what interest he has received, but that the defendant is entitled under the arrangement between the parties to half of that interest. In my opinion it turns on what were the real terms of the agreement between the plaintiff and the defendant—that is to say, between Ward, the plaintiff, who is dead, and the defendant Lawson.

The original plaintiff Ward was a country solicitor, and the defendant Lawson, who

was in partnership with another gentleman, was a London solicitor. No doubt Ward was originally the solicitor of the railway company, and then he applied to the defendant, or his then firm, in order that his then firm might transact some business for the railway company. I think it is hardly to be doubted that in its origin the position was that of country solicitor and London agent. But then came an agreement made between the parties, and it is said that afterwards, at a later period, Ward ceased to be the solicitor of the company, and then Lawson himself became the solicitor of the company, and that therefore it was not a case as between Ward as country solicitor and Lawson as London agent. In my opinion it has not been shewn that there was any putting an end to the agreement which I have referred to; and, in my opinion, if that was the real position of the parties at one period, yet the agreement is binding, and still regulates, so far as it applies and can regulate it, the question in dispute between these parties. The agreement was this. Ward made an arrangement with the firm of Eyre & Lawson that the firm should act for Ward as his agents in London, and it was agreed between Ward and the firm that all business introduced by Ward to the firm and transacted by the firm should be so transacted as agents for Ward on the usual agency terms. So that so long as Ward was really in the position of solicitor, and the firm were in the position of London agents, the usual agency terms were to regulate their dealings and transactions, and that, as regards all business which was introduced by Ward, the firm were to act as agents for Ward on the usual agency terms—that is to say, that so long as the business was introduced, and as regards all business introduced by the plaintiff to the firm, they should act on the usual agency terms. To my mind that means that any moneys received in respect of the business so introduced, even though at the time the defendants were not really in the position of London agents for the country solicitor, should be dealt with on the usual agency terms; and there is this, that in the usual case the London agent has no claim at all against the client, but he can sue the country solicitor for what

(1) 1 Campb. 50.

(2) 54 Law J. Rep. Chanc. 639; Law Rep. 29 Ch. D. 517.

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is due to him on the arrangement usually regulating the distribution of moneys received or charged for in respect of bills of costs.

Now there was a considerable question as to what was the position and claim of the London agent as against the country solicitor. Of course, the London agent is entitled to all charges which are made for sums paid by him out of pocket, but there may be, and are, many other charges in solicitors' bills where there is no actual expenditure by the London agent. He makes charges for professional services, and attending on the client or rendering advice, and many other matters. Those, I think, are called "profit charges"; and the conflict as to what the right of the London agent is was this: Was he entitled to half the profit made on the bill of costs in respect of the transactions in which he was engaged? or was he entitled to half the amount of the profit charges—that is to say, of those charges to which I have referred? We did not feel quite justified in deciding that point without getting the opinion of one who would know very well, from his position as Taxing Master and his former position as solicitor, what was the arrangement; and we learn from Mr. Ryland what I have said, that the London agent is entitled only—not regarding the charges which he has paid out of pocket—to half the amount of those which are called profit charges—that is, those charges which do not involve any expenditure of money by him. It is upon the use of the term "profit charges" that this difficulty has really arisen. Now the contention raised here on behalf of the defendant is that he is entitled to half the profit. We are told by Mr. Ryland, "Not at all—the London agent has nothing to do with the profit made by the solicitor; nor is he in any way, unless there is some special arrangement, implicated in any loss which the country solicitor, the solicitor in the case, may suffer in respect of the client not being able to pay him." Now, is there any arrangement here which alters that—which gives the defendant here a claim to half the profit? It is said that there is, because this was not on the usual agency terms, and, in my opinion, it was not. There was no distinction or differ-

ence as regards the distribution of the money which he received—that is to say, as regards the charges which the London agent is able to make; but there was this, that he was not to sue the plaintiff until the plaintiff had obtained payment of his bills of costs from the company. The words are that they shall not call upon the plaintiff to pay any of their agency bills until the plaintiff has obtained payment of the bills of costs from the company. That does not, to my mind, say what amount is to be claimed by the defendant, or what sums he is entitled to charge as against the plaintiff, his principal—what in his agency charges he can claim—but only limits the time. It says that he shall not make any claim in respect of what he is entitled to as agency charges unless and until the plaintiff obtains payment of the bill of costs from the company. In my opinion there is nothing in that which gives the London agent, the defendant here, any right to anything more than he would get according to the usual agency terms. It prevents him undoubtedly from suing for those, or from making any claim against the solicitor, until the solicitor is paid; but the saying that he shall not do so for a certain time does not alter in any way the amount which he can claim when that time arrives.

Then it is said that natural justice gives him a claim as against the solicitor for any interest he may obtain, in addition to the amount of the profit charges—charges in respect of which the London agent has made no expenditure. That might have been very reasonable if there had been any such clause here; but there is not; and, in my opinion, it would be wrong, simply because the London agent has agreed not to sue the solicitor until certain events occur, to import into that this condition, that if in consequence of the delay you get any interest paid to you, then there is an implied contract or agreement that I shall have half that interest. In my opinion, the view of Mr. Justice Chitty was wrong, and I cannot agree with it. I think the appeal must be allowed.

LINDLEY, L.J.—The difficulty of this question arises from misunderstanding the

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exact meaning of the real agreement entered into between the parties, because the decree upon which the respondent relies is based upon that agreement, and it is so carefully worded and expressed as to give effect to it. Now, there is nothing in the decree which settles this point one way or the other. I am quite aware that there is the 3rd clause about "dealings and transactions," but there is nothing which says what is to be done with the interest when it is recovered—whether it is to be shared between the parties, or to whom it is to belong. To decide that, we must look at the agreement itself. Now the agreement was entered into at two different times. It is set out in paragraph 4 of the bill in *Ward v. Lawson*. The first agreement was in January, 1859, when it was arranged that the business, which I will shortly allude to by calling it "the business," should be transacted by Eyre & Lawson, as agents of the plaintiff, on the usual agency terms. I pass that over for the moment. Then, after that, in 1860, there was a further agreement embodying this important stipulation, that the defendants, the town agents, Eyre & Lawson, should not call upon the plaintiff to pay any of their agency bills until the plaintiff had obtained payment of the bills of costs from the company, and that those bills should be kept separate. Now the first question, and the main question, is, what is meant by the expression "on the usual agency terms"? I confess I thought at one time, until Mr. Ryland made it plain that I was wrong, that the town agent shared the profits up to a certain point made by the country solicitor. But that is not so at all. Mr. Ryland tells us that what is meant by "the usual agency terms" is this: that the town agent has nothing on earth to do with the profits; and he gave us a very remarkable case in which a country solicitor got from a grateful client 500% in a case in which Mr. Ryland was the town agent, and the town agent did not get a farthing of that. The town agent does not share the profits, and has nothing to do with the profits, but what he does is this: he gets his disbursements, and then he has half of certain charges which are called "profit charges" to distinguish them from dis-

bursements. When once one sees it, and gets clearly into one's head that the usual agency terms have nothing to do with sharing profits at all, then this case becomes one very easy of solution.

Now there is nothing in the agreement, and there is nothing which, when the expression is understood, can be interpreted so as to involve as a consequence the right of the town agent to share any profits, whether they come in the shape of interest, or whether they come in the shape of gift, or otherwise, to the country solicitor. The sum which the town agent is to be entitled to is to be ascertained upon a different footing altogether, and there is nothing in the decree which in any way varies that; but in consequence of the difficulties which have arisen from the contentions of Mr. Lawson, and from his conduct—I do not say that he was wrong or right in the matter—he may have been partly right and partly wrong—but in consequence of the fact that he had apparently worked, or assumed to work, for the company as principal, and not merely as an agent, it became necessary, in pronouncing the decree, to introduce some words which would define the position of the two parties, and there is an account therefore. First of all there is a declaration as to his position—that he is an agent, and what he is to do; then there is the third clause about "all dealings and transactions," which was naturally relied on by the respondent. Then there are certain clauses carefully worded with reference to getting in what is due from the company, and they are both to get in as best they can what may be payable from the company to them or either of them; but there is not a word that I can see in this decree which entitles the town agent to more than the agreement gives him; and it appears to me that that is where Mr. Justice Chitty has gone wrong, because he seems to have attributed to this decree a force and effect which I do not think it bears. He says, "It is clear in this case, from the terms of the agreement which I have read, that if Mr. Lawson had received the amount of the bills from the railway company, he must have allowed, as between himself and Mr. Ward, in account, the sum he actually

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received"—he certainly must—"and if that sum had included the original principal of the demand, and interest for forbearance, then he would be chargeable with interest, and the interest would then go as part of the profit to be divided between these two persons." There, I think, is a mistake; he would have had to hand over the amount of that interest to the person to whom it belonged, and that is the country solicitor. I cannot, now that I understand the meaning of the agreement, spell out of this anything to the effect which would entitle Mr. Lawson to interest on these bills. He has stipulated that he will not demand payment for a time, which is, unfortunately, very long—until the railway company pays. That delay has been very considerable, and nothing would have been more reasonable than for him to have stipulated that he should have interest, if the railway company paid interest. He has not done anything of the kind; and, now that the terms of it are understood, I do think that it is incumbent upon him to shew some agreement entitling him to interest. At first I thought it was the other way. I thought it would require an agreement to disentitle him; but that is entirely changed, I think, when one understands the full and accurate meaning of the phrase "usual agency terms." That Mr. Ryland has explained to us; and, in face of his explanation, this appeal must be allowed.

LOPES, L.J.—In the judgment in *Ward v. Lawson*, which has been referred to, Lord Selborne says that the account in question is an agency account between a London agent and a country solicitor. The relation, therefore, between the plaintiff and the defendant in this case is the relationship of a country solicitor and a London agent. What, then, is an agency account—or, in other words, what is a London solicitor entitled to receive in respect of agency charges from the country solicitor? He is entitled to receive all out-of-pocket expenses, and he is entitled to receive a share—be it a half or a third—of the profit charges, whichever may be the arrangement between them. Now this, to my mind, is, when it is considered for a moment, a very reasonable arrangement

in respect of these charges. The country solicitor does nothing whatever, but, on the other hand, he has introduced the business to the London solicitor, and, moreover, the country solicitor remains immediately responsible to the client. Therefore, it seems to me fair that he should be remunerated, although the work is done by the London agent. Now, when it is clearly understood what the agency bill is, or what the agency charges are, it appears to me not very difficult to interpret this agreement. To my mind, it means this: the country solicitor is speaking, and says, "You, the London agent, are to have your share of the agency charges, but subject to this, that you are not to be entitled to have those charges paid to you by me, the country solicitor, until I, the country solicitor, have received them in the bill of costs which I shall send in and shall recover from the company—or, in other words, until the company has paid them to me." That being so, I am of opinion that Mr. Lawson, the London agent, is not entitled to recover the interest which he seeks to recover in this case. The country solicitor is entitled to recover the amount of his bill of costs, subject to the proper proportion in respect of agency charges being paid to the London agent. I think, therefore, that the judgment of Mr. Justice Chitty was wrong, and that this appeal must be allowed.

Appeal allowed.

Solicitors—Sole, Turner & Knight, for appellants; A. Scott Lawson, for respondent.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
 LINDLEY, L.J. } *In re* THE BRIGHTON AND
 LOPES, L.J. } DYKE RAILWAY COMPANY.
 1890.
 Feb. 11.

Railway Company—Petition for Confirmation of Scheme of Arrangement—Railway Companies Act, 1867 (30 & 31 Vict. c. 127), ss. 6, 12, 13, 16, and 17—The Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 13—Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), ss. 13 and 14—Splitting of Ordinary Shares—Preferred and Deferred Half Shares—Preference Shares.

A company was incorporated with a capital of 72,000*l.*, divided into 7,200 ordinary shares of 10*l.* each. Under a power contained in the company's special Act, 4,960 shares had been split into preferred and deferred half shares. The holder of any two halves was entitled in respect thereof to such right of voting and other advantages as were incident to one entire share, but two half shares did not become one entire share. Upon a petition being presented under section 16 of the Act of 1867 for the confirmation by the Court of a scheme of arrangement,—Held (reversing the decision of NORTH, J.), that the holders of the preferred half shares could not be treated as a class of preference shareholders within section 12 of the Act of 1867 whose assent was required to the scheme of arrangement, but that any rights of priority belonging to the holders of the preferred half shares as between themselves and the holders of the deferred half shares would be protected by the provisions of section 17 of the Act of 1867.

The Brighton and Dyke Railway was incorporated in 1877 by its special Act, 40 & 41 Vict. c. clxxxix., with a capital of 72,000*l.*, in 7,200 shares of 10*l.* each. The shares were all ordinary shares.

Section 10 was as follows: "Subject to the provisions of this Act, the company, with the authority of three fourths of the votes of the shareholders present in person or by proxy, at a general meeting of the company specially convened for the purpose, may from time to time divide any share in their

capital into half shares, of which one shall be called 'preferred half share,' and the other shall be called 'deferred half share'; but this company shall not so divide any share under the authority of this Act unless and until not less than sixty per centum upon such share has been paid up, and upon every such division fifty per centum upon the entire share shall be carried to the credit of the deferred half share (being the whole amount payable thereon), and the residue to the credit of the preferred half share."

Section 11: "The dividend which would from time to time be payable on any divided share, if the same had continued an entire share, shall be applied in payment of dividends on the two half shares in manner following—that is, first, in payment of dividend after such rate, not exceeding five per centum per annum, as shall be determined once for all at a general meeting of the company specially convened for the purpose, on the amount for the time being paid up on the preferred half share, and the remainder (if any) in payment of dividend on the deferred half share, and the company shall not pay any greater amount of dividend on the two half shares than would from time to time have been payable on the entire share if the same had not been divided."

Section 12 provided that the dividend on preferred half shares was to be paid out of profits of year only, in priority to the deferred half shares bearing the same number.

Section 13, that half shares were to be registered, and each half share was to bear the same number as the number of the entire share certificate in respect of which it was issued.

Section 17: "The several half shares under this Act shall be half shares in the capital of the company, and every two half shares (whether preferred or deferred, or one of each) held by the same person shall confer such right of voting at meetings of the company, and (subject to the provisions hereinbefore contained) shall confer and have all such other rights, qualifications, privileges, liabilities, and incidents as attach and are incident to an entire share."

The company had split 4,960 of the

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shares into preferred half shares and deferred half shares, leaving 2,240 shares unsplit—the preferred half shares to have a five per cent. dividend.

The company being unable to meet its engagements with its creditors, the directors, on the 11th of December, 1889, filed a scheme of arrangement under section 6 of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), which scheme was, on the 23rd of December, submitted to an extraordinary general meeting of ordinary shareholders specially called for that purpose, and was assented to by a large majority.

The directors, on the 2nd of January, 1890, presented a petition under section 16 of the Railway Companies Act, 1867, for the confirmation of the scheme by the Court. This petition was opposed by a minority of shareholders, who objected to the scheme.

North, J., had decided that the holders of the preferred half shares were “preference shareholders” within the meaning of section 12 of the Act of 1867 (1), and ordered the petition to stand over generally, for the purpose of enabling the directors to obtain the assent of such preference shareholders in accordance with that Act.

The directors appealed.

Cozens-Hardy, Q.C., and Grosvenor Woods, for the appellants.—We submit that when these ordinary shares were,

(1) 12: “The scheme shall be deemed to be assented to by the guaranteed or preference shareholders of the company when it is assented to in writing as follows: If there is only one class of guaranteed or preference shareholders, then by three fourths in value of that class; and if there are more classes of guaranteed or preference shareholders than one, then by three fourths in value of each such class.”

Section 13: “The scheme shall be deemed to be assented to by the ordinary shareholders of the company when it is assented to at an extraordinary general meeting of the company specially called for that purpose.”

Section 17: “After hearing the directors, and any creditors, shareholders, or other parties whom the Court thinks entitled to be heard on the application, the Court, if satisfied that the scheme has been, within three months after the filing of it, or . . . assented to as required by this Act, and that no sufficient objection to the scheme has been established, may confirm the scheme.”

under the statutory power, divided into preferred and deferred, the preferred half shares did not become preference shares, nor the holders of them a class of preference shareholders, within section 12 of the Act of 1867, whose assent is required. The assent of the ordinary shareholders which has been obtained in pursuance of section 13 is sufficient. At the passing of the Arrangement Act of 1867, there was no power to split up shares, such power being given for the first time by the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 13, which enabled any company which in the immediately preceding year had paid a dividend of three per cent. to divide its ordinary stock into preferred and deferred ordinary stock; but at the passing of the Arrangement Act of 1867 the only general definition of a preference share is to be found in the Companies' Clauses Act, 1863, sections 13, 14 (2). Here, for convenience of dealing, the ordinary shareholder is entitled to split his shares into two halves; but the shares have not lost their character of ordinary shares because a preference is given to the preferred over the deferred half. There is only one class of shareholders in this company. More than one-third of the shareholders have not exercised the option, and it would be strange if the true meaning of “preference shares” in section 13 were to depend on whether the individual shareholder had or had not exercised his option. If section 12 applies, then one-fourth of 4,960 preferred half shares—that is, 1,240—may

(2) 26 & 27 Vict. c. 118. part 2, s. 13: “Where any company (incorporated before or after the passing of this Act) is authorised by any Special Act hereafter passed and incorporating this part of the Act to raise any additional sum or sums by the issue of new preference shares or by the issue of new preference stock, . . . then . . . the company may, for the purpose of raising such additional sum or sums, from time to time create and issue . . . such new shares or stock, either ordinary or preference . . . respectively, with any fixed, fluctuating, contingent, preferential, perpetual, terminable, deferred, or other dividend or interest. . . .”

Section 14: “The preference shares or preference stock so issued shall be entitled to the preferential dividend or interest assigned thereto, out of the profits of each year in priority to the ordinary shares and ordinary stock of the company. . . .”

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defeat 3,720—that is, the balance of the preferred half shares, and the whole of the 2,240 ordinary shares—making together a total of 5,960 shares in precisely the same position; the holders thus outvoting persons nearly five times as numerous as themselves, while the 1,240 preferred half shares would not on any other question of the company have that amount of voting power, because, being half shares, they would only represent 620 votes. Preferred stock of this kind could not be held to be preference stock within the authorised investment of the Trust Investment Act, 1889 (52 & 53 Vict. c. 32), s. 3 (g).

S. Stephens, for holders of some of the preferred half shares.—The company have treated these holders as preference shareholders in the ordinary sense, and in their circulars have called the shares five per cent. “preference shares.” This preferred half share is created a particular class of statutory preference share. The object of section 10 of the special Act was to authorise the creation of preference shares without the necessity of a new Act of Parliament.

Cozens-Hardy, in reply.

COTTON, L.J.—I should hardly like to give an opinion whether, in a case where all the shares in a company like this had been divided into preferred and deferred shares, the result would not be that the former would be preference shares in the ordinary acceptance of the term; but I think that in the present case we have not got a class of preference shareholders within the meaning of section 12 of the Act of 1867. Of course, this matter was not pointed at in the Act of 1867, because these split shares were not then in existence, or, as far as I know, authorised by law. But, in consequence of the power to split shares having been introduced into the special Act of this railway company, we are now called upon to determine whether the shares which have been so split do form a class of preference shares within the meaning of the Act of 1867. I am afraid I do not entertain so clear an opinion on the point as my learned brethren do, but I think these are not preference shares. We have not the same

nomenclature in the special Act of 1877 as in the Act of 1868, which, in express terms, treats part of the split shares as “preferred ordinary stock,” and the other part as “deferred ordinary stock”; but I think in substance we cannot say there is any class of preference shares here—for this reason, that in the special Act there is nothing mentioned but ordinary shares, there is no statement that there are to be any preference shares or stock at all, and on looking at the Act I see that when two of the shares which are split come together they never do become, as far as I can see, one entire share. All the Act does is to give to any one who holds two split or half shares, whether they be deferred or preferred, the same right of voting as if he held an entire share; but that is entirely different from saying that the shares, when there are two united together, of whatever class they may be, do become one entire share. That, to my mind, creates a difficulty in the way of the view taken by Mr. Justice North, because how can it be said that there was any class of preference shares, when there are no preferred shares, but only these two halves, which when they come together only give the same right of voting that they would have done if they had been one entire share?

We have a little difficulty thrown upon us in this, that when these classes of split shares were introduced, those who framed the Act had not their attention called to the question arising here, and did not provide whether these halves were to be considered as preference shares or not. I do not think we can hold them to be so, because preference shares as defined by the Act of 1863 mean this, “That the preference shares or the preference stock so issued shall be entitled to the preferential dividend or interest assigned thereto out of the profits of each year in priority to the ordinary shares and ordinary stock of the company.” That is not what is done here. The dividend attributable to the ordinary stock is to be given to these shares which have been split; but then, with respect to that dividend, one half of the split share is to have a fixed dividend given to it, and the remainder of the dividend is to go to the deferred half

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of the split share. One sees, notwithstanding the arguments which have been used, there may very likely be differences of interest as between those who hold the preferred half and those who hold the deferred half, which might make it very reasonable, if the Judge thinks it right to say so, that there shall be some assent obtained from those who hold the preferred half shares; but I cannot see that Parliament has, by section 12 of the Act of 1867, hit upon these half shares and the holders of half shares, as preference shares and a class of preference shareholders. I think we have in this case, as in many others, to deal with this matter as something which ought to have been but has not been provided for; and what we have to do is to see how best we can fit in a new state of things to legislation which was passed without any reference to that state of things.

I differ from the view which was taken by the learned Judge, that the assent of the holders of these preferred half shares is required by section 12; but I express no opinion as to what had better be done if he sees there is any difference of interest between them and the holders of the deferred half shares.

LINDLEY, L.J.—Mr. Justice North has ordered a petition to confirm this scheme to stand over, on the theory that this company contains a class of persons who are preference shareholders within the meaning of section 12 of the Railway Companies Act, 1867, and that the requisite assents of that class of shareholders to this scheme have not been obtained. There is no doubt, from the form of the order as drawn up, that that was his view, and we have to consider whether it was right.

I have come to the conclusion that this company has no class of shareholders who are preference shareholders within the true construction of section 12 of the Act of 1867, and that, therefore, there is no necessity for convening a meeting such as is referred to in that section, or for obtaining the assent which would be necessary if there were a class of preference shareholders. It is quite obvious that the confusion which has arisen in

this case arises from the practice which has originated since 1867. So far as I know, the method, which is now not very uncommon, of dividing stocks or shares into two halves was unknown in 1867, and when we come to look at the rights of the holders of the various halves, although, unquestionably, there is a preference to a certain extent between the holders of the preferred halves over the holders of the deferred halves, the holders of the preferred half are not what is commonly called preference shareholders, and are not within the class of people denoted by that expression in the Act of 1867.

Under those circumstances it appears to me that Mr. Justice North has erred in the construction which he has put upon section 12 of the Railway Companies Act, 1867. When the case comes before him he will have to deal with it as prescribed by section 17, and of course these holders of the preferred half shares will be entitled to be heard in opposition to that scheme, and it will be the duty of the Judge to see that they are not unfairly dealt with, and that their rights are sufficiently protected, and of course he can, if he wishes, decline to confirm the scheme unless they assent. That is all within his power under section 17, but this particular method of doing it appears to me not to be necessary, or required, or wanted by the Act of 1867.

I think, therefore, the appeal must be allowed, and the case remitted to the learned Judge to be dealt with upon its merits.

LOPES, L.J.—In this company there were no preference shares. The shares were all ordinary shares, but these ordinary shares have been split into preferred and deferred shares. What I understand to be the definition of a preference share is this—a right conferred upon the holder to receive interest in priority to the ordinary shareholders. Now, I cannot think that the holders of these split shares are in that position, and I am of opinion that this case does not come within the terms of section 12 of the Act of 1867. I have no doubt that in 1867 this plan of splitting the shares into preferred and deferred shares had not been devised, and that the

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Act of 1867 was passed without any reference to the state of things which has happened in regard to this company. I think this appeal should be allowed.

Solicitors—Powell & Rogers, for appellants;
F. J. Blake, for objecting shareholders;
Norton, Rose & Co., for the company.

[IN THE HOUSE OF LORDS.]

1889. } COOKE, SONS, AND COMPANY
July 18, 19. } v. THE GOVERNOR AND COM-
Aug. 9. } PANY OF THE NEW RIVER.

Water Company—Water Supply—Charge—Meter—Rateable Value—Domestic Purposes—The New River Company's Act, 1852 (15 & 16 Vict. c. clx.), ss. 35–41—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 53.

The expression "consumer of water" in section 41 of the New River Company's Act, 1852 (15 & 16 Vict. c. clx.), means, not any person who desires to consume the company's water, but one who either already has a supply or has taken the necessary steps entitling him to demand a supply from the company.

Decision of the Court of Appeal affirmed.

This was an appeal from a decision of the Court of Appeal, which reversed one of Kekewich, J. The proceedings in the Courts below are reported 56 Law J. Rep. Chanc. 850; 57 *ibid.* 383; Law Rep. 36 Ch. D. 641; 38 Ch. D. 56.

The facts and arguments sufficiently appear in the report of the case before Kekewich, J.

Sir Horace Davey, Q.C., and Rigby, Q.C. (R. C. Dobbs with them), for the appellants.

The Attorney-General (Sir R. E. Webster, Q.C.) and Warmington, Q.C. (F. Vaughan Hawkins with them), for the respondents.

Sir H. Davey, Q.C., in reply.

Cur. adv. vult.

LORD HERSCHELL (on the 9th of August).—The question in this case turns on the construction of section 41 of the New River Company's Act of 1852. The appellants are the occupiers of a warehouse situate in Friday Street, in the city of London, which is within the limits of the New River Company as defined by their Act. For some years prior to June, 1886, the appellants had been supplied by the respondents in the ordinary way with water, which was used for cleaning the warehouse and for lavatory and urinal purposes. In respect to this supply they had paid the respondents water rates at the annual value of their premises in accordance with the scale specified in section 35 of the Act. These rates they paid down to the 25th of June in that year. They had also obtained water for an hydraulic lift at meter rates under an agreement between themselves and the company. This agreement was terminated by notice on the 25th of June, 1886. Prior to that date the appellants required the respondents to supply them after the 25th of June with all the water which they needed for their premises by meter at the rate specified in the 41st section of the Act. The respondents refused so to supply them, and the question is, whether they were entitled to make this demand.

It has been my lot to attempt to construe many Acts of Parliament which were obscurely worded, but I do not think I ever met with one upon which it was more impossible to put a satisfactory construction than the statute with which we have to deal in the present case. If the object had been to render it as difficult of construction as possible, success could hardly have been more complete. I have read the series of enactments contained in the sections 35 to 41 again and again, and it appears to me impossible to put any construction upon them which is not open to well-founded criticism. In the view which I take it is not necessary to deal with many of those sections.

The real point which has to be determined is whether the appellants have made out that they are entitled to demand a supply by meter under the provisions of the 41st section. That section enacts, "That the company shall, at the request of

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any consumer of water for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited, or at their own instance, afford a supply of water by means of a meter," "and may charge for such supply not exceeding the following rates per 1,000 gallons." Then the rates are specified. The appellants contend that they have brought their case within this section. They seek to make it out in the following way: First, they say that the words "for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited" may be read as "for purposes other than domestic purposes," inasmuch as it is only for domestic purposes, according to them, that rates have been specified. Next, they say that the words which I have just read are to be taken in conjunction with the words "any consumer of water" which they immediately follow. And thirdly, they say that the words "any consumer of water" are to be construed as meaning "any person desirous of consuming or desirous of obtaining a supply of water." They would therefore read the section thus: "The company shall, at the request of any person desirous of obtaining a supply of water for purposes other than domestic purposes, afford a supply" at the specified rates.

I cannot think that construction is one which gives to the language used its natural meaning. I do not think that the words "any consumer of water" naturally mean any person desirous of consuming water. I think, on the contrary, their *prima facie* meaning is, "any person consuming water"; I do not deny that the words might be shewn by reference to other provisions in the statute to have been used in that sense. One has known in some statutes the words "consumer of gas," and I am not sure that one may not have found the words "consumer of water" also, used in the sense for which the appellants contend; but if so construed, it must be because that construction is indicated as the correct one by the provisions of the Act, and the circumstances under which, and the collocation in which, the words are found.

Now the contention of the appellants really amounts to this, that any person

(because it would be useless to put in the words "desiring a supply of water, or desiring to consume water," inasmuch as presumably a person who had not that desire would not make that demand) may demand and insist upon receiving a supply of water by meter for other than domestic purposes—that is, for trade purposes, or any purpose whatsoever.

The result of such a construction is somewhat startling when one looks at the provisions to be found in the other parts of the Act. One is naturally led to turn first to the only other section in the Act which gives compulsory rights—I mean the 35th section; and, turning to that section, one finds there a right is given in similar terms to demand a supply of water for domestic purposes. But to whom is that right given? It is strictly limited. It is given to the "owner or occupier of any house or part of a house in any street within their limits in which any pipe of the company shall be laid." All those conditions must be fulfilled to entitle him under the first part of that section to a supply of water for domestic purposes. The section goes on, "Or any person who under the provisions of this Act, or any Act incorporated therewith, shall be entitled to demand a supply of water."

That sends us to the 53rd section of the Waterworks Clauses Act, 1847, which is incorporated in the New River Act. That section provides that "every owner and occupier of any dwelling-house, or part of a dwelling-house, within the limits of the special Act, shall, when he has laid such communication-pipes as aforesaid, and paid or tendered the water rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive" "a sufficient supply of water for his domestic purposes"; so that when we are dealing with the right to demand a supply for domestic purposes, the persons entitled to make that demand are specifically described and limited. They must be persons answering the description of being owners or occupiers of a house or part of a house in any street within the limits where a pipe has been laid down by the company, or where they have laid a communication-pipe. Those persons, and those persons alone, are en-

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titled to demand a supply of water for domestic purposes; but in section 41 of the New River Company's Act, according to the construction contended for, no limitation is laid down at all. It is said that any person, without regard to his owning or occupying premises within the limits, and without regard to there being a pipe in the street, or any other of the conditions which are prescribed in the general Act in the case of persons entitled to demand a supply for domestic purposes, is entitled to demand a supply of water for all other purposes whatsoever.

One shrinks from a construction which would lead to such a conclusion as that. But when we turn to the 40th section, which immediately precedes that which we are construing, we find that when the Legislature, in relation to this Act, intended to apply a provision to "any person," appropriate language was used, because the 40th section enacts "that the company may supply any person or body within their limits with water, to be used within such limits for other than domestic purposes, at such rates and upon such terms and conditions as shall be agreed upon." Having used the words "any person or body within their limits" in the 40th section, if they meant the same thing in the 41st, why was not that language used? In the 40th section it is not, without limit, "any person or body"—it is "any person or body within their limits"; and even the water so supplied by agreement is to be used within their limits. No such limitation is to be found according to the construction put upon section 41. It may be that the condition that it must be a person within their limits would be assumed, although an argument might certainly be raised upon the fact that when the Legislature intended that limitation they had so expressed it. But it is not necessary to dwell upon that point, because the considerations to which I have alluded appear to me conclusively to shew that a consideration of the other provisions of the Act, so far from leading to the conclusion that the expression "any consumer of water" ought to have what is certainly not its primary meaning put upon it, leads to a conclusion exactly the reverse. I therefore feel constrained to

reject the construction which has been put upon the words "any consumer of water" by the appellants. Unless they can establish that construction their case is at an end. They have not got over the difficulty which meets them at the threshold; and inasmuch as I think they have not brought themselves within these words, and therefore cannot be entitled to demand a supply of water under that section, it is unnecessary to consider any of the other questions which have been raised. I express no opinion, therefore, upon the meaning of the words which immediately follow those words, and upon the question whether those words so following ought to be attached to the words immediately preceding them or to be detached from them. These are matters which may possibly hereafter have to be considered, but they are not necessary for the decision of this case.

Upon the simple ground I have put—namely, that the appellants have not shewn that they come within the words "any consumer of water"—I move your Lordships that the judgment appealed from be affirmed, and that this appeal be dismissed, with costs.

LORD FITZGERALD.—I agree in the result announced, and also in the criticisms of my noble and learned friend on the woolsack upon this particular Act of Parliament. It might almost be said to be the result of malicious ingenuity, if it had not been that probably the bill was submitted to a Select Committee, and we may take the contradictions in it as resulting from some effort at compromise in the course of the deliberations of that Committee.

I called attention in the course of the argument to what appeared to me to be the guiding principle of the Act, as to the proper appropriation of the water to be supplied under this Act of Parliament. It is to be found in section 34. That section provides that: "The company shall cause main pipes to be laid down, and pure and wholesome water to be brought to every part of the district within the limits of this Act, whereunto they shall be required by so many owners or occupiers of houses," &c. What they have to

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do in the first place is to provide an ample supply of pure and wholesome water to be used for domestic purposes. In this contradictory Act, we must put some construction upon the various parts of it, and I am inclined to think with my noble and learned friend, when we come to look at section 41 and the preceding section, the appellant has failed to shew that he is a "consumer of water" for the purposes of section 41, and is entitled to put the powers of that section in force, assuming that they are mandatory upon the New River Company.

My noble and learned friend opposite (Lord Macnaghten) allowed me yesterday to read the judgment which he is about to deliver, and both in his criticisms of the Act and in the result he has arrived at I entirely agree. I consider it better to leave it in his hands than to endeavour to effect the same purpose by less forcible words.

LORD MACNAGHTEN.—In attempting to construe this curiously ill-drawn enactment, I cannot say that I have arrived at a conclusion which is quite satisfactory to my own mind. But I am satisfied that, of all the constructions that can be suggested, the one proposed by the appellants is the least eligible.

Before the Act of 1852, the New River Company were not under any positive obligation to supply water to any person or persons whatever. By the terms of their charter they were free to deal with whom they pleased. In every case the supply was matter of agreement. They had, as we learn from the preamble of the Act, "for many years past supplied a considerable portion of the metropolis, and parishes and places adjacent thereto, with water for domestic and other purposes." They had, therefore, at the time customers who were consumers of water for domestic purposes, and customers—not necessarily in all cases the same persons—who were consumers of water for other purposes.

The Waterworks Clauses Act, 1847, had been passed but a few years before. It is plain, I think, from that Act, that Parliament had been in the habit of imposing on the promoters of waterworks the obligation of supplying all owners and occupiers of dwelling-houses within their

district with pure and wholesome water for domestic purposes, and it is evident that it was the intention of the Legislature as a general rule that the same obligation should be imposed in the case of all similar undertakings in the future. But it is to be observed that, except in certain cases where a supply is required in the interest of the public, there are no provisions in the Waterworks Clauses Act pointing to the compulsory supply of water for non-domestic purposes.

In 1852 the New River Company came to Parliament for further powers, and then Parliament put them under certain terms. The question is what those terms are. That question must of course be determined by the Act of 1852, construed according to the ordinary rules of interpretation. But I think we may approach the Act with the presumption that the terms required would probably be in accordance with the scheme of the Waterworks Clauses Act, and that, while compelling the New River Company to supply householders within their district with water for domestic purposes, Parliament would leave them unfettered, or substantially unfettered, as regards the supply of water required for private non-domestic purposes.

The Act of 1852 incorporates the Waterworks Clauses Act, with the exception of certain sections which are to be found in it in a somewhat modified form. The sections of the Act upon which the discussion turned are sections 35 to 41 inclusive. Sections 35 to 38 inclusive deal with the supply of water for domestic purposes. Section 35 gives the owner or occupier of any house or part of a house the right to demand a sufficient supply of water for domestic purposes at the rates thereafter specified. A difficulty occurs there, because the rates specified are expressed to be rates "for water supplied to any dwelling-house," and the question at once arises whether the word "house" in the earlier part of the section has a more extended meaning than the word "dwelling-house" which is used in the latter part. I am disposed to think the two expressions are synonymous, and that it is only to the owner or occupier of a dwelling-house or part of a dwelling-house (what-

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ever the term "dwelling-house" may mean) that this right is given. Whether the appellant's house is or is not a dwelling-house within the meaning of the Act is a different question, and one upon which I do not think it is necessary to express an opinion.

I then come to section 40. That section has, I think, an important bearing on the present question, because it seems to recognise the right of the company within their district to deal in the supply of water for non-domestic purposes without being subject to any compulsion in that respect.

Then follows section 41, on which the question mainly depends. The appellants claim under that section the right to a supply of water by meter for domestic purposes. Their contention is that although the purposes for which they require the supply are domestic purposes, they are not purposes in respect of which the rates mentioned in section 35 are provided, because they say that their house is not a dwelling-house, and in their view those rates are only applicable to the supply of water for domestic purposes in a dwelling-house. But to bring themselves within section 41 the appellants must make out that they are consumers of water. The rights given by section 41, whatever they are, are given only to consumers of water. The appellants say that the expression "any consumer of water" in that section means any person who wishes or proposes to become a consumer of water. I must say I think that is doing too great a violence to the language. I agree with the Court of Appeal that the expression "any consumer of water" must mean a person who is actually consuming water, or who, at the least, is entitled to demand a supply of water for his consumption, and is taking the necessary steps to obtain it.

I may add that, besides doing violence to the language of section 41, the contention on behalf of the appellants seems to be open to the objection that it renders section 40 wholly nugatory. It would in effect compel the company to supply water at meter rates for non-domestic purposes, whatever those purposes might be, to every person or body within their district. I cannot find anything in the Act

to shew that it was the intention of Parliament to impose on the company an obligation which would be so great a departure from the scheme of the Waterworks Clauses Act, and which might have the effect of seriously interfering with that which was evidently the first and principal object of the Legislature—the supply of pure and wholesome water for domestic purposes.

I am, therefore, of opinion that the appeal must be dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors — Phelps, Sidgwick & Biddle, for appellants; Thompson & Debenhams, for respondents.

[IN THE HOUSE OF LORDS.]

1889. }
Nov. 21, 22. } NOUVION v. FREEMAN.

Foreign Judgment—Final or Interlocutory—Foundation of Action in England.

According to Spanish law two kinds of proceedings may be taken to recover a debt—first, summary or executive proceedings, in which no defence contesting the validity of the contract can be set up; secondly, plenary proceedings, in which all defences can be raised. A judgment in executive proceedings called a "remate" judgment is final in those proceedings, but does not prevent the unsuccessful party from resorting to plenary proceedings in the same Court. A "remate" judgment may be enforced, if security be given, though plenary proceedings are pending:—Held, that a "remate" judgment could not be enforced by action in England.

Judgment of Court of Appeal affirmed.

This was an appeal from a decision of the Court of Appeal, which reversed one of North, J. The case is reported in the Courts below, 57 Law J. Rep. Chanc. 367; Law Rep. 35 Ch. D. 704; 37 *ibid.* 244.

The facts of the case are stated in the reports of the proceedings below, and for

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the present purpose sufficiently appear by the headnote.

Napier Higgins, Q.C., and Finlay, Q.C. (*Yate Lee* with them), for the appellant.—The “remate” judgment is final and conclusive, though it may be true that its effect might be neutralised by plenary proceedings. The case is analogous to a recovery in an action at common law before the Judicature Acts, which was none the less final and conclusive because an injunction might be obtained in Chancery to restrain the plaintiff from enforcing it. Again, it may be compared to a judgment which is subject to appeal. It is settled that the fact that an appeal is pending is no bar to an action upon such a judgment—*Scott v. Pilkington* (1).

They also referred to *Williams v. Jones* (2), *Patrick v. Shedden* (3), *Russell v. Smyth* (4), and *Copin v. Adamson* (5), in addition to the authorities referred to in the judgments.

Rigby, Q.C., Kenelm E. Digby, and J. D. Davenport, for the respondent, were not called upon.

LORD HERSCHELL.—This appeal arises in an action brought by the appellant, the plaintiff below, for the administration of the estate of a deceased gentleman named Henderson. In order to found his claim to an order for the administration of that estate, it became necessary for him to shew that he was a creditor of the deceased. The case presented by him for the purpose of making that out was that he had obtained a judgment of a foreign Court upon which he was entitled to sue in this country, and which in this country established the existence of a debt. The Court ordered under those circumstances that there should be first tried the issue, “Whether the judgment or decree” upon which he relied, one pronounced on the 5th of April, 1878, “and the other judg-

ments or decrees whereof particulars have been delivered, or any and which of them, are orders or judgments upon which the claim of the plaintiff in this action, or some and what part of it, can be sustained.”

It appears that Mr. Henderson, the administration of whose estate is in question, had purchased certain properties in the district of Seville of the plaintiff, Mr. Nouvion, and that the deeds by which those properties were conveyed contained an obligation to make certain payments, and were registered in the registry of the district of San Roman, and that where deeds of that description are so registered, according to the law of Spain the person who is entitled to payment under such deeds can obtain what is called an “executive” judgment.

It is necessary to state distinctly what the nature of that judgment is; because I think it will be found that the decision of your Lordships must be determined by that consideration. In an action of this nature only a very limited number of defences can be raised by the person sued. He cannot impeach the instruments upon which the action is founded, or shew that they were obtained by fraud, or that on any other ground they did not properly form the basis of an obligation on his part. He can only defend himself by such defences as are open to him on the assumption that the deeds were valid and in the first instance did create the obligation. He may shew that there has been a waiver, or that he has discharged the obligation by payment; but, substantially, I think those are the only defences open to him. It is open to either of the parties to such an instrument to sue in the same Court in another form of action, which is called a declaratory or plenary action, and which is said to be the ordinary course, not as meaning that the other is a course which can only be taken under exceptional circumstances, but that the one conforms to the general and ordinary rules of procedure in an action in the Spanish Courts, and that the other is a special procedure allowed in particular cases. In such a plenary action, which is open to either of the parties, every defence which may be available is open, as well as every consideration establishing the ground of

(1) 2 B. & S. 41; 31 Law J. Rep. Q.B. 81.

(2) 13 Mee. & W. 628; 14 Law J. Rep. Exch. 145.

(3) 2 E. & B. 14; 22 Law J. Rep. Q.B. 283.

(4) 9 Mee. & W. 810; 11 Law J. Rep. Exch. 303.

(5) 45 Law J. Rep. Exch. 15; Law Rep. 1 Ex. D. 17.

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action; and such a plenary action may be instituted by either of the parties to the executive action—that is to say, the party against whom the decision has been pronounced in the executive action, be he either plaintiff or defendant, is at perfect liberty to sue in a plenary action for the purpose of obtaining a declaration of the rights of the parties; and in such a plenary action the fact that a judgment has been delivered in an executive action cannot be set up as at all affecting the rights of the parties, either in the way of proof or of title to succeed in the plenary action. The same points which have been decided in the executive action can again be raised in the plenary action, as well as other questions which were not open in the executive action. No effect is given, even in the Court in which it was pronounced, and in which afterwards the plenary action may be pending, to the judgment in the executive action as being *res judicata* and final, and as concluding the rights of the parties upon any point whatever.

In the present case, the plaintiff, Mr. Nouvion, who was a party to the agreements which I have mentioned, which had been duly registered, brought an executive action, and in that executive action a decree was pronounced in these terms: "Let an order of execution be issued against the property and goods of Mr. William Henderson for the principal amount of 697,135 reales 60 centimos, and also for the amount of the legal interests thereon from the date of default being made by not meeting" certain drafts which are there mentioned.

It appears that, owing to the absence of Mr. Henderson from Spain, it became necessary, in accordance with the procedure of the Spanish Courts, to send letters requisitorial to this country—that is to say, to Scotland—where Mr. Henderson was resident, and to obtain from the Spanish consul in Scotland a return to those letters, which intimated that Mr. Henderson had not discharged, as he would then have had an opportunity of discharging, the liability which was declared by the judgment. Thereupon, Mr. Henderson having intervened, and having alleged that the debt was not due, by

reason of a promise of the plaintiff not to sue him, and that having been decided against him, a decree was made, which I think may properly be termed a final decree in that action, that the distraint be carried into effect, "and in virtue thereof sale by auction be made of the property attached, and out of the proceeds thereof entire and complete payment to the executing plaintiff of the amount of the principal demanded," with interest.

The plaintiff relies upon that judgment as being sufficient to entitle him, when he sues upon it in the Courts of this country, to a judgment for the amount of the debt for which it was ordered that execution should issue; and the only question in this case is whether, under the circumstances which I have mentioned, that judgment is sufficient to entitle him in the Courts of this country to a judgment for his debt as being a creditor of the deceased person, Mr. Henderson.

Now, there can be no doubt that in the Courts of this country effect will be given to a foreign judgment. It is unnecessary to enquire upon what principle the Courts proceed in giving effect to such a judgment and in treating it as sufficient to establish the debt. Reliance was placed upon a *dictum* by Mr. Baron Parke and Mr. Baron Alderson in the case of *Williams v. Jones* (2), where the law is thus stated: "Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained." But it was conceded, and necessarily conceded, by the learned counsel for the appellant, that a judgment, to come within the terms of the law as properly laid down, must be a judgment which results from an adjudication of a Court of competent jurisdiction, such judgment being final and conclusive. I shall, of course, have something to say upon the meaning which must be given to those words; but the general proposition in that form is not disputed by the learned counsel for the appellant. They contend that this judgment is final and conclusive, and no doubt in a certain sense that must be conceded. It puts an end to, and absolutely concludes, that particular action. About

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that there can be no manner of doubt—in that sense it is final and conclusive. But the same may be said of some interlocutory judgments upon which there can be no question that an action could not be maintained; they do settle and conclude the particular proceeding, the interlocutory proceeding, in which the judgment is pronounced. It is obvious, therefore, that the mere fact that the judgment puts an end to and finally settles the controversy which was in question in the particular proceeding, is not of itself sufficient to make it a final and conclusive judgment upon which an action in the Courts of this country may be maintained, when such judgment has been pronounced by a foreign Court.

I think that in order to establish that such a judgment has been pronounced, it must be shewn that in the Court by which it was pronounced it conclusively and finally and for ever settles the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to become *res judicata* between the parties. If in the same Court which pronounced it it is not conclusive, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in the same Court, and upon proper proceedings being taken and such contest being adjudicated upon it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt. The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open at all events to the parties, however much they may have failed to take advantage of them or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may

well be said that, giving credit to the Courts of another country, we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation. But where, as in the present case, the adjudication is consistent with the non-existence of the debt or obligation which it is sought to enforce, and it may thereafter be declared by that tribunal that there is no obligation and no debt, it appears to me that the very foundation upon which the Courts of this country would proceed in enforcing a foreign judgment altogether fails.

It has been suggested that a judgment obtained in an "executive" action may be regarded as analogous to a judgment obtained in a common law action in the times prior to the Judicature Act, the execution of which might be restrained by a Court of equity, and you might have prevented the plaintiff who had succeeded in such an action from obtaining the fruits of his judgment. I do not think that such an analogy is a complete one; but even if it were more complete than I think it to be it appears to me that it would afford very little assistance to your Lordships, unless we could know what had been the course adopted with regard to such judgments in countries in whose system of law the same force and effect is given to foreign judgments as is given in the Courts of this country. Upon that point we have had no information whatsoever.

Then it is said that such a judgment would be analogous to a judgment which has been obtained upon which a suit may be instituted in the Courts of this country even although an appeal may be pending. It appears to me that there is a vital distinction between the two cases. Although an appeal may be pending, a Court of competent jurisdiction has finally and conclusively determined the existence of a debt, and it has none the less done so because the right of appeal has been given whereby a superior Court may overrule that decision. There exists at the time of the suit a judgment which must be assumed to be valid until interfered with by a higher tribunal, and conclusively establishes the existence of the debt which is sought to

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be recovered in this country. That appears to me to be in altogether a different position from that which exists in the present case, where the judgment is a "remate" judgment, and where the very Court which pronounced the "remate" judgment (not the Court of Appeal) may determine, if proper proceedings are taken, that the debt for which this "remate" judgment is sought to be used as conclusive evidence has no existence at all.

The plaintiff in such a suit, an executive suit, is not really, by the decision which is now under appeal, deprived of his rights. He may still sue upon the original cause of action. Of course, it may happen that in this particular case such a suit is barred by lapse of time; but that is an accident. The right of the plaintiff to sue on his original cause of action is not at all interfered with by the judgment which has been pronounced; and in such an action, if it were brought, all questions arising upon which depend the rights of the parties, and by which must be determined ultimately the obligation to pay, would be open to consideration, and could be dealt with by the Courts, and finally and conclusively settled. I do not, therefore, see that there is any wrong or any hardship done by holding that a judgment which does not conclusively and forever between the parties establish the existence of a debt in that Court cannot be looked upon as sufficient evidence of it in the Courts of this country.

Very ingenious arguments have been urged upon your Lordships by the learned counsel for the appellant, and they have strenuously contended that the proper course would be to permit such a judgment to be sued upon, and that justice might be done by staying proceedings, as might be done in the case of an English judgment sued upon which was under appeal.

But no authority has been cited, no case has been referred to, which supports the view put forward on the part of the appellant that such an action upon such a judgment as this could be maintained, and I certainly cannot advise your Lordships to make such a precedent, because it it appears to me, after giving due weight to all the arguments of the learned counsel

for the appellant, that on the whole the result would, as a general rule, be likely to be mischievous and to work injustice rather than justice between the parties.

For these reasons I move your Lordships that the judgment appealed from be affirmed and the appeal dismissed, with costs.

LORD WATSON.—This case has been very ably argued for the appellant. But the reasons assigned for the judgment of the Court of Appeal are, to my mind, so satisfactory that I agree with your Lordships in thinking it ought not to be disturbed.

That the Court of Seville had jurisdiction to determine all questions competently raised between these parties, when duly convened before it, in relation either to the constitution or subsistence of the contract upon which the appellant relies; and, also, that the Courts of England would recognise and give full effect to any final and conclusive judgment of the Spanish Court upon these questions, are propositions neither disputed by the respondents, nor controverted in the opinions delivered by the learned Judges of the Appeal Court. The only question which the facts of this case present for decision is—Whether the decree of the 5th of April, 1878, obtained by the appellant in what is termed an "executive" proceeding, comes within the principle established by decisions comparatively recent, of which *Godard v. Gray* (6) and *Schibsey v. Westenholz* (7) are leading examples.

The decree of the 5th of April, 1878, appears to me to be deficient in certain particulars which are necessary in order to bring it within that principle. It is not necessarily a decision which exhausts the merits of the controversy between the parties, because in "executive" proceedings the Court can entertain no plea stated by the defendant which does not go to payment, satisfaction, or waiver of the plaintiff's claim. What, in my opinion, constitutes a still graver defect is the fact that the same Court which issued the

(6) 40 Law J. Rep. Q.B. 62; Law Rep. 6 Q.B. 139.

(7) 40 Law J. Rep. Q.B. 73; Law Rep. 6 Q.B. 155.

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"executive" decree has jurisdiction, in an "ordinary" or "plenary" action, to entertain and dispose of any and every plea which the original defendant may think fit to urge against his liability, and in that action can re-try those pleas which have already been put forward and repelled in the "executive" suit. If the decision of the Court in the "plenary" differs, in whole or in part, from that pronounced by it in the "executive" suit, the latter is, to the extent of that difference, superseded or nullified.

The English cases to which I have already referred establish a more liberal rule in regard to the enforcement of foreign judgments than is to be found in the older authorities; but no decision has been cited to the effect that an English Court is bound to give effect to a foreign decree, which is liable to be abrogated or varied by the same Court which issued it. All the authorities cited appear to me, when fairly read, to assume that the decree which was given effect to had been pronounced *causa cognita*, and that it was unnecessary to enquire into the merits of the controversy between the litigants, either because these had already been investigated and decided by the foreign tribunal, or because the defendant had due opportunity of submitting for decision all the pleas which he desired to state in defence. The decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and, if appealable, the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal. The case of *Patrick v. Sheddin* (5) appears to me to be very much akin to the present. There the "executive" decree of the Court of Session for costs was final in this sense, that it was not appealable, and that it was enforceable in Scotland; but the Court of Queen's Bench refused to recognise it as a final and conclusive judgment, mainly on the ground that it might be, at any time, recalled or modified by the Court of Session on just cause shewn. In my opinion there is no real difference in principle between a Court retaining the power to alter its

own decree by an order in the same suit, and its retaining the power to defeat its operation by an order pronounced in another suit relating to the same debt.

I accordingly concur in the judgment proposed.

LORD BRAMWELL.—I think this judgment should be affirmed. I think the proceeding in the Spanish Court which is relied on was final to this extent, that no further proceedings could be taken on it, and I think, also, that it was a personal judgment, as far as such a judgment could be personal; but I think I am right in reading it, not as a judgment that a debt is due, but as an order that execution do issue. Then we know that this is, what I may call for want of a better expression, a defeasible judgment—that is to say, the defendants who are subject to the order that execution may issue, may take proceedings which would have the effect of defeating, or nullifying, or making an end of the judgment or order which has been pronounced that execution may issue. It seems to me that that is not such a judgment as can be (to use the old-fashioned expression which Mr. Baron Parke used) the subject of an action of debt—that is to say, now that we have got rid of the forms of action, the subject of an action in a Court in this country. Whether what is called the comity of nations had anything to do with the matter, I do not know, nor do I think it material; but Mr. Baron Parke, in the judgment he pronounced, does not refer to the comity of nations as a reason, but he speaks of foreign judgments, and of colonial judgments, and of judgments of inferior Courts; and he seems to consider—I believe he says so, but, at all events, if he does not say so directly, he says that from which I infer that his opinion was—that where the judgment of a competent Court had been given it shewed that there was a debt, and that that being so, there was a legal obligation on the part of the person against whom it was decreed or adjudged that there was a debt, to pay it. But how is that applicable to a case of this description? How can it be said that there is a legal obligation on the part

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of a man to pay a debt who has a right to say, "I owe none, and no judgment has established against me that I do"? I cannot see. On that short ground it seems to me that this judgment ought to be affirmed.

There are, however, one or two other observations I should like to make. It was said that my argument, or such an argument as I am now using (for it is not my argument in particular), would equally apply to all cases where there was a possibility of error being brought. Not so. There is no presumption that error may exist in the proceedings; the presumption is the other way: the presumption is that a Court of competent jurisdiction has given a right judgment. But there is no such presumption here; on the contrary, we learn that it is perfectly possible, not merely that what was decided in the Court may be reversed, but that there may be questions raised between the parties which could not be decided in that proceeding. There is an essential difference, therefore, between the case where a Court of competent jurisdiction has entertained the controversy between the parties, and come to a conclusion which is to be presumed to be accurate, and this case, where there is no ground for saying that all the controversies between the parties have been decided.

Then another argument that was urged was this: It was said, "Why, if this argument is a good one, there never was a judgment in an English Court upon which an action ought to have been maintainable, because it was always possible that it might be set aside by proceedings in equity." Really I do not think any argument can be founded upon, what I may take the liberty now of calling, the preposterous condition of things that existed in England before the Judicature Act, where one Court gave a final judgment finding a debt due, or damages due, or what not, and another Court said, "Well, that is all very well; we find no fault with the judgment being right in point of law—it was perfectly right in point of law; but if you, the plaintiff, in whose favour it was given, enforce it, we will put you in prison." Really, I think

that some twenty or thirty years hence, when the present generation of lawyers have ceased to exist and there is another one, it will scarcely be believed that such a state of things did exist in a civilised country. I do not say this for the purpose of finding fault with the state of things which is now, happily, at an end, and was brought about, I dare say, by persons who had very sincere desires to improve the jurisprudence of the country; but I say it for this purpose, that I do not think you can found any argument upon such a condition of things as then existed.

Then there was a matter brought forward prominently by Lord Ashbourne, which I think is entitled to great consideration; and that was, that if we should give judgment for this plaintiff here, he would be better off than he would be if there were a mere affirmance of the judgment with all its consequences in Spain, because in Spain the judgment that he has got is liable, as I have said before, to be defeated; but if judgment were given for him here, there would not be that liability to be defeated by proceedings being taken here analogous to the plenary proceedings in Spain. Well, I think that is a cogent argument. It occurred to me that perhaps it might be met in this way: that if a judgment in a foreign Court or in an English Court were reversed upon error, and an action upon the judgment had been brought in an English Court, and judgment given in that action on the judgment, then afterwards, when the original judgment was reversed upon error, I suppose there would, in such a case as that, be some remedy for the defendant who had got rid of the first judgment against him. The remedy of *audita querela* is now abolished, but there is a rule which says that the Court may give relief—I should suppose that that would mean that they must give relief—where the original defendant would have got relief upon *audita querela*. But it is not the same thing. He would have a judgment against him which he would have to get rid of; so that, in the first instance, he would have to get rid of the judgment in the Spanish Court, and then he would have to come to England to get rid of the judg-

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ment by proceedings in the nature of the old-fashioned *audita querela*. I think, therefore, he would be worse off if judgment were given against him, as is prayed in this action, than he is at present by the proceedings in Spain. It perhaps is not of any very great consequence; but I cannot help thinking that it is worth mentioning, at all events for the purpose of shewing that we are not dealing with a judgment like a judgment in proceedings, where all the questions can be gone into, which is presumably right, and has decided all the possible controversies that the parties have thought fit to bring before the Court.

Upon these grounds I think this judgment should be affirmed.

LORD ASHBOURNE.—I also am of opinion that the judgment under appeal is correct, and should be affirmed. The reasons which have led me to that conclusion have already been expressed by such of your Lordships as have spoken.

It is conceded—there is no controversy—that a foreign judgment will not be upheld in this country and made the foundation of relief here, unless it is final and conclusive. There is no question about that. That has been treated as axiomatic in the arguments on both sides in the Courts below, and the argument addressed to us on behalf of the appellant, and in the judgment of Mr. Justice North, and in all the judgments of the learned Judges who sat in the Court of Appeal. The sole controversy in law before us and before these tribunals was, Is this a judgment which can be regarded as coming within the definition of a final and conclusive judgment?

I entirely concur that in a sense this must be regarded as a final judgment, but only in a limited and narrow sense. It is a summary judgment, it is an executive judgment, it is a "remate" judgment. In its terms there is nothing to contradict the fact that there has been a final judgment; but then it is a judgment on a claim which could only be encountered by a certain limited number of pleas of a certain prescribed and definite character. It was not a judgment upon a claim which could be met by pleas upon the merits, going ex-

haustively into all the topics upon which the defendant was entitled to rely if he had the wide scope open to him which in any plenary suit a litigant would have. Therefore, in no sense can this be regarded as an adjudication in a cause where the merits were, or where they could be, tried; and I am not aware of a single case where a foreign judgment has been given effect to in this country where the adjudication was had in a case where the merits could *ex necessitate rei* not have been discussed. No such case has been suggested in the course of the argument, and none was suggested in the Courts below. This is a peculiar judgment. There is no analogy to it that I know of in our law; none has been stated. A couple of cases were mentioned as approximations to analogy, but no judgment known to our law or to the law of Scotland has been suggested which is at all really analogous to this peculiar form of "remate" judgment, which may be nullified, which may be paralysed, which may be reduced to a state of absolutely worthless paper by a proceeding in which the merits can be gone into. In other words, we are asked to say that this "remate" judgment shall be accepted by our laws as final and conclusive, when the laws of Spain itself which produced this "remate" judgment say that it is one which may be absolutely swept away when proceedings come before the Court in which the merits can be gone into.

It would be, I venture to think, a very startling result if in this country we should hold this executive summary "remate" judgment to be final and conclusive, while in the municipal institutions of the country which has sent out this judgment it would not even be regarded as *res judicata*. That is a point referred to with force and persuasiveness in the arguments addressed to the Court below, and most powerfully in the judgment of Lord Justice Lindley, and I adopt everything that he said. It strikes my mind as being to the last degree surprising to listen to a suggestion that when the laws of Spain do not regard this judgment as of such a binding character that it can be relied upon in any proceeding as *res judicata*, the very minute the intervention of a foreign country is

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invoked, it becomes so *sacrosanct* that it is to be regarded by us as final and conclusive. It appears to me to be almost a contradiction in terms to make the suggestion.

For these reasons I entirely concur in the decision at which your Lordships have arrived.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors—Ewbank, Partington & Co., for appellant; Freeman & Bothamley, for respondents.

NORTH, J. }
1890. } *In re THE EMPIRE MINING*
March 1, 8. } COMPANY.

Company—Winding-up—Scheme of Arrangement—Sanction of Court—Secured Creditors—Power to compel Secured Creditors to surrender their Security—Joint-Stock Companies' Arrangement Act, 1870 (33 & 34 Vict. c. 104), s. 2.

The Court has jurisdiction under section 2 of the Joint-Stock Companies' Arrangement Act, 1870, to compel secured creditors of a company to surrender their security and to accept shares in lieu thereof.

Petition.

This was a petition under section 2 of the Joint-Stock Companies' Arrangement Act, 1870, to obtain the sanction of the Court to a scheme of arrangement between the Empire Mining Company and its debenture-holders.

The Empire Company was incorporated on the 1st of April, 1886, with a nominal capital of 100,000*l.*, divided into 100,000 shares of 1*l.* each. By a special resolution of the company passed on the 27th of April, 1888, and confirmed on the 14th of May, 1888, the original capital of the company was increased to 125,000*l.*, by the creation of 25,000 new shares of 1*l.* each. 100,300 of these shares had been issued and were fully paid up.

The objects of the company were (*inter alia*) to purchase or otherwise acquire and

work mines, minerals, and mining rights, including the Empire Mining Claim, near Marysville, Lewis, and Clarke County, Montana Territory, United States of America. Shortly after its incorporation the company purchased and took possession of the mining claim, and the plant and machinery belonging to it, and proceeded to work the mines. In the year 1888 the company issued debentures of 50*l.* each to the amount of 25,700*l.*, bearing interest at the rate of 10 per cent. per annum. At the date of the presentation of their petition, debentures to the amount of 23,700*l.* were outstanding.

By each debenture the company charged with the repayment of the principal sum of 50*l.*, with interest thereon, all the undertaking, lands, works, plant, property, and effects, both real and personal, of the company, "to the intent that this debenture, and all other debentures forming part of the present issue of 25,000*l.*, may rank equally as a first charge upon the same undertaking, lands, works, plant, property, and effects, but so that the same shall be a floating security, and shall not be recorded in the registry of the company of Lewis and Clarke, in the territory of Montana, and shall not hinder any sale, exchange, lease, or other disposition of the said lands, works, plant, and effects, or any part thereof, or any other dealings in the course of the business of the company, but shall attach to the proceeds of sale or exchange of the lands or other property, chattels, or effects taken in exchange, or purchased with such proceeds, and so that the same shall be no charge on the ordinary moneys of the company, other than the proceeds of the sale of any of the property included in this security."

At a meeting of the company held on the 31st of October, 1889, a resolution was passed for the voluntary winding-up of the company, and the petitioners were appointed liquidators. A special resolution was afterwards passed conferring on the liquidators power to transfer and sell the whole or any portion of the property or business of the company to another company, and to receive in compensation, or in part compensation, for such transfer or sale shares in any such company for

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the purpose of distribution among the members of the Empire Company. By an agreement dated the 31st of December, 1889, and made between the Empire Company and the liquidators of the one part, and the Golden Leaf (Limited) (hereinafter called the "new company") of the other part, it was (amongst other things) agreed that the Empire Company should sell, and the new company should purchase, all the undertaking and assets of the Empire Company, subject to the said debentures and all other incumbrances affecting the same. By clause 3 it was provided that the new company should pay, satisfy, and discharge all the debts, liabilities, and obligations of the Empire Company (except the said debenture debt and interest), and indemnify the Empire Company, its liquidators and contributories. By clause 4 it was provided that the liquidators should be entitled to have allotted to their nominees 100,300 shares in the capital of the new company, with the sum of 13s. per share credited thereon as paid up, to the intent that such shares might be distributed amongst the members of the Empire Mining Company or their nominees. Clause 5 provided that every debenture-holder of the Empire Company should be entitled to request the new company to allot him 50 fully paid-up 1l. shares in the new company in exchange for each 50l. debenture held by him in the Empire Company, and in discharge of all principal and interest due on such debentures, and that the new company should comply with such request.

By an agreement dated the 22nd of January, 1890, and made between the Empire Company and the liquidators of the first part, the new company of the second part, and E. H. Young, purporting to contract on behalf of himself and all other the debenture-holders of the Empire Company, of the third part, after reciting the agreement of the 31st of December, 1889, it was agreed that that agreement should be carried into effect, and that each of the debenture-holders of the Empire Company should surrender to the new company to be cancelled the debentures of the Empire Company held by him or her, and that the new company should allot to him or

her 50 fully paid-up 1l. shares in the capital of the new company in respect of and in exchange for each 50l. debenture so surrendered by him or her, and he or she should accept the same in discharge of all principal money and interest due on the surrendered debenture or debentures. The agreement stated that it was intended to submit the arrangement embodied therein to a meeting of debenture-holders, to be convened by order of the High Court, pursuant to the powers of the Joint-Stock Companies' Arrangement Act, 1870, and afterwards to apply for the sanction of the Court. The arrangement was made subject to any modifications or conditions which the Court might think fit to require or impose; and the agreement was made conditional on the arrangement being sanctioned by an extraordinary resolution of the Empire Company, and also upon its being sanctioned by the Court.

On the 24th of January, 1890, an order was made by Mr. Justice North that a meeting of the debenture-holders of the Empire Company should be convened by the liquidators for the purpose of considering the scheme of arrangement embodied in the agreement of the 22nd of January, 1890. A meeting of debenture-holders was accordingly held on the 12th of February, 1890. There were present at this meeting, either personally or by proxy, eighty-one debenture-holders, holding between them debentures to the amount of 20,550l., and a resolution was passed approving of the arrangement. All of the debenture-holders present in person or by proxy voted in favour of the resolution except four, holding between them debentures to the amount of 650l. These four debenture-holders voted against the resolution. At a meeting of the Empire Company held on the 24th of February, 1890, an extraordinary resolution was passed by a large majority of shareholders (excluding debenture-holders who were also shareholders), sanctioning the scheme of arrangement embodied in the agreement of the 22nd of January, 1890.

In addition to the debenture debt the Empire Company were indebted to unsecured creditors in England to the extent of 500l., of which the sum of 274l. was a Crown debt, and the sum of 178l. was due

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in respect of costs to the company's solicitor, who had agreed to accept payment in fully paid shares of the new company, and the remainder was due for stationery, printing, and general expenses. The company also owed about 9,000*l.* to creditors in Montana, of which the sum of 7,000*l.* was due to creditors who had issued attachments against the property of the company and had duly recorded them. These were practically the only debts of the Empire Company.

Cozens-Hardy, Q.C., and *F. B. Palmer*, for the petition.—A debenture-holder is a "creditor" within section 2 of the Joint-Stock Arrangement Act, 1870, and the Court clearly has jurisdiction to sanction the scheme—*Slater v. The Darlaston Steel and Iron Company* (1). The scheme is supported by an overwhelming majority of debenture-holders.

Napier-Higgins, Q.C., and *Farwell*, for debenture-holders holding between them 6,000*l.*, supported the scheme.

Seaward-Brice, Q.C., and *Archibald Brown*, for a holder of five debentures.—The Court has no jurisdiction to deprive debenture-holders of their security and compel them to take ordinary shares instead.

[*NORTH, J.*—Did not the Court do it in *Slater v. The Darlaston Steel and Iron Company* (1)?]

The only question in that case was whether the Court could bind unsecured creditors. That case was not contested.

[*Cozens-Hardy, Q.C.*, referred to *In re The North Western Company* (2).]

Grosvenor Woods, for debenture-holders holding between them debentures to the amount of 500*l.*, opposed the scheme.

[*NORTH, J.*—I see no difficulty as to jurisdiction, but I do not see my way to depriving debenture-holders of their security.]

Cozens-Hardy, Q.C.—The debenture-holders contracted not to "record" their debentures, and by the law of Montana all creditors in that country who have issued attachments have priority over all other creditors, including debenture-holders.

NORTH, J.—I will allow the petition to stand over to enable you to procure satisfactory evidence as to what is the law of Montana with respect to creditors who have issued attachments and duly recorded them.

March 8.—Evidence was now produced that according to the law of Montana a debenture-holder, unless his debenture were "recorded" in the registry of the company of *Lewis and Clarke, Montana*, could not have or exercise any of the rights of a mortgagee over the mines, machinery, and other real and personal estate expressed to be charged by the debenture, and that all attachments, as soon as duly "recorded," constituted a lien on the properties attached.

NORTH, J.—I think this is a case in which I ought to sanction the proposed agreement. In the first place I do not think there is any doubt about the jurisdiction of the Court to do it, if the Court thinks fit. It has power, under section 2 of the Joint-Stock Companies' Arrangement Act, 1870, to bind creditors, and debenture-holders are creditors. The word "creditors" in the Act is general. The Act does not except any particular class of creditors from the jurisdiction of the Court. Of course, it is one thing to say there is power to do it, and quite another thing to say whether the Court, in the exercise of its discretion, thinks it is a case for doing it or not. I must say I felt some difficulty in saying it ought to be done in the present case, for this reason. It was pointed out that the debenture-holders had a first charge on the property of the company for 23,000*l.*, and certainly the scheme proposes to deprive them of the benefit of that security in favour of other creditors. It also proposes to give preference over them to certain English creditors for 500*l.*, who have no security for their debt at all. But when the matter comes to be investigated, the difficulty which I at first felt disappears. In the first place, as regards the English creditors for 500*l.*, there is only a small sum of 48*l.* left, since part of the sum of 500*l.* is a Crown debt, which of course has priority, while another part

(1) W.N. (1877), pp. 139, 165.

(2) *Palmer on Companies* (3rd ed.), p. 604.

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is due for costs, in respect of which the solicitors are content to take shares. There only remains, therefore, the small sum of 48*l*. If, therefore, the arrangement is otherwise beneficial, it would be absurd to say that providing for payment in full, instead of in part, of sums of that small amount ought to stand in the way of the arrangement. Then, as regards the deprivation of the debenture-holders of their security, I do not see that what is proposed will have that result. In the first place it is clear now that there are debts to a considerable amount in Montana which have a prior charge, by the law of the country, by reason of the creditors having issued attachments, by virtue of which the property of the company can be sold; and as against these creditors the debentures are no charge whatever, because it is part of the bargain under which the debentures are issued that they were not to be "recorded" in any way. That being so, these attachments and the other local debts all have priority to the claims of the debenture-holders. Then what is proposed is that the debenture-holders, giving up their so-called securities, shall have fully paid-up shares in the new company to a similar amount. Of course, they need not take those shares unless they like, but that is what is offered to them. There are, I believe, debenture-holders altogether to the amount of 23,700*l*. There has been a meeting held at which the matter has been fully considered, and the debenture-holders are almost unanimous on the subject. It is quite true that some debenture-holders who had notice of the meeting did not attend it; but there were present at that meeting, either personally or by proxy, debenture-holders to the amount of upwards of 20,000*l*., and they all, with the exception of four, holding between them debentures to the amount of 650*l*., voted in favour of the scheme, and the only persons who now object to the scheme are five debenture-holders holding between them debentures to the amount of 750*l*. If the approval of the debenture-holders is to be unanimous, if one debenture-holder has a right to stop the whole arrangement, the Act of Parliament giving the Court power to

summon meetings of creditors and to sanction the scheme would be altogether nugatory. On the other hand, if I am not to give effect to such an expressed opinion of creditors as I have in this case, I cannot conceive any case in which the Court ought to do it. I have clear jurisdiction to do it, and I think, this being a clear case in which I have jurisdiction, I ought to say that the views of the very large majority of debenture-holders ought to prevail. Under these circumstances I sanction the scheme, and order the company to pay the costs of all parties.

Solicitors—Stretton, Hilliard & Co., for the petition and debenture-holders supporting it; J. W. Smart, and Snell, Son & Greenip, for other parties.

KEKEWICH, J. }
1890. } CRAWFORD v. FORSHAW.
Jan. 11. }

Will—Construction—Power—Executors named—Executor renouncing.

A testator having appointed three executors, one of whom renounced probate, gave the residue of his estate to such charitable institutions as his executors therein "named" might select, to be divided in such proportions as they might approve of:—Held, that one of the persons named as executor, but who renounced probate, was entitled to take part in the selection of the charities.

Keates v. Burton (14 Ves. 434) explained and distinguished.

J. K. Mainwaring, who died in March, 1888, by his will, bequeathed legacies in the following terms: "To my executors herein named the sum of 50*l*. each for the trouble they may have in the execution of this my will, and also to mark my friendship and regard for them."

The testator appointed Joseph Crawford, John Forshaw, and William Jones to be his executors, and after bequeathing legacies to several hospitals disposed of his residuary estate in these terms: "The residue of my estate I leave and bequeath

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to the above-named charitable institutions, or such others or additional as my executors herein named may select, in such proportions as they may approve of."

John Forshaw renounced probate, and the will was proved by Joseph Crawford and William Jones.

In other proceedings relating to the testator's estate, it had been decided that John Forshaw was entitled to the legacy of 50*l.* bequeathed to each executor, the Court holding that the will disclosed other motives for the gift beyond the appointment of executor. The two executors who proved the will now applied by originating summons for the determination of the question whether John Forshaw was entitled to take part in the selection of the charitable institutions, the subject of the residuary gift, and the division of the residue under that gift.

Neville, Q.C., and *Crawford*, for Joseph Crawford and William Jones.—The division of the residue is a matter of administration, and part of the duty of the executors; when Forshaw renounced probate, his rights in respect of the executorship wholly ceased—20 & 21 Vict. c. 77. s. 79, *Williams on Executors* (8th ed.), p. 290, pt. 1. bk. 3. c. 6. s. 2. The testator has said his executors are to distribute. Forshaw is not an executor. This is not a gift to persons in trust to distribute.

The case is covered by the decision in *Keates v. Burton* (1).

Warmington, Q.C., and *P. Ogden Lawrence*, for John Forshaw.—Under the term "my executors herein named" the testator in effect referred to the persons named in the previous part of his will. He reposed a special confidence in those three persons. Any of them might exercise the power of selection and division, although renouncing probate of the will—*Sugden on Powers* (8th ed.), p. 118, c. 4. ss. 1, 52. In the report of *Keates v. Burton* (1), it does not appear that the case was argued on behalf of the executors who did not prove the will, even if they were parties to the suit; and, further, this precise point was not decided in that case.

Neville, Q.C., replied.

(1) 14 Ves. 434.

KEKEWICH, J.—If I thought that *Keates v. Burton* (1) really decided the question submitted to me for decision, of course I should follow it without cavil—indeed, without expressing any opinion of my own; because, not only is it a decision of great age, but it is a decision of a very learned Judge, and I should be bound to follow it. But it does not seem to me to have decided the point. It is quite true that the words have unusual similarity—I mean that there is more similarity than one generally finds in a case of one will cited upon the consideration of another. But it seems to me that the point really considered and decided was not the point which I have to consider and decide here. As I have already mentioned, the arguments are reported, and one gladly turns to the arguments to see what the Court was called upon to decide. It is stated: "The question is, whether this legacy of 2,000*l.* is, under the circumstances and in the events that have happened, an absolute interest in Christie." That was what the Master of the Rolls considered in the interval between the hearing of the case and his judgment, and what he purported to decide. No doubt in deciding that point he states that the power could not be exercised; that the executors have renounced the only character in which they could exercise it, and therefore it was not exercisable, and that the Court could not exercise it. If that were a deliberate expression of his opinion on a point argued, the case would have far greater importance than I now apprehend it to have; but I do not think that that is what the learned Judge intended to decide. I think he is giving that statement as the result of what had taken place in Court—as the result of the arguments and the facts; and, for aught I know, it was argued on more facts than are stated: because the case is reported with reference to the point I have mentioned, and not with reference to this other point. I think it would be straining the authority of that case too much to say it was actually a decision that a power vested "in my said executors hereinafter particularly named" was exercisable by those who proved, and not by those who did not prove.

Then, before turning to the particular

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words of the will on which the decision must rest, I ask: Is this given to the executors as part of their office? Because, if it is not, the section of the Act of Parliament has no application (20 & 21 Vict. c. 77. s. 99). I am not sure that it has much application even then; but is this given to the executors as part of their office? It seems to me that it cannot be. The duties of executors are perhaps not easy to define, and I will not attempt a definition of them; but I apprehend that directly you have either the residue or an appropriated fund clear of debts, funeral and testamentary expenses, and legacies, it immediately becomes a trust fund. If the trust is merely to hand it over to a legatee, that is part of the duty of an executor, and in one sense he is a trustee. But if there is anything in the way of settlement, as to one person for life with remainder over, or upon trust for distribution among such persons as the executors shall think fit, then, by the words determining his duty, he is constituted trustee. It is not part of his duty as executor, and it may be exercised by him, notwithstanding that he ceases to be executor, or has never really been executor. It seems to me that the distinction between executor and trustee must be borne in mind, and that this cannot be part of the duty as executor.

Now, turning to the words of the will, there is a gift of a legacy "to my executors herein named." I have held these words to give a legacy to Mr. Forshaw, but I do not think that my former decision in any way controls the present, because there is no doubt that he was named as an executor and one of the persons contemplated. The reason of my decision in his favour on that question was because there were other reasons given, other motives to be found in the will, for the gift beyond the appointment of executor. But one cannot pass over the identity of language there and in the direction for distribution. The direction is, "the residue of my estate I leave and bequeath to the above-named charitable institutions, or such others or additional as my executors herein named may select." It has been argued that one might read in the names

there. That is one way, no doubt, of reading the will. But, whether you read in the names or do not, I cannot regard that as other than equivalent to a power given to the gentlemen named, whom in the other part of the will he appointed executors.

Then is that a power exercisable by Mr. Forshaw in connection with the others? I have already said that it is not part of the executors' duty, and must be vested in them in some other character. That goes a long way towards deciding that Mr. Forshaw can still exercise it, notwithstanding that he has renounced probate. But the passage read from Lord St. Leonards on Powers, and the general law as to the execution of powers, aids me in the same direction. I see no reason why Mr. Forshaw, though he has renounced probate, should not be a trustee for the purpose of exercising this power, and although I am unwilling to decide the case too much upon mere technical grounds—that is to say, technical use of language—yet I see that if I were to decide that he is not entitled to exercise the power, I should be deciding really that the persons "herein named" are not to exercise it. The testator has said that the executors herein named shall do it. If I exclude Mr. Forshaw, the executors herein named cannot do it. To that it may be answered that if Mr. Forshaw died in the testator's lifetime, there would be a difficulty. The only answer I can give is that he has not. He is one of the persons named in the will. The power is given, and it being a power in the nature of a trust, it is still exercisable by him, notwithstanding that he is not an executor.

Solicitors—Miller & Williamson, Liverpool, for plaintiffs; G. A. Forshaw, Liverpool, for defendants.

CHITTY, J. }
1890.
Feb. 7. }

JONES v. SIMES.

Practice—Death of Party—Order to carry on Proceedings—Transmission of Interest—Cause of Action—Survival of—Injury to Freehold—Mandatory Injunction—Damages—3 & 4 Will. 4. c. 42. s. 2—Rules of Supreme Court, 1883, Order XVII. rules 1-4; Order XXXVI. rule 58.

The plaintiff in an action for a mandatory injunction and damages for obstruction of light to freehold property, died more than six months after the commencement of the action, and three months after her death B. J., her executor and devisee, obtained the common order, under Order XVII. rule 2, to carry on proceedings against the defendant. The defendant moved to discharge the order on the ground that the cause of action did not survive:—Held, that the plaintiff's equitable right to a mandatory injunction devolved to B. J. as her devisee, and that B. J., as her executor, was at least entitled to continue the action for the recovery of damages in respect of injury committed during a period of six months prior to the plaintiff's death.

Motion by the defendant to discharge an order to carry on proceedings against him, obtained under Order XVII. rule 2, by the plaintiff's executor and devisee. By the writ issued on the 3rd of December, 1888, the plaintiff, Jane Jones, claimed a mandatory injunction and damages for obstruction and interference with the access of light to her freehold house. By the statement of claim delivered on the 7th of February, 1889, the plaintiff claimed—first, an injunction to restrain the defendant from allowing certain buildings lately erected by him any longer to remain, so far as such buildings or any part of them obstructed or diminished or interfered with the access of light to the plaintiff's windows, and that the defendant might be ordered to pull down the said buildings to the extent aforesaid; secondly, an injunction to restrain the defendant from erecting any other buildings which should in any manner obstruct or interfere with the access of light to the plaintiff's house, and also an in-

junction to restrain the defendant from allowing a certain wall erected by him upon a party-wall any longer to remain, and that the defendant might be ordered to pull down the said party-wall; and thirdly, damages. By the statement of claim it appeared that before the completion of the buildings certain correspondence took place between the parties in May, 1888, wherein the defendant wrote that he would do his utmost to prevent any annoyance to the plaintiff or injury to her property.

Statement of defence and reply having been delivered, the action was entered for trial on the 19th of March, 1889.

On the 15th of October, 1889, the plaintiff died, having by her will appointed B. Jones her sole executor and devisee. On the 10th of January, 1890, B. Jones obtained the usual order of course to carry on proceedings against the defendant. This order the defendant now moved to discharge for irregularity, on the ground that the cause of action did not survive or continue, and that there was no transmission of interest to the plaintiff's executor and devisee. The defendant declined an offer at the bar to amend his statement of defence by pleading the statute 3 & 4 Will. 4. c. 42. s. 2.

Romer, Q.C., and *Maidlow*, for the defendant, in support of the motion.—The action is founded on a *tort*, and dies with the plaintiff—*Williams on Executors* (8th ed.), p. 792, &c.—unless the respondent is able to bring himself within the statute 3 & 4 Will. 4. c. 42. s. 2. But that is not possible, for the injury to the plaintiff's real estate has been committed more than six months before her death—*Bowker v. Evans* (1), *Phillips v. Homfray* (2), and *Kirk v. Todd* (3). In *Twycross v. Grant* (4) the order for revivor was made because damage to the deceased's personal estate was shewn. The effect of the order obtained by the respondent is to assimilate

(1) 54 Law J. Rep. Q.B. 421; Law Rep. 15 Q.B. D. 565.

(2) 52 Law J. Rep. Chanc. 833; Law Rep. 24 Ch. D. 439.

(3) 52 Law J. Rep. Chanc. 224; Law Rep. 21 Ch. D. 484.

(4) 47 Law J. Rep. C.P. 676; Law Rep. 4 C.P. D. 40.

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his position to that of the testatrix, but the acts which may possibly give the respondent a right of action are not, and cannot be, the acts upon which the present action is founded. So far as the respondent seeks for an injunction, he must seek it in respect of acts of continuing injury to the freehold, and assuming that the completion of the building is a continuing injury, we should submit that such injury is nevertheless, so far as the respondent is affected by it, a new and distinct cause of action. Again, so far as the respondent claims damages in the present action, we submit that he is claiming outside the limits of the statute in respect of injury done to the real estate more than six months previously to the testatrix's death, for after the completion of the buildings the injury was complete, and the damages could be assessed definitely and once for all—that is to say, so far as those damages were damages to the testatrix's estate. If any injury has been done to the real estate within the statutory six months, the respondent must bring a new action. To a new action many defences may be raised which are not open to the defendant in the original action. By the death of the plaintiff all charges against parties of bad faith, &c., are extinguished. If the respondent were to bring an action under 3 & 4 Will. 4. c. 42 his statement of claim would contain different allegations to those contained in the statement of claim in the action which he is endeavouring to continue. It is clear that, irrespectively of the statute, the respondent could not sue in respect of anything which had occurred during the testatrix's lifetime, and that the statute gives no right to sue if the substantive act on which the action is to be founded has occurred more than six months previously to the testatrix's death, even although it may be the case that the results of the act complained of are apparently continuous—*Wordsworth v. Harley* (5) and *Lord Oakley v. The Kensington Canal Company* (6). 3 & 4 Will. 4. c. 42. s. 2 gives no right to continue an action, but only a right to bring a new action.

[CHITTY, J.—The revivor rule is a sta-

(5) 1 B. & Ald. 391; 9 Law J. Rep. M.C. 50.

(6) 5 B. & Ald. 138; 2 Law J. Rep. K.B. 210.

tutory improvement, otherwise there would be a new action alleging acts done six months before the plaintiff's death, and also acts done after the plaintiff's death.]

The revivor rule is not applicable, for there has been no "change or transmission of interest," and it cannot be contended that the law has been superseded—*Flinn v. Perkins* (7).

Whitehorne, Q.C., and *Carleton Rea*, for the devisee and executor.—Where the damage is caused to the estate of the deceased, even an action for *tort* can be revived—e.g. a claim in the nature of slander of title—*Hatchard v. Mège* (8). In order that the action may survive, all that is required to be shewn by the legal personal representative is injury to the estate of the deceased—*Oakey v. Dalton* (9). That the equitable remedy by injunction survives has never been doubted—*Garth v. Cotton* (10).

[CHITTY, J., referred to actions mentioned in 3 & 4 Will. 4. c. 27. s. 36, and observed that he was under the impression that such actions were allowed to be carried on by the real representative—*Vivian v. Champion* (11) and *Ferrers v. Cherry* (12).]

The practice in Chancery has ever been that the proper legal representative, personal or real, as the case might be, could always revive an injunction action—*Price v. Berrington* (13). The defendant's object is merely to get rid of an action to which he has no defence.

[*Rolf's Case*, cited in *Penruddock's Case* (14), was referred to as shewing that injury to a man's freehold done during his lifetime was a cause of action surviving to the heir.]

CHITTY, J.—Certainly this case has been very fully argued; but, nevertheless, if I thought it necessary to go through all the authorities on the subject before deciding it, I should probably take some time in

(7) 32 Law J. Rep. Q.B. 10.

(8) 56 Law J. Rep. Q.B. 397; Law Rep. 18 Q.B. D. 771.

(9) 56 Law J. Rep. Chanc. 823; Law Rep. 35 Ch. D. 700.

(10) 1 Dicken, 183.

(11) 2 Ld. Raym. 1125.

(12) 1 Eq. Cas. Abr. B. 11, 5th ed. p. 3.

(13) 11 Beav. 90.

(14) Coke, part 5, 101a.

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order to put my judgment into such form as the citation of the authorities seemed to require; but, notwithstanding the various arguments I have heard, I cannot but consider this otherwise than as a plain case.

The writ was issued in December, 1888, but before the action came on for trial the original plaintiff died, and within six months after her death the common order to carry on the action was obtained by her executor and devisee, who is one and the same person. The motion is to discharge the order, and the defendant's counsel declined to accept anything less than a discharge. The point taken is that the action is dead. I use the term "action," which is the modern term; but when properly considered, this action is a common law action, and also a suit in equity, such as might have been maintained in the old days in the Court of Chancery. The case made by the late plaintiff (of course, I pronounce no opinion on the merits) is a case for a mandatory injunction as well as an ordinary injunction, and also for damages, and the case stated is of this nature: that not long before the writ a correspondence passed—I am not going to prejudice the trial in any way by putting any particular construction on these letters, but I merely state them for the purpose of shewing what kind of case was raised—a correspondence then passed on which the plaintiff relied as a matter of conduct against this defendant; and as possibly raising something in the nature of a contractual obligation on his part, which, if the late plaintiff can sustain, would have put him in the position of being entitled to have the obstruction complained of removed—that is to say, there is a personal case made against the defendant in regard to the erection of the buildings.

Now there are two matters of complaint. The first is that by the erection of a permanent building there will be an obstruction of the plaintiff's light, and the second is building wrongfully on a wall or a party-wall of the plaintiff; and the mandatory injunction asked is in respect of both those wrongs—that is to say, to compel the defendant to remove his building so far as it obstructs the light, and to compel him also to remove the building which he has erected on the wall.

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The statement of claim also states that the building which has caused the obstruction of the light was not wholly erected when the writ was issued, but was in part erected after the writ was issued. These points are material on the question of the mandatory injunction that is asked. The action, as I have said, is a common law action in respect of the damages which are asked. It is also a suit in equity in respect of the injunction asked for.

Counsel for the defendant now moving are well aware of certain general rules which exist in regard to the granting of mandatory injunctions. It was stated, but loosely stated, as a general rule, that if the building is up before the writ is issued, the Court is disinclined to grant a mandatory injunction. It is not an excess of jurisdiction to grant it notwithstanding the building is completed before writ issued, for there may be circumstances which justify the Court in ordering the building to be removed. In exercising the discretion the conduct of the defendant in putting the plaintiff off his guard—*e.g.* in running up his building, as some of these wrongdoers do, in haste in the night, so that the building grows like a mushroom—is, amongst other circumstances, one which the Court takes into consideration on a question of mandatory injunction. At the bottom of this motion lies, as one can see, almost a scandal, which has been almost avowed—namely, that if the devisee has to bring his action, he will have to bring the action considerably more than a year after the building was finally completed, and the devisee will not be in a position to rely, as against the defendant, on the letters which passed between the testatrix and him—in other words, if by any chance the defendant could drive the devisee to a new action, the defendant thinks that he will be in a better position to escape from the equitable remedy. I have mentioned a case in reference to damages in a common law action for *tort*. The devisee, of course, cannot recover the damages which would be granted as a matter of course in a common law action. Those damages would go to the personal estate, or, in other words, belong to the executor. I will stay now to consider the order so far as it relates to the executor.

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Formerly the damages in a common law action were only damages down to the date of the writ; but under the existing rules, Order XXXVI. rule 58, where the damages are to be assessed in respect of any continuing cause of action, they are to be assessed down to the time of the assessment, so that the late plaintiff could have recovered the common law damages down to the date of the assessment, and was not confined, as she was under the old practice, to damages down to the date of the writ. But the statute of the 3 & 4 Will. 4. c. 42. s. 2, has put the executors of the late plaintiff clearly in the position of being entitled to bring an action in respect of this injury to the real estate of the testatrix, although the action must, according to the statute, be brought within six months from the date of her death, and be confined as to damages to six months before. Consequently the continuing plaintiff as executor could bring such an action, and therefore there is a right of action by virtue of that statute; and seeing that the late plaintiff could have recovered the damages down to the period of her death, it is clear to my mind that the personal executor can recover those damages in this instance. Consequently I think there is a right on the part of the legal personal representative to continue, at least to the extent I have mentioned, the action, so far as the common law action is concerned.

I am not called on, and I do not intend, to express any opinion at the present moment, as the motion is only to discharge the order, whether the executor can recover more than the damages accruing within six months previously to the death, although my impression is that he cannot—but I leave that to be discussed at the proper time. It is no ground for discharging the order, because I have offered the defendant to be allowed to plead the statute, but that has been rejected.

But now I come to the other part of the action, the claim for a mandatory injunction, and it appears to me that the peculiar remedy to have that building removed was an equitable right existing in the late plaintiff, and, of course, that equitable right has not devolved or passed to the executor, for the executor has no

interest in the land, but it has passed with the equitable remedy to the devisee, and I think the devisee is, in respect of the mandatory injunction, in the same position as the testator was. Of course, there is no rule of common law that applies to it. Possibly, if I had a little more time, by searching through the old writs when there were real actions at common law and the like, a discovery might be made, and I am disposed to think, in a case where there was a real action, that the heir could have continued the action. I will not say anything about the actions which are mentioned in the 36th section of 3 & 4 Will. 4. c. 27. That would only raise an analogy; it would not settle the point. I have enquired of the Registrars, and I have also enquired of learned persons as to the practice, and I have myself some considerable amount of knowledge of the practice at the present time, and I find that no one has ever heard of a case of this kind of a devisee not continuing the action, and the reason why it may be difficult to find at present any such case is, as has often been stated under similar circumstances, that it was never thought worth reporting. I think at the bottom of the argument of the defendant lies the fallacy of comparing the right to the mandatory injunction to a common law action of *tort*, and I think in respect of that remedy—which cannot, of course, be granted to the executor because he has not the estate—the defendant's argument went so far as to say that if the wrongdoer, the present defendant, had died, and the original plaintiff was still alive, that his legal representative would have escaped altogether scot-free from this action. I, however, consider that, to say the action could not have been maintained against the executor or his heir, as the case may be, is an extravagant proposition.

The 3rd rule of Order XVII. runs, that "in case of the devolution of any estate or title *pendente lite*, the cause or matter may be continued by or against the person to or upon whom such estate or title has come or devolved." I cannot find any reason, either in the nature of things or in regard to general rules, to cut down that order, and say that it does not apply

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to such a case as the present, and I decline to think so, and I refuse the motion, with costs to be paid by the defendant in any event.

I have not gone through all the authorities which have been cited. I am quite surrounded by them, and I was quite prepared to go through a great many more, but I have considered them as they have been mentioned to me. I should say that in one of those cases, *Kirk v. Todd* (3), the case of *The Original Hartlepool Collieries Company v. Gibb* (15) was mentioned, and the late Master of the Rolls held, and rightly held at the time, that the common law damages were damages up to the time of the writ being issued. The practice, however, has since been altered by Order XXXVI. rule 58, and damages in respect of a continuing cause of action are now assessed down to the time of the assessment.

Solicitors—A. Hunt, agent for Miller Corbet, Kidderminster, for plaintiff; Church, Rendell & Co., agents for Thomas Southall, Leicester, for defendant.

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1890. } HART v. COLLEY.
Feb. 20, 24, 25. }

Trade Mark—Registration—Protection limited to Goods for which Mark is registered—Patents &c. Act, 1883, ss. 62, 65, 70, 76, and 77—Passing off Goods by former Servant.

The owner of a trade mark can only sue in respect of an infringement of that trade mark in connection with the particular goods or classes of goods for which his trade mark is registered.

A servant is entitled, when he leaves his employment, to carry on a business of the same character as his former employer's, and to obtain the custom of his former employer's customers, and to use trade wrappers and other trade papers, notwithstanding

ing that his former employer does so, and to employ the same printer; but in exercising these rights it is especially incumbent upon him to do so in such a manner as not to represent that his business and goods are the business and goods of his former master; and if he does so represent, an injunction will be granted to restrain him from so doing.

Action.

In May, 1883, the plaintiff, Morris Hart, a dealer in toilet appliances, obtained registration under the Trade Marks Registration Act, 1875, of two trade marks for "a toilet requisite, being a machine of iron to hold a roll of perforated paper," in class 6, which, by the classification in the schedule to the Rules under the Act of 1875, comprised "machinery of all kinds, and parts of machinery, except agricultural machines, included in class 7." Each trade mark consisted of a representation of the holder and roll of paper, with differing inscriptions added to the device.

The defendant, W. W. Colley, was in the employment of the plaintiff as his manager from October, 1884, to May, 1888, at which time he left the plaintiff and opened a business in toilet appliances on his own account, in which he sold toilet paper, among other articles, using trade marks and trade papers which bore considerable resemblance to the plaintiff's, and seeking and obtaining orders from the plaintiff's customers.

On the 6th of December, 1888, the plaintiff commenced the present action, in which he sought to restrain the defendant from infringing his trade marks, and from representing the goods made and sold, or offered for sale, by him, to be the plaintiff's goods, and for damages or an account.

The defendant pleaded, among other defences, that the plaintiff was not entitled to sue in respect of any infringement by the use of his trade marks on paper, they being only registered in class 6, and not in class 39, which included paper.

This was the trial of the action.

Cozens-Hardy, Q.C., and J. C. Graham,

(15) 46 Law J. Rep. Chanc. 311; Law Rep. 5 Ch. D. 713.

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for the plaintiff.—As to the infringement of trade mark, the marks have been registered for upwards of five years; there is no motion to rectify the register; and by section 76 of the Patents &c. Act, 1883, the registration is conclusive as to the plaintiff's right. As to the representations made by the defendant's wrappers, labels, and price-lists, these are plainly imitated from the plaintiff's, and the injunction should go.

Aston, Q.C., and *R. Wallace*, for the defendant.—As to the trade marks, the plaintiff cannot sue in respect of them. The action is brought for selling paper under the trade mark; but the plaintiff is not registered for paper, but only for machinery—*Edwards v. Dennis* (1).

Cozens-Hardy, Q.C., in reply on this point, referred to *The Singer Manufacturing Company v. Wilson* (2).

NORTH, J.—I think it better to dispose of this point now, because in the view I take it will prevent the necessity of calling some evidence that otherwise might be necessary. I do not think the plaintiff is entitled to sue in respect of this trade mark. I wish to make this clear, that for this purpose, but no other, I assume he may be right in suing to restrain the defendant from imitating his goods; but that is a different head of relief from that of suing in respect of the trade mark. As to that, there is a difficulty raised which seems to me insuperable, and it is this—that the plaintiff has registered this in class 6 only, and he does not complain of the sale by the defendant of any goods whatever that come within that class at all. The article for which No. 32,482 is registered, is described: "a toilet requisite, being a machine of iron to hold a roll of perforated paper." The thing indicated is a machine, the trade mark represents this machine with a roll of perforated paper within it, shewing exactly how the machine is used in connection with the roll to hold which it is intended.

Then, when we look at the statement

of claim, what we find is this: "The defendant is a dealer in toilet requisites, perforated paper, and similar goods, and has, prior to the issue of the writ in this action, and since the said registration, sold large quantities of perforated paper contained in wrappers, and has issued large numbers of circulars and advertisements, whereon there were printed the registered trade marks of the plaintiff." Then it is suggested what the circulars and advertisements are. There are sixteen documents, not quite all circulars—one or two of them are trade lists—but the bulk of them are circulars of various colours, with somewhat different letterpress upon them, entirely detached from any machine or iron work at all; and the injunction asked is to restrain the defendant from continuing to infringe the trade marks, and from misrepresenting by circulars, advertisements, wrappers, or otherwise, that the goods made and sold by him are of the plaintiff's manufacture. Then the defence is: "If the defendant has at any time used in his said business marks similar to the plaintiff's alleged trade marks, which the defendant does not admit, then the defendant says that the plaintiff's alleged trade marks are registered for a different class of goods from those mentioned in the statement of claim." It is not very happily expressed, but it is intelligible, and the particulars of defence delivered with it explain more fully what the point raised by the defence is; and that really is, that the defendant is not selling goods within class 6, whereas, in point of fact, the plaintiff is only registered in respect of class 6.

Now, what *Mr. Cozens-Hardy* says is, that what the Act requires is registration, and that when there once is registration, then the plaintiff is entitled to sue; and he relies on section 77 of the Act of 1883, which provides that "a person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of a trade mark, unless, in the case of a trade mark capable of being registered under this Act, it has been registered in pursuance of this Act, or of an enactment repealed by this Act." It is quite true that *Mr. Hardy's* client has, to some extent, done what is necessary

(1) 55 Law J. Rep. Chanc. 125; Law Rep. 80 Ch. D. 454.

(2) 47 Law J. Rep. Chanc. 481; Law Rep. 3 App. Cas. 376, 389.

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to enable him to sue in getting registration; but for registration he could not sue at all. However, there is nothing in the section to say that if he once has registered he is entitled to sue in respect of anything. It is simply a negative, requiring registration under the Act, as a condition precedent or necessary preliminary to suing.

Then the question is what registration under the Act is. Now the 65th section of the same Act says: "A trade mark must be registered for particular goods or classes of goods." Therefore, a general registration in respect of all goods could not be effected. Then, looking at section 62, we find it says: "The comptroller may, on application by or on behalf of any person claiming to be the proprietor of a trade mark, register the trade mark." Then it says in what form the application must be made, and then adds: "The application must be accompanied by the prescribed number of representations of the trade mark, and must state the particular goods or classes of goods in connection with which the applicant desires the trade mark to be registered." Therefore, it points to particular goods or classes of goods. The form referred to in the 2nd sub-section of that section is prescribed by the statute. That was altered by the rules, and I refer to the form prescribed by the rules and numbered F in the second schedule. There it is shewn what is to be done, and how the designs are to be placed. Then it says: "You are hereby requested to register the accompanying trade mark in class [] in respect of

." A blank is left to be filled up with the description of the goods. That applies to marks registered under the Act of 1883. This mark was registered under the Act of 1875, of which section 2 corresponds with section 65 of the Act of 1883, and the form of application under the earlier Act states: "I desire the trade mark may be registered in respect of the description of goods following contained in . . ." Then follow in brackets, classes—that is to say, "acids, mineral dyes," and so on, and then there is a marginal note: "Here insert description of the goods and the class or classes under which the applicant desires to have them

registered." That corresponds with the note in the margin on form F under the present rules.

Then, again, section 70 deals with the assignment of the trade mark. "A trade mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered." Now here, again, it may be said this is not the Act under which the present mark is registered, but it corresponds exactly with the 2nd section of the Act of 1875, and I am reading it from the existing Act for convenience. I do not see what is the object of the requirement for registration as to particular goods or classes of goods, and these other requirements under which the applications are to be made for particular classes, if the plaintiff can by registering in respect of one class have a right to sue in respect of all, which I understand the argument to be. I think that the express object of requiring the application for registration to be in respect of particular goods and classes of goods is to confine the registration, and the right to sue in respect of registration, to the goods so indicated.

Then there is another thing that bears out the same view. The Commissioners of Patents invented what is known as the "Three Mark Rule," which was in reality one relating only to old marks, but what it did provide for was that no more than three old marks should be capable of being registered with respect to particular goods or descriptions of goods. Of course, it would have been utterly useless to say that only three should be registered in respect of particular goods or descriptions of goods, and that where there were more than three, the mark should be taken to be in common use, if, in case there were three old marks registered in respect of particular goods or classes of goods, a person who had the same old mark registered in respect of totally different goods could sue to restrain infringement in respect of the classes of goods with reference to which the three were registered.

Then, again, there is the common practice. In turning over the leaves of the *Trade Marks Journal* one constantly finds four or five or even seven or eight trade

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marks all exactly alike registered in respect of different classes of goods. What is that for? Why, because the common consent of every one shews that they understand that the right to registration under the Act must be in respect of the particular goods or classes of goods for which registration was obtained.

I am surprised to find that this point has not been expressly decided, for it must have arisen a great many times; but I find in the case of *Edwards v. Dennis* (1), to which Mr. Aston referred, certain observations of the Judges which seem to me to go exactly the same way. There it will be remembered that it was held that a person could not register with respect to all goods of a particular class, unless he had used the mark in respect of such goods, and it was held that the mark having been registered with respect to a particular class, but only used with respect to certain goods in that class, the register must be rectified so as to shew that the registration was not in respect of the whole class, but on the goods only with respect to which the mark had been used. Now, it would be absurd to say that if a man registers under class 1 in respect of particular goods in that class, he can only sue in respect of those particular goods in that particular class, but that he can without any other registration sue in respect of all the goods found in all the other classes. It is impossible to come to the conclusion that that would be so, and from this decision that a man can only register with respect to the goods in a particular class upon which the marks are used, it follows *a fortiori* that a man who is registered in respect of one particular class cannot, by virtue of that registration, sue in respect of goods which are not within that class at all.

In *Edwards v. Dennis* (1) Lord Justice Cotton says: "Now what was done in the present case? There was a registration by Mr. Edwards' predecessors in title for class 5, 'unwrought and partly wrought metals used in manufacture.' That was registration in respect of all goods which come under class 5—a class which includes a vast number of things." Then, passing over a few lines—"The registration in the present case has been for the

entirety of that class. In my opinion that is wrong. Even if a trade mark can be registered which is not in actual use, it ought to be restricted to those goods in connection with which it is going to be used. In my opinion it is not the intention of the Act that a man registering a trade mark for the entire class, and yet only using it for one article in that class, can claim for himself the exclusive right to use it for every article in the class." Then a little further on he says, "Can a man claim registration for all the articles specified in the class when the business he is engaged in comprises only one specific portion of the articles named in the class? I am of opinion he cannot." To paraphrase that, can a man who is registered in one class claim in respect of articles not comprised in that class, but comprised in some of the other classes? In the same way, in my opinion, he cannot. I do not think I need read further from that case for this purpose, but there are some very important observations in the judgments of all three of the Lords Justices bearing upon the point, all to the same effect as that which I have read.

Now what the defendant in this case has done, and what he is charged with doing, is the selling rolls of paper with the plaintiff's trade mark upon them. Rolls of paper come, so far as I can see, under class 39 and in no other class, and inasmuch as the plaintiff has not registered his trade mark in respect of paper or other goods in class 39 that might include paper, he is not entitled to sue in respect of the infringement of the trade mark, there being no registration in accordance with the statute that entitles him to sue under that head. That leaves the point entirely open as to whether the defendant has or has not attempted to pass off his goods as the goods of the plaintiff, and that is the only point upon which Mr. Aston will have to go into evidence.

Evidence was then called on this point, and

Aston, Q.C., and *R. Wallace*, were heard for the defendant.

Cozens-Hardy, Q.C., was not called on to reply.

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NORTH, J.—I have no doubt whatever what the result of the case must be as regards this fraud which the defendant has committed, by the way in which he has endeavoured to pass off his goods as the goods of the plaintiff.

The first thing to be borne in mind is this, that for several years the defendant had been employed by the plaintiff in carrying on his business as his servant. A time comes at which he separates from the plaintiff, Mr. Hart, and determines to start in business on his own account, and a man who is so starting for himself is bound to be particularly careful that in what he does he does not represent it as being done by the person whose servant he has been. The first thing, however, that Mr. Colley does is this: wanting to have labels printed, he goes to the printer who had been in the habit of printing the labels for the plaintiff down to that time. It was perfectly open to him to do so, but if he did choose to employ to print his own labels the man who had printed labels for the plaintiff, it was all the more incumbent on him to take care to give the printer the necessary warning to prevent the defendant from being supplied with the same thing that had been supplied to his master when he was his servant.

Then there is another thing to be borne in mind. When Colley started in business, I have an account of what he did, given by a Mr. Fordham, who had been a customer of the plaintiff prior to the autumn of 1888, when the defendant visited him and obtained his custom. [His Lordship read from the evidence of this witness, and continued:] So that we have got this: the defendant is not only getting wrappers to use for his goods, but he is going to a person who had previously been exclusively a customer of the plaintiff for the purpose of trying to get his custom. Well, if he chooses to do that, I say again it is the more important, bearing in mind the position he had previously filled, that he should be very careful not to do anything that might have the effect of passing off his goods as those of the plaintiff.

Then we find this, that he has himself drawn up the wrappers in question. There

are three articles complained of practically: the wrappers put on the perforated papers, the wrappers put on the non-perforated papers, and the price lists. Now, as regards the price lists, I do not think those are very important. Those are prepared for the purpose of shewing them principally to regular customers, and if they are circulated about to persons who are not customers I do not think that they are likely to produce much harm. But it is not an insignificant thing that the defendant's price list is, in my opinion, deliberately copied from the plaintiff's price list, and undoubtedly with the plaintiff's price list before the defendant when he was doing it. It follows precisely the plaintiff's price list, with this one remarkable exception from beginning to end, that it puts the prices in every case a little lower in the defendant's list than they are in the plaintiff's list. The excuse is made that he is selling the same articles, and that the price lists must be alike. The second proposition does not follow from the first. That the price lists of persons who are themselves dealing in the same articles should give similar articles and similar prices is natural enough; but when I find, from the beginning to the end, that, as far as similarity is concerned, the articles are all arranged in the same order precisely, and that the same language, as nearly as possible, is used, it is impossible to believe it is a mere fortuitous accident, and that this list has not been taken from the other. I am quite satisfied, notwithstanding what Mr. Colley said in the box, that when he prepared the price list he took the part of it which he says he took, and the greater part, from the plaintiff's. But there is one part that is no doubt different, and that is the prices, which he did not take from the plaintiff's, but inserted lower prices in each instance.

That is what the defendant did in respect to price lists; now let us see what he did in respect to wrappers. [His Lordship described the plaintiff's and defendant's wrappers, and continued:] Looking at the two wrappers, I have come to the conclusion, without any hesitation, that the defendant has deliberately adopted

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the form which he has adopted because it is so like that theretofore used by the plaintiff.

Then it is said that these wrappers are all of a common type, common to the trade, and that the defendant had therefore a right to use them. I have seven or eight others before me, and looking at these I find they are none of them nearly so like the plaintiff's as the defendant's is. I do not think it necessary to go through the various resemblances, but I am quite satisfied, comparing these two together, and looking at the others that were used by other persons in the trade, that the defendant's is far more like the plaintiff's than any of the others, and that it was made so with a purpose.

Then is there any evidence to shew that people might be deceived? There is plenty of it. [His Lordship read from the evidence on this point, and continued:] Although the defendant may use such wrappers as are to his liking, he must take very good care that in doing it he does not adopt any which may have the effect, or be calculated to produce the effect, of passing off his goods as those of the plaintiff, which effect, in my opinion, these wrappers of his, in respect both of the perforated and of the non-perforated paper, are calculated to have; and I say further that, in my opinion, they were intended to produce that result.

I think the plaintiff is entitled to an injunction.

Solicitors—Linklater & Co., for plaintiff; Truefitt & Gane, for defendant.

NORTH, J. }
1890. } *In re OLIVE'S ESTATE.*
March 22. }

Practice—Compulsory Purchase of Land—Payment into Court—Costs of subsequent Incumbrancer—Lands Clauses Consolidation Act, 1845, s. 80.

After payment into Court by a corporation of the purchase-money of land (taken by them under compulsory powers) belonging to a tenant for life and remaindermen, one of the latter mortgaged his reversionary interest in the fund. Upon the death of the tenant for life, the remaindermen presented a petition for payment out of the fund:—Held, that the corporation must pay the costs of the subsequent mortgagee (not exceeding 42s. for his costs of appearance), and the costs of serving the petition upon him.

Petition.

By the will of Walter Olive, dated the 11th of October, 1844, certain land at Cheltenham was devised to trustees—as to one third part thereof, upon trust for Charlotte Olive for life; and after her death, upon trust for her children who should attain twenty-one, equally as tenants in common. And the two other third parts were devised upon similar trusts for certain other persons and their children.

The testator died in November, 1844.

Charlotte Olive, in September, 1845, married Frederick Rodway. There were issue of the marriage, the petitioner Charlotte A. Rodway, and two other children (co-petitioners), and Oliver Rodway (out of the jurisdiction), all of whom had attained twenty-one.

In the year 1885 the corporation of Cheltenham, under compulsory powers conferred on them by their special Act (which incorporated the Lands Clauses Consolidation Act, 1845), took the land at Cheltenham, and paid the purchase-money of 3,580*l.* into Court “in respect of land situate at Cheltenham, wherein Daniel Olive is interested as trustee without power of sale.”

In April, 1885, the usual order was made for investment of the purchase-money, and payment of the dividends to Daniel Olive, the trustee. Pursuant to

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this order the money was invested in the purchase of 3,509*l.* 16*s.* 1*d.* India 3½ per cent. stock.

Charlotte Rodway, the equitable tenant for life of one third part of the fund in Court, died in January, 1890.

By an indenture dated the 19th of June, 1888, and made between Charlotte Rodway of the first part, the petitioner Charlotte A. Rodway of the second part, and B. Hartland of the third part, the share of Charlotte A. Rodway in the fund in Court was assigned to Hartland, by way of mortgage, to secure 120*l.* and interest. By an indenture dated the 7th of March, 1890, and made between Hartland of the one part, and the respondent George J. Fowler of the other part, the mortgage debt and interest and the securities for the same were transferred to Fowler.

This was a petition by the three children of Charlotte Rodway (within the jurisdiction), asking that one third of the fund in Court might be sold; that, out of one fourth of the proceeds of sale, the succession duty payable in respect of the share of the petitioner Charlotte A. Rodway might be paid; and that, out of the residue of such one-fourth share, the mortgage debt and interest might be paid to Fowler, and the balance to the petitioner Charlotte A. Rodway. The petition, after providing for the payment of two other fourth shares to the two other petitioners, and for the carrying over of the remaining fourth share to a separate account, asked for the usual order for payment of costs by the corporation, pursuant to the 80th section of the Lands Clauses Act.

The petition was served on Fowler, the mortgagee of Charlotte A. Rodway's share; Daniel Olive, the trustee of the will; and on the Corporation of Cheltenham.

The only question which calls for a report was as to how the costs of the mortgagee in respect of the mortgage effected subsequently to the payment into Court were to be borne.

Micklem, for the petitioners and the trustee of the will.—Here there will only be one set of costs for the corporation to pay; we have saved them the costs of separate appearances.

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They ought to pay the costs of the mortgage effected subsequent to the payment into Court, as those were costs occasioned, not by any adverse claims, but by the ordinary course of dealing with property—*Eden v. Thompson* (1), *In re Bareham* (2), and *In re Brooshoof's Settlement* (3).

Farwell, for Fowler, the mortgagee, referred to *In re Nicholl's Trust Estates* (4).

E. E. H. Brydges, for the corporation.—“After payment of the purchase-money into Court there is an end of liability on the part of the company to costs occasioned by dealings with the fund by the owners themselves,” *per* Bacon, V.C., in *In re Gough's Trusts* (5); and the decision in *In re Jones's Trust Estate* (6) is to the same effect. The remarks of Kay, J., in *In re Brooshoof's Settlement* (3), the only case really against me, were only *obiter dicta*.

If the Court should decide that the corporation must pay the costs of the mortgagee, the corporation can only be called upon to pay 42*s.* for the costs of his appearance and the costs of the affidavit of service—*Ex parte Jones* (7).

Micklem.—I do not dispute that.

NORTH, J.—I think that the mortgagee is entitled to his costs, notwithstanding the fact that the mortgage was made after the property was taken by the corporation. The property in question was settled; and, while that state of things existed, proceedings were taken by the corporation to acquire the property, and the purchase-money was paid into Court. After that, some one entitled to a share in remainder mortgaged her share to the person served as the first respondent.

I am only dealing with the case of the first respondent. There is nothing to shew that anything vexatious has been

(1) 2 Hem. & M. 6.

(2) Law Rep. 17 Ch. D. 329.

(3) 58 Law J. Rep. Chanc. 654; Law Rep. 42 Ch. D. 250.

(4) W. N. 1866, p. 93.

(5) 53 Law J. Rep. Chanc. 200; Law Rep. 24 Ch. D. 569.

(6) 39 Law J. Rep. Chanc. 190; 18 W. R. 312.

(7) Law Rep. 14 Ch. D. 624.

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done by him for the purpose of getting costs; and, as his appearance is *bona fide*, he seems to be entitled to his costs.

It is said, however, that there are two cases at variance with this view. But there are also certain cases in confirmation of it. The decision in *Eden v. Thompson* (1) is exactly in point. The facts of that case no doubt were different; but Vice-Chancellor Page Wood lays down the principle to be applied. He says: "The principle of the later cases is that, if a suit has been instituted specifically dealing with the particular fund, then the petition, which is necessarily a petition in the suit, should be served like any other petition in the suit, and not merely as a petition under the Act; and the practice which has grown up has been to serve these petitions upon all parties to the suit. Then it is objected that a petition ought to have been presented before suit for payment of this fund out of Court, in which case it would have been simply a petition by the trustees for payment to them, and the only costs payable would have been theirs. But persons whose estates are taken by railway companies or other such bodies, under compulsory powers given to them for their own benefit or the benefit of the parties whom they represent, are entitled to deal with their estates to suit their own convenience, not that of the company; and if it happens in the course of such dealing that a suit is instituted, not being litigation properly so called, but merely administration, or some similar proceeding under the direction of the Court, it will follow as of course that the company (except in the case of vexatious or wanton proceedings, of which the Court would take special notice, and with which it would know how to deal when they came before it) would have to pay the costs of all necessary parties, occasioned, not by any particular adverse claims, but by the ordinary course of dealing with property. This principle clearly covers the case of a mortgage, and would provide for all the ordinary costs of mortgagor and mortgagee, so long as there was no suit to set aside the mortgage, or other contest of that nature, between the parties."

The latter words deal with a case in

principle precisely like the present case; and, indeed, throughout, those observations are dealing with a case *in pari materia*, because the learned Judge is dealing with costs occasioned by proceedings taken by persons interested subsequent to the payment into Court. The rule which was then laid down in *Eden v. Thompson* (1) was followed by the Court of Appeal in *In re Bareham* (2), to which I need not further refer. Then there was the recent decision, before Mr. Justice Kay, in *In re Brooshoof's Settlement* (3), in which he took the same view. It is said that in *In re Brooshoof's Settlement* (3) Mr. Justice Kay was not dealing with the case of a mortgagee; that is true, but he points out the principle that there is no reason why, in a case between mortgagor and mortgagee, the company should not pay the costs both of the mortgagor and the mortgagee. He says: "I have been referred to certain cases in which a man has mortgaged his property after the land had been taken and the money paid into Court, and the Court has refused to give two sets of costs—namely, those of mortgagor and mortgagee. But it seems, even there, there are decisions both ways. If I had to decide it myself, I should say again I do not see why the company ought not to pay the costs both of mortgagor and mortgagee. When they take a man's land compulsorily, they know there is always a chance of his dealing with it so as to increase the cost of getting the money paid out."

There are other cases to the same effect. But then there are two cases which are said to be contrary, and I think they are. The first is the case of *In re Jones's Trust Estate* (6); that case is so shortly reported in the *Weekly Reporter* that I do not understand the ground of the decision. Vice-Chancellor James, in giving judgment, says: "The company must pay the costs of the re-investment. A man whose land is taken may say he wants land in return, and the slight alteration in the trust is immaterial. The company, however, is not liable to pay the costs of the mortgagees, but they will of course have them out of the fund." As I said before, I do not understand the ground of the decision; and, therefore,

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that case is not to me such an authority as it would have been if the circumstances of the case had been more fully stated in the report; there may have been some special circumstances in that case. The other case is *In re Gough's Trusts* (5). There, at the time the land was taken, it was settled on a person for life, with remainders over. After the company had taken the land and paid the purchase-money into Court, some of the persons entitled in remainder mortgaged their reversionary interests. [His Lordship, after reading the marginal note of the case, continued:] I confess that I do not understand that decision at all: it was not a question, as the report states, whether or not the company should pay the mortgagees' costs of the petition, but whether the company should pay the costs of proving the mortgages; and I do not see how the money could have been paid out without that proof. The petition was presented by the owners of the equity of redemption (then in possession) and their mortgagees, and they both appeared by the same counsel. Vice-Chancellor Bacon, in giving judgment, says: "The practice, as laid down by the more recent authorities, seems to be that, after the payment of the purchase-money into Court, there is an end of liability on the part of the company to costs occasioned by dealings with the fund by the owners themselves." The more recent authorities there referred to were, apparently, two text-books; but the authorities do not seem to bear out the text-books; and I do not see any case cited as leading to that conclusion except *In re Jones's Trust Estate* (6). The Act of Parliament says, in section 80, that the company are to pay all the costs occasioned by their taking possession of land under their compulsory powers, "except such as are occasioned by litigation between adverse claimants;" and I do not find that the Act says anything about the costs of matters (subsequent to the payment into Court) between the persons entitled. The decision in *In re Gough's Trusts* (5) is, I think, inconsistent with the earlier authorities, and with the later case before Mr. Justice Kay.

I hold, therefore, that the mortgagee

has been properly served, and he must have his costs.

As to the second point, he is only entitled to be paid by the corporation the sum of 42s. for his costs of appearance, and the costs of serving the petition upon him; and he must add the balance of his costs to his security.

Solicitors—Waterhouse, Winterbotham & Harrison, agents for Winterbothams & Gurney, Cheltenham, for petition and some of the mortgagees; Mear & Fowler, for the remaining mortgagees; Peacock & Goddard, agents for E. T. Brydges, Cheltenham, for corporation.

[IN THE COURT OF APPEAL.]

COTTON, L.J.

LINDLEY, L.J.

LOPES, L.J.

1890.

Jan. 30, 31.

SMART v. TRANTER.

Husband and Wife—Will of Wife having no Testamentary Capacity—General Grant of Probate—Action of Husband against Executor in Chancery Division—Title of Executor.

The mere appointment of an executor, and the grant by the Probate Division of probate to the person named as executor, does not amount to an admission of the capacity of the testator or testatrix to dispose beneficially of the property which the executor gets in by virtue of the probate. So, where a married woman who was entitled to two choses in action had, without any testamentary capacity by assent of her husband or otherwise, made a will appointing an executor and bequeathing her property away from her husband, and probate of the will had been granted to the executor in general form, in accordance with the Probate Rules, March, 1887,—Held (reversing the decision of KAY, J.), that although her husband could not have sued the person liable to his wife in respect of the choses in action without taking out administration to her estate, such choses in action forming part of her assets, yet, having

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the beneficial interest in them when got in by the executor, he could sue such executor in respect of such interest in the Chancery Division without taking proceedings to recall probate or obtain administration to his deceased wife.

Appeal from a decision of Kay, J. The case is reported 58 Law J. Rep. Chanc. 183.

The plaintiff in the action was the husband of a lady whom he had married before the Married Women's Property Act, 1882, came into operation, and who had died on the 3rd of July, 1887, having made a will whereby she appointed the defendants executors, and purported to leave all her property upon trust for her mother for life, with remainder to her brothers and sisters.

The plaintiff had entered a *caveat* against the proof of the will, but afterwards withdrew it, and probate was then granted to the defendant, one of the executors, in the general form according to the Probate Rules of March, 1887, rules 15 and 18.

The plaintiff brought this action against the defendant, claiming as against him a legacy of 50*l.* to which his wife was entitled on the death of her mother, who was still living, and a debt of 100*l.* owing to his wife from her brother, which had not been reduced into possession, alleging that his wife had no power to dispose of either of the sums without his assent, and which assent had never been given, and claiming that the defendant should transfer and assign both the said sums to the plaintiff.

Before Kay, J., it was stated that the wife had no separate property or any testamentary power of appointment; but it had been since ascertained that she was entitled to a small amount of separate estate.

Kay, J., had held that the plaintiff could not dispute the executor's title to these two *choses in action* in the Chancery Division, but that his proper course was to take proceedings in the Probate Division to recall the probate and obtain administration to his wife.

The plaintiff appealed.

Napier Higgins, Q.C., and Barnard, for

the appellant.—Under the Married Women's Property Act, 1882, ss. 1 and 2, every woman married after 1882, and every woman married before 1882 as regards property and things in action acquired after 1882, can convey and dispose of her property as if she were a *feme sole*, and the concurrence of her husband in any disposition is not necessary. This Act having made such a large alteration in the testamentary powers of married women, new rules were promulgated in the Probate Division on the 29th of March, 1887, and, under rules 15 and 18 of these rules, in a grant of probate of the will of a married woman it shall not be necessary to recite in the grant, or in the oath to bind the same, the separate personal estate of the testatrix, or the power or authority under which the will has been, or purports to have been, made. The probate shall take the form of ordinary grants of probate, without any exception or limitation, and issue to an executor or other person in the usual course of representation to take the same. The appellant here was married to the testatrix before the Married Women's Property Act, 1882, came into operation. The testatrix died in July, 1887, having made a will. The appellant entered a *caveat* against the proof of the will, but withdrew it on the 14th of November, 1887, but gave notice to the executor named in the will, both before and after he obtained probate, that he claimed to be entitled to two sums of money disposed of by the will, and asking the executor not to part with them. The executor would not give the undertaking, and the appellant then brought this action. Kay, J., dismissed the action on the ground that our proper course was to take proceedings in the Probate Division to recall the probate. That we cannot do if the testatrix had any separate estate; and since the case was decided in the Court below it has been discovered that the testatrix was entitled to certain separate estate. With regard to the sums of money, the husband is equitably entitled to them, and the person to whom probate of the will has been granted is trustee for him. No doubt the husband, to get the legal title to them, must obtain administration, but the executor holds them

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on trust for him—*In re Lambert's Estate; Stanton v. Lambert* (1). Where a wife died intestate, and her husband afterwards died without having taken out administration to her, the Ecclesiastical Court granted administration to the next-of-kin of the wife, and not to the representative of the husband. But such administrator was in equity considered a trustee for the representative of the husband—*Humphrey v. Bullen* (2), *Elliott v. Collier* (3), *Squib v. Wyn* (4), and *Cart v. Rees* (5). Under the old practice of the Probate Court, probate to the will of a married woman was limited to such property as she could dispose of by will. Now, under the new rules, which have statutory force, probate is granted in general terms, and any person claiming to be executor of a married woman can go to the Probate Court, and is *prima facie* entitled to probate, without any limitation; but, having obtained probate, he is trustee for the husband of property to which the husband is equitably entitled. We cannot go to the Probate Court to get the probate recalled, because the probate granted is in accordance with rules 15 and 18 of the new rules. We submit, therefore, that we are entitled to the relief claimed in this action.

They cited also *In the goods of Amelia Price* (6).

Whitehorne, Q.C., and *Eustace Smith*, for the respondents.—The decision of Kay, J., is right. The Probate Court is the proper Court to determine the question. The Ecclesiastical Court had no power to determine any question with regard to the separate estate of a married woman, and therefore it simply granted probate of a married woman's will limited to such property as she had power to dispose of by will, leaving the question as to separate estate to be determined by the Court of Chancery. The Divorce Act of 1857 gave the Probate Court power to a certain extent to decide questions with regard to

separate estate; but we find that the questions were generally determined by the Court of Chancery. Since the Judicature Act the Probate Court has had full power to determine all questions. Here probate has been granted to the respondent of the testatrix's will in general terms, in accordance with rules 15 and 18, and his title cannot be disputed in this action. Under the grant of probate he has a complete title which can only be revoked by the Probate Court, and we have already pointed out that that Court now has power to determine all questions which may arise in the matter.

The appointment of executors by the Court amounts to a disposition to a certain extent of the property of the testatrix, and the person to whom the grant of probate has been made becomes an officer of the Court, to get in the assets, pay the debts, &c.; and the plaintiff coming and suing the executor as executor can only claim the balance which remains in the executor's hands after discharging all liabilities. But the plaintiff is in fact claiming to have the assets handed over to him free from any liability to bear thereout the charges which the executor would have to bear.

They cited *In re Tharp; Tharp v. Macdonald* (7).

COTTON, L.J.—A very learned argument has been addressed to us with regard to a very small sum. This is an appeal from a judgment of Mr. Justice Kay, who decided that the plaintiff, the husband of the deceased, one of whose executors the defendant is, is not entitled to any judgment in his favour in this action, but that he must go to the Probate Division and get the grant of probate which has been made to the defendant revoked, and a grant of letters of administration to himself in respect of any property which his wife could not dispose of by will.

The subject-matter of the plaintiff's claim is two *choses in action* of his wife, which did not fall into possession during her life, but still remained *choses in action* forming part of her estate at her death. She purported to make a will, and appointed two executors. According to the

(1) 57 Law J. Rep. Chanc. 927; Law Rep. 39 Ch. D. 626.

(2) 1 Atk. 458.

(3) 3 Atk. 526.

(4) 1 P. Wms. 378.

(5) 1 P. Wms. 381.

(6) 56 Law J. Rep. P., D. & A. 72; Law Rep. 12 P. D. 137.

(7) Law Rep. 3 P. D. 76.

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present practice of the Probate Division as laid down by a recent order, the Court does not now, as formerly, grant probate to the persons named as executors limited to so much as the married woman had power to dispose of by will, accompanied by a grant of administration *cæterorum* to the husband, but the grant of probate is in general terms. The Court has taken upon itself to say that the testatrix, although a married woman, has power to make a will as regards her separate estate, and as regards any property which may have come to her after the passing of the Married Women's Property Act; and so, without entering into the question whether there is any property which she was not able to dispose of, and which would go to the husband, makes a general grant of probate to the persons named by her as executors, instead of a limited grant to them and a *cæterorum* grant to the husband.

Mr. Justice Kay has held that the husband could not claim anything from the executors; they assert title to the whole; but that he must, if desirous of asserting his claim to the property, obtain from the Probate Division a limited grant of probate to the executors, and a *cæterorum* grant to himself. That was on the footing that a husband on the death of his wife could only claim her *choses in action* not reduced into possession on taking out administration to her estate, and, not having done so, he could not make his claim; and that by bringing this action against the executors he had admitted a title in them to all the estate of his wife which the probate purported to give. I think that there is a fallacy there. How came it that the husband could not obtain his wife's *choses in action* without taking out administration to her? It was because her *choses in action* not reduced into possession were assets of the wife, to which the husband was entitled by virtue of section 25 of the Statute of Frauds, which prevented the Statute of Distributions giving any right to the next-of-kin to the prejudice of the husband's previously existing right. And it is under the effect of that statute that, notwithstanding the Statute of Distributions, the husband is entitled to what were assets of the wife

which she had no power to dispose of by will, and which but for that clause in the Statute of Frauds would have gone to her next-of-kin under the Statute of Distributions. These *choses in action* were her assets, but assets which, having regard to the then existing law, she could not dispose of by will because they came to her before the Married Women's Property Act, 1882, was passed, and were not settled to her separate use. How is the husband deprived of his rights as against the executor to that portion of her estate which she could not dispose of by will, and which accordingly forms the undistributed personal estate of the wife? If there had not been a husband surviving, the next-of-kin would have claimed it under the Statute of Distributions as an estate not disposed of by will; but here the husband is entitled to that part of the estate of his wife which she could not dispose of by will. It seems to me that the husband, in respect of the beneficial right which he had, although he could not sue the person who was liable for these *choses in action* to his wife without taking out administration to her, still is entitled to the benefit of them; and if the executors under the grant of probate are entitled to sue such person and obtain these *choses in action*, he, the husband, can sue the executors for them as being their *cestui que trust*, as a person beneficially entitled to the personal estate which they have the right to get in.

But it is said that the plaintiff is wrong, and must go to the Probate Court; and Mr. Justice Kay has so held because it is said the appointment of an executor amounts to a disposition to some extent of the property of the woman or man who makes a will appointing executors. Here it is said a married woman makes a will and appoints executors, and that will has at present been admitted to probate, and the effect of that is to give to the executors power to dispose of property. It must be disposed of according to their oaths—that is, they must dispose of it in paying debts and in performing the other duties imposed by the will—that is, of paying legacies and residuary legatees. But that is a fallacy; the mere appointment of executors does not amount to an

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admission that the testatrix can appoint beneficially by the will all the property which the executors get in by virtue of the probate. It enables them, as persons who are recognised by the Probate Court as being the persons named by the testator or testatrix, to get in, whether it has been beneficially disposed of or not, the estate and assets of the deceased. The *choses in action* in the present case are assets of the deceased, although her husband could not have claimed them without taking out administration; and if after the death of the husband, he not having got in the assets, not having taken out administration, somebody else takes out administration to the deceased wife, that person could get them in, but would be a trustee of the property when got in for the personal representative of the deceased husband. The mere appointment in this case of executors, and grant of probate to them in general form by the Probate Court, did not amount to a recognition of the right of the testatrix to dispose beneficially of this particular property, but merely treated the persons named as executors as the persons recognised by the Probate Court as entitled to get in everything forming part of her assets. That ingenious argument fails.

I think the plaintiff is entitled to say, "I am the beneficiary entitled to that part of my wife's assets when got in by the executors." But in what position is he to take them? He must take them subject to the same liabilities as he would have been under if he had taken out administration. He would have had to pay the costs of taking out administration, and any debts of his deceased wife, for there might be debts of his wife's contracted by her when a single woman, and which would be payable out of this property. It is said that there were debts of the wife in this case; but these must be debts of the married woman if they are to be payable out of her assets. I am not dealing now with the separate estate. There might have been liabilities contracted by her with reference to her separate estate, but these are not debts of a married woman in the proper sense of the word—that is, debts payable by her administrator or executor out of her assets—but merely debts in the view of a

Court of equity, according to which a married woman, although not capable by law of contracting, might with reference to her separate estate contract so as to create liabilities which must be discharged out of that estate. But there do not appear to be any debts which would be payable by her administrator as such out of her assets. We must therefore declare that the plaintiff is entitled to these disputed assets, subject to the payment of the probate and testamentary expenses properly incurred by the executors with reference to her estate.

There appearing to be no debt of the wife or funeral expenses properly payable out of her estate—I say nothing about the separate estate, that is untouched by our judgment, which only has reference to the *choses in action* of the wife—we must discharge the order of Mr. Justice Kay and order repayment to the plaintiff of the costs ordered to be paid by him to the executors. The defendants, no doubt, by their ingenuity, have persuaded the Judge to make an order which we hold to be erroneous, and so we must give the plaintiff the costs of the appeal for setting that right.

With reference to the whole costs of the action I am not well satisfied with the terms of the claim made by the plaintiff's notice; but that notice was sent to the executors before they took out probate, and after receipt of the notice of the plaintiff's claim they still persisted in taking out probate, and they really by their action, without knowing whether there was any possible estate to which the probate could be useful, caused the whole of this litigation. But I think it would be wrong to make them pay any costs except the costs of the appeal, and, with that exception, each party must bear his own costs of the action.

LINDLEY, L.J.—A small sum of money is in dispute, but it has raised a discussion of considerable importance, and the legal point involved is obscure and difficult.

It is an action by a husband against persons who have obtained probate of the will of his late wife—part of her assets consisting of reversionary *choses in action*

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which had not been reduced into possession. The husband says by his claim, "Hand these assets over to me," and the defendants, the executors, oppose that demand. Mr. Justice Kay has adopted the view that the husband has no *locus standi*, that he cannot claim even from the defendants the assets of his wife unless he can get the probate granted to them recalled, and administration to her estate granted to him. That is an intelligible view, but having considered the case I think Mr. Justice Kay has taken an erroneous view of the position of the husband. His rights involve for their elucidation some enquiry into the old law. The position of the husband will be found explained accurately and clearly in 2 *Williams on Executors* (7th ed.), p. 1488, "It has been shewn that the husband is entitled to the grant of administration of his wife's effects"—of that there is no doubt—"and consequently, before the Statute of Distributions, he was entitled, as all administrators were, to the exclusive enjoyment of the residue."

That is true enough. The consequence of that was that as the law then stood he took all, whatever it might be. The Statute of Distributions was passed altering that law as regards administrators generally, and there were some expressions in it, especially in the 7th section, which provided that if there is no wife then the estate should be distributed amongst the children, and a doubt arose whether that had not altered the law as regards the husband. That doubt was set at rest by a clause introduced into the Statute of Frauds, section 25, which provided that neither the Statute of Distributions nor anything therein contained "shall be construed to extend to the estates of *femes covert* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said Act." That left the husband where he was before the Act, but it gave rise to another doubt. It is that, since the Statute of Frauds, if a husband takes out administration he can get the reversionary *chooses in action* of his wife; but if he

does not, the Statute of Frauds does not apply, and in whom is the right to these *chooses in action* vested?

That doubt was solved very early, in the case of *Cart v. Rees* (5), (cited by the Lord Chancellor Cowper, who gave judgment in *Squib v. Wyn* (4)). There "a wife died possessed of *chooses in action*, and the husband survived, and died without taking out letters of administration to his wife, after which the next-of-kin of the wife administered to her, and Lord Parker held that the administrator to the wife was but a trustee for the executor of the husband, the right to the wife's *chooses in action* being by the Statute of Distributions vested in the husband as next-of-kin to the wife; and whereas there is a proviso in 29 Car. 2, saying that the Statute of Distributions shall not extend to the estates of *femes covert* that die intestate, but that their husbands may have administration of their personal estate as before the making of the Act. His Lordship said, this clause was made in favour of the husband and not to his prejudice; so that it was intended by the Parliament that the husband should be within the Statute of Distribution so as to take the wife's *chooses in action*, as to his benefit, but should not be within the same, as to his prejudice; and that this was not a new point, but had been settled, and upon very good reason—for, were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next-of-kin, though ever so remote, which was not the intent of the statute."

There are other cases on the same point to be found in *Williams*, p. 1489, which have settled the doubt, and have laid down that in regard to the reversionary *chooses in action* of the wife, the husband, if he survives, is beneficially entitled to them, and that if he takes out administration he is entitled to them in law and in equity; but if he dies without having taken out administration the legal personal representative of the wife is the person to get them in, but that having got them in he holds them in trust for the husband. How does that view affect the right of the husband in this case? Till lately it was the practice of the Probate Court to grant administration to the estates of married

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women in what may be called, in a popular sense, a double form. If she made a will and appointed executors, the executors would take out administration as to some assets, and the husband would take out administration as to the rest.

After the Married Women's Property Act, 1882, that course was found embarrassing in practice. If, for instance, there were two legal personal representatives of the wife, to which of them was a person indebted to the wife to make payment? So the practice of the Probate Court was altered in 1887, when the present rule was made; and, in conformity with that rule, where a married woman dies leaving a will the Court grants probate to her executors in general terms, and will not grant partial probate to one person and letters of administration as to part of her property to another. But that alteration cannot affect the rights of parties to property. It is a mere matter of machinery. The machinery has been adopted here, and the defendants have obtained probate of the wife's will. They, therefore, are the only persons entitled in this country to get in her personal estate. It does not matter whether she can dispose of them by will or not. These reversionary *choses in action* form part of her estate, as is proved by the old cases, which shew that no one could get them in without taking out administration to her estate.

Bearing in mind that this marriage was before the Act of 1882 was passed, the mode of dealing with these particular assets is clear enough. They are assets of the wife; they belong to the husband. She cannot will them away without his consent, but it is just conceivable that at common law, without reference to separate estate, there might be debts of the wife contracted properly payable out of those assets—*e.g.*, a debt incurred before marriage which was unsatisfied; or, again, the married woman might be a sole trader under the custom of the city of London. If there were any such debts they would come out of her assets in priority to anything else. It is obvious there were no such things here. It is obvious that there is no use in having an enquiry, as there are no debts properly payable out of these particular assets. It is a theoretical pos-

sibility, but one with which we have nothing to do. The result will be that, subject to the payment of probate and testamentary expenses, these assets belong to the husband, and he is entitled to a declaration to that effect.

On the question of costs both parties are in the wrong. The husband claimed too much, and the executors have set him at defiance. I think the nearest approach we can get to doing justice is to give the husband the costs of the appeal, and to give him the costs already paid by him, and each party to bear his own costs of the action. I say that because one cannot help feeling that there was a certain amount of embarrassment on the part of the executors, and they have fought this claim on that account.

LOPES, L.J.—The form in which probate is granted does not alter the right of the beneficiaries. When that is borne in mind I do not think the case is so difficult to deal with as it at first sight appeared. It appears to me that the executors are the proper persons to get in these outstanding *choses in action* of the wife, and that the husband will subsequently get payment from the executors, subject only to the same deductions as they would have been subject to if the husband had taken out administration under the old practice.

I agree with what has been said by the other members of the Court on the other points.

Solicitors—Collyer-Bristow, Russell & Hill, agents for Wood & Awdry, Chippenham, for plaintiff; Morse, Hewitt & Farman, agents for A. W. Boodle, New Swindon, for defendant.

NORTH, J. } *In re* THE MANCHESTER ROYAL
1889. } INFIRMARY.
Dec. 17, } THE MANCHESTER ROYAL INFIRM-
18, 21. } ARY *v.* THE ATTORNEY-GENERAL.

Corporation — Trustees — Corporation holding Funds for Charitable Purposes—Trust Investment Act, 1889 (52 & 53 Vict. c. 32), ss. 3, 5, 6, 7, and 9.

A corporation incorporated by special Act of Parliament and holding funds for charitable purposes is a trustee within the meaning of the Trust Investment Act, 1889, and consequently is entitled to invest any trust moneys in its hands on any of the securities specified or referred to in section 3 of the Act, unless expressly forbidden to do so by the instrument creating the trust. A trustee, however, who has not, under the instrument creating his trust, power to vary the investments comprised in such instrument, cannot sell existing investments for the purpose of reinvesting the proceeds in the securities specified or referred to in section 3 of the Act.

Originating summons.

The Manchester Royal Infirmary was regulated by four special Acts of Parliament. The first (48 Geo. 3. c. cxxvii.) was passed in the year 1808, and was entitled "An Act for enabling Sir Oswald Mosley, Bart., to grant certain lands and hereditaments in the parish of Manchester, in the county palatine of Lancaster, for the purposes of the Manchester Infirmary, dispensary, lunatic hospital and asylum, and for vesting the property and effects belonging to the said charity in trustees for the benefit thereof." Section 1 empowered Sir Oswald Mosley to grant specified lands to trustees, nominated and appointed as therein mentioned, for the purpose of accepting and taking such grants by the major part of the benefactors and subscribers to the said charities for the time being, upon the trusts and for the purposes therein mentioned, which grants were to be taken to be valid and effectual notwithstanding the Act 9 Geo. 2. c. 36, or any of the Statutes of Mortmain, and the trustees for the time being so to be appointed were immediately empowered and enabled to accept and take the same grants.

Section 2: "The property of all and

singular the money, implements, materials, furniture, goods, chattels, and effects, matters, and things whatsoever already belonging, due, or owing to the said infirmary, asylum, dispensary, and charities, or the subscribers or benefactors thereto in respect or on account thereof, or which shall hereafter be purchased, subscribed, contributed, or provided for the purposes of the said charities, shall, from and after such nomination and appointment of trustees as aforesaid, be vested in such trustees so to be nominated and appointed as aforesaid, their executors, administrators, and assigns, upon the trusts and for the purposes hereinafter mentioned," and the trustees were thereby empowered to bring actions for the recovery of property of or belonging to the charity, and it was also provided that in all such actions it should be sufficient to state generally that the property for which the action should be brought was the property of "the trustees for the time being of the Manchester Infirmary, specifying the names of the trustees."

Section 4: "The said trustees so to be nominated and appointed as aforesaid, and the survivor and survivors of them, and the trustees, executors, and administrators of such survivor respectively, shall stand and be seized and possessed of and interested in the hereditaments and premises which have been so demised or granted as aforesaid, or which shall or may be granted or otherwise conveyed or assured by the said present Sir Oswald Mosley, his trustees or assigns, in pursuance of the power and authority hereinbefore contained in that behalf, and also of and in all and singular the moneys, securities for money, implements, materials, furniture, goods, chattels, and effects, matters, and things whatsoever, which may become vested in them in consequence of this Act and every part thereof respectively, in trust for and for the benefit of the said charities and charitable purposes accordingly, and subject to the rules, orders, and regulations now made and used, or such rules, orders, and regulations as shall hereafter be made, either with respect to the said lands, buildings, hereditaments, and premises, and the said goods and chattels of the said infirmary, dispensary, lunatic hospital and asylum,

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or with respect to the recommendation and admission of patients, or otherwise relating to the management, reputation, and government of the said charities by the major part of the benefactors and subscribers to the same charities for the time being."

By section 8 it was provided that the Act should be printed by the King's printer, and that a copy thereof so printed should be admitted as evidence thereof by all Judges, Justices, and others.

The second Act (5 Vict. c. 1) was passed in the year 1842. Section 2 was as follows: "The president, treasurers, deputy treasurers, benefactors, and subscribers for the time being of and to the Manchester Royal Infirmary, dispensary, and lunatic hospital or asylum, shall be incorporated by the name of 'The president, treasurers, deputy treasurers, benefactors, and subscribers of and to the Manchester Royal Infirmary, dispensary, and lunatic hospital or asylum,' and by that name shall be a body corporate with perpetual succession and a common seal, and with power to hold and retain for the purposes of this Act the lands comprised in the several hereinbefore-mentioned indentures, and all buildings now erected or to be hereafter erected upon the said lands with the appurtenances: provided always, that if any member of the said corporation shall be guilty of a breach of trust or any misfeasance in respect of any property or lands belonging to the Manchester Infirmary, dispensary, and lunatic hospital or asylum, or either of them, whether under the sanction of the corporation seal or not, he shall be subject to the same liabilities as if this Act had not been passed."

By section 3 it was provided that immediately after the passing of the Act, and by virtue of the same, the land and buildings of the charity should vest in the corporation according to the true intent and purport of the conveyances executed of the same to the trustees of the charities, and that in like manner all the moneys, stocks, funds, and securities for money, goods, chattels, rights, credits, and effects belonging, due, and owing to the charities, should be vested in the corporation, and for that purpose the persons in whose

names any sums of money, stocks, funds, mortgages, securities for money, or other effects should at the time of the passing of the Act stand or be secured, the beneficial interest wherein should belong to the charities thereby incorporated, should forthwith transfer or assign the same respectively, so and in such manner as that the same should be vested in the corporation.

Section 4: "As well the moneys arising from the sale or transfer of any of the public or Government funds, stocks, securities, or any other securities, as also any other moneys for the time being belonging to the said charities, may from time to time be invested, either in the name of the said corporation hereby created, or in the names of any other persons on behalf of and to be named and appointed by the said corporation, upon trust for the said charities, on mortgage of any hereditaments of a clear and indefeasible estate of inheritance in fee-simple to be situate in England or Wales, free from incumbrances, except quit-rents or other annual small payments and leases at rack-rent to tenants or occupiers, . . . or the same moneys, stocks, funds, and securities may in like manner be invested in any of the public or Government stocks, funds, or securities, and all such mortgages, stocks, funds, and securities may be from time to time called in, and the money arising therefrom be again invested in manner aforesaid so often as may be deemed expedient."

Section 11: "This Act shall be a public Act, and shall be judicially taken notice of as such."

The third Act (7 & 8 Vict. c. 43) was passed in the year 1844 to enable the corporation to enlarge the infirmary, and to purchase and hold land for the erection of a new lunatic hospital or asylum. Section 12 provided that "this Act shall be a public Act, and shall be judicially taken notice of as such."

The fourth Act (15 Vict. c. 3) was passed in the year 1852 for the purpose of uniting a charity, called the Manchester House of Recovery, with the Manchester Royal Infirmary. Section 12 provided that the Act should not be a public Act, but should be printed by the Queen's printer, and a copy thereof so printed

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should be admitted as evidence thereof by all Judges, Justices, and others.

The greater portion of the funds belonging to the corporation was invested in Government securities in the name of the corporation; but there were some small sums invested in the name of the official trustee of charities.

This summons was taken out by the plaintiffs, asking that it might be determined whether the plaintiffs, or their trustees, treasurers, and managers, were entitled to invest the funds and moneys belonging to the plaintiffs on such securities as are specified or referred to in section 3 of the Trust Investment Act, 1889; and whether that Act applied to the Manchester Royal Infirmary and the funds and moneys thereof.

Cozens-Hardy, Q.C., and *Farwell*, for the plaintiffs.—The provisions of section 11 of the Act of 1842, and the similar provisions contained in section 12 of the Act of 1844, do not make those Acts public Acts. The only object of those provisions is that the Acts in question may be judicially taken notice of. The Acts are private Acts, and were introduced as private bills. The question whether an Act is public or private depends upon the nature and substance of the case, and not on technical considerations—*Dawson v. Paver* (1). There is nothing in the “instrument creating the trust” which prohibits the investment of the funds of the charity on the securities mentioned in section 3.

The Attorney-General (Sir R. E. Webster, Q.C.) and *Ingle Joyce*, for the Attorney-General.—It was not intended by the Act of 1889 that property owned by a corporation should be considered as held by them as trustees in the ordinary sense. It is difficult to see how, in such a case, the Court could execute the trust. The officers of a corporation might be made liable for misappropriation of the funds, and yet it could not very well be said that they were trustees of the funds in the ordinary sense of the word. The Act of 1889 was passed for the purpose of amending the law relating “to the investment of trust funds.” It is very doubtful whe-

ther corporation property would be correctly described as “trust funds.” By the Act of 1842 the plaintiffs are constituted a public body holding funds for public purposes; they cannot be said to be “trustees” within the meaning of the Act of 1889.

Cozens-Hardy, Q.C., in reply.—Corporations can be trustees for charitable purposes in respect of property vested in them—*In re The Norwich Town Close Estate* (2) and *In re The Clergy Orphan Corporation* (3).

[NORTH, J.—I feel some difficulty as to what is the “instrument creating the trust.” Although I think the special Acts relating to the charity are private Acts, still I have considerable doubt whether they are “an instrument” within section 3 of the Act of 1889.]

The plaintiffs only ask for a declaration that they are trustees within the meaning of the Act of 1889.

NORTH, J.—This case raises a question as to the application of the Trust Investment Act, 1889. [His Lordship stated the provisions of the special Acts, and continued:] The corporation have very considerable funds belonging to them, the bulk of which is invested in the name of the corporation, though there is a small amount standing in the name of the official trustee of charities.

The question is, upon what securities can these funds be now invested; in other words, does the Act of 1889 apply to them? The Act is entitled “An Act to amend the law relating to the investment of trust funds.” It provides by section 3 that “it shall be lawful for a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands in manner following.” We have first of all to find whether a person is a “trustee” within the meaning of the Act; if he is a trustee, then the extended power of investment applies to “any trust funds in his hands.” Then section 5 provides that “every power conferred by this Act shall be

(2) 57 Law J. Rep. Chanc. 958; Law Rep. 40 Ch. D. 298.

(3) Law Rep. 18 Eq. 280.

(1) 5 Hare, 415; 16 Law J. Rep. Chanc. 274.

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exercised according to the discretion of the trustee, but subject to any consent required by the instrument (if any) creating the trust with respect to the investment of the trust funds." And by section 6 the Act is to apply as well to trusts created before as to trusts created after the passing of the Act, and the powers thereby conferred are to be in addition to the powers conferred by the instrument (if any) creating the trust.

Then section 7 is, I think [his Lordship read it], material in this way. First of all, it seems to me to contemplate that such bodies as the council of a county or borough or an urban sanitary authority come within the scope of the Act, because I do not think it would be the right construction to say that this section is dealing with bodies entirely outside the Act, and giving them powers which, unless they have them as trustees, would not properly find a place in this Act at all, but ought to be found in an Act relating to different subjects. It shews that this section is not, as I was at first inclined to think, one which merely limits the powers of these bodies, but that they have power to make the investments which are contemplated in the Act. Now the point put—and it is one requiring serious consideration—is whether it can be said that the property belonging to this corporation is a "trust fund" in their hands as "trustees" within the meaning of the Act? I think it is. I think that the money is clearly held on trust for charitable purposes. It was in the first instance in terms vested in trustees by the Act of 1808; and when by the subsequent Act the funds were vested in the corporation, this was done for the purpose of facilitating the dealing with the funds; but I do not think it in any way prevents that from continuing to be a trust fund which, beyond all question, had been a trust fund down to that time. Moreover, it is a fund for the purposes of the infirmary lunatic asylum, &c., referred to in the Acts. It seems to me beyond all question that the funds are held on a charitable trust, with respect to which the rights and duties of trustees belong to and are imposed on the body in whom the funds are now vested in trust, just as they

would be in the case of any ordinary trustee.

Mr. Cozens-Hardy referred to *In re The Clergy Orphan Corporation* (3), which is very like the present case; but, curiously enough, the point which I have now to decide seems to have been withdrawn from the consideration of the Judge there. The headnote to the report is as follows: "Stock in the funds belonging to a charity incorporated by Act of Parliament and having power to invest in the public funds may, under section 4 of the statute 23 & 24 Vict. c. 38, be sold out for the purpose of reinvestment on any of the stocks, funds, and securities on which cash under the control of the Court may be invested." Section 11 of that Act provided that "when any such general order as aforesaid shall have been made"—that is, as to cash in the control of the Court—"it shall be lawful for trustees, executors, or administrators, having power to invest their trust funds upon Government securities, or upon Parliamentary stocks, funds, or securities, or any of them, to invest such trust funds, or any part thereof, in any of the stocks, funds, or securities in or upon which by such general order cash under the control of the Court may from time to time be invested." But the petition presented in that case sought the advice and direction of the Court as to whether funds already invested could be sold for the purpose of reinvestment; and the argument of Mr. Cozens-Hardy for the petitioners was this: "No question is asked as to the power under section 11 to invest in the manner desired any funds to be hereafter acquired by the society; but the decision in *In re Warde* (4) has caused a question to be raised as to the power of the trustees to sell out funds, already invested, with a view to reinvestment where there is no express power of varying existing securities." Then the Vice-Chancellor Malins said, "I consider that the intention of section 11 was to enlarge the powers of investment previously belonging to trustees by allowing them to invest any fund in their hands on the stocks, funds, and securities from time to time sanctioned by the Court;

(4) 2 Jo. & H. 191.

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and my opinion is that, the petitioners being trustees, and having funds directed by the Act of Parliament to be invested in the public funds, come within the enabling clause, and that, consequently, all the funds of this charity, whether invested or not, may be dealt with as cash under the control of the Court. I do not say that the decision in *In re Warde* (4) was not right, but, though I do not see very clearly the grounds of that decision, it must, I think, be treated as depending upon its special circumstances. I consider, therefore, that the petitioners may sell out the existing stock with a view to reinvestment, and I shall, therefore, answer the question in the affirmative." The point, therefore, decided there was, not whether the trustees could reinvest, but whether they could sell out existing stock for the purpose of reinvestment. No doubt there is an observation made by Vice-Chancellor Malins which shews he thought that they were trustees within the meaning of the Act, although that was not the point to which his attention had been directed by the argument, and which was being answered by him. The further point was suggested, whether Metropolitan Consolidated Stock was within the power of investment, and that turned upon section 13 of the Board of Works Act, 1871. The Vice-Chancellor said, "That section seems to be wide enough to include the present charity. The petitioners will, therefore, be allowed to invest in that stock." That, again, was an observation upon a point not raised by the petition, and not calling for decision; still, so far as the case goes, it shews that the Vice-Chancellor took that view, although the point had not been argued; and that is in favour of the view which I have taken of the construction of the Act of 1889.

I propose, therefore, to make a declaration that the corporation are trustees within the meaning of the Trust Investment Act, 1889, and are entitled to invest any trust funds in their hands in the manner thereby authorised, unless expressly forbidden by any instrument creating the trust.

I should add that I do not consider that *In re The Clergy Orphan Corporation*

(3) in any way interferes with the decision in *In re Warde* (4); and, therefore, my decision is not intended to go to this, that the corporation have any power to sell existing securities for the purpose of making other investments under the powers given by the Act. That depends entirely on what their powers may be, independently of the Act, under the instrument creating the trust. The Act expressly provides, by the final clause of section 3, that trustees who may invest as therein mentioned may "also from time to time vary such investments." Those words are necessary for this reason. If trustees, by the instrument creating their trust, had a more limited power of investment, and had also power to vary investments, there might have been a question whether the power contained in the instrument to vary the investments authorised by it could extend to investments which are authorised, not by the instrument, but by the Act, and it is for the purpose of preventing any question of that sort from arising that the words which I have just read are inserted in section 3. But the express direction that trustees are to have power to vary the investments authorised by the Act goes a long way to shew that the Act only extends any previously existing power to vary investments to such investments as are authorised by the Act. That is the reason why I limited the declaration which I have made expressly to funds in the hands of the corporation.

Solicitors—Pritchard, Englefield & Co., agents for Earle, Sons & Co., Manchester, for plaintiffs; Hare & Co., for Attorney-General.

[IN THE COURT OF APPEAL.]

COTTON, L.J.

LINDLEY, L.J.

LOPES, L.J.

1890.

March 25, 27.]

In re HARGREAVES.
DICKS v. HARE.

Administration—Annuity under Covenant in a Deed—Right of Annuitant to institute Administration Proceedings—Insolvent Estate—Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10—Valuation of Annuities and Future and Contingent Liabilities—Rules of Supreme Court, Order LV. rules 3, 4, 44, and 46.

The right of proof in respect of annuities and contingent liabilities given by section 10 of the Judicature Act, 1875, in the administration of insolvent estates is dependent upon the pendency of an administration by the Court, and the section does not confer upon a contingent creditor any greater right of instituting administration proceedings than that which he had independently of the section—e.g. an annuitant under a covenant contained in a deed whose annuity is not in arrear has no right under this section to institute proceedings for the administration of the covenantor's estate, notwithstanding that the capitalised value of the annuity at the time of the covenantor's death would, if reckoned amongst the liabilities of his estate, have the effect of making that estate insolvent.

The rules 3 and 4 of Order LV. are only rules of procedure, and only enable certain proceedings to be taken by way of originating summons that would before have had to be taken by action, and do not enlarge the class of persons entitled to take those proceedings.

Appeal from a refusal in chambers by North, J., upon an originating summons, to make an administration order. His Lordship had given a certificate that he did not require a further hearing.

The deceased Hargreaves had covenanted with the plaintiffs, Messrs. Dicks & Winter, to pay to them as trustees for a lady, formerly the wife of the deceased, an annuity of 500*l.* for her life, by equal quarterly payments, and it was provided that the annuity should be treated as accruing *de die in diem*. Hargreaves had

died on the 21st of October, 1889, and on the 23rd of October a letter was received from the executors of the deceased stating his death, and that the annuity would cease on the ground of the insufficiency of the estate.

The lady was still living, and was twenty-seven years old, and the present value of the annuity, according to the tables, was 8,386*l.* 7*s.* 6*d.*

The executors had set apart and invested in consols a sum of 4,000*l.* cash to meet the annuity. The trustees desired to prove for the capitalised value of the annuity.

If their claim for the value of the annuity were to be taken into account the estate would be taken into account the estate would be insolvent, whereas otherwise the creditors, other than the trustees, would be paid their debts in full; while the sum set apart would be enough to provide payment of the annuity for some eight years, assuming only the annuitant to live so long. All the half-yearly payments, including those that fell due in December, 1889, and on the 25th of March, 1890, had been duly paid. The payments had, however, been accepted without prejudice to the claim of the plaintiffs. The trustees, for the purpose of obtaining the benefit of the provisions of section 10 of the Judicature Act, 1875, with reference to the valuation of annuities, on the 13th of December, 1889, took out an originating summons on behalf of themselves and all other creditors of the deceased, making the executors and devisees in trust under the will of Hargreaves defendants, asking for the administration of the real and personal estate of the deceased. The summons was heard in chambers, and North, J., being of opinion that unless an administration were actually pending, section 10 gave no right to persons with only a contingent debt or liability to institute proceedings, refused the application.

The plaintiffs appealed.

Maclean, Q.C., and *S. Dickinson*, for the appellants.—This is really an insolvent estate, and the plaintiffs have therefore, under section 10 of the Judicature Act, 1875, a statutory right to immediate proof in respect of the value of this annuity—

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assuming an administration order to be made; and so they must have also a right to come to the Court as plaintiffs to ask for the administration of the estate so as to give effect to their present right of proof.

The only person interested in having an administration is the annuitant, every other creditor will get paid in full, and it is absurd that the right of the plaintiffs should depend upon the institution of administration proceedings by persons who would only be prejudiced by taking them. The reason why under the old practice a contingent creditor had no right to an administration decree was that if the decree were made he had no right of proof; but now that that right has been given by statute the reason for such disqualification has ceased, and if the plaintiffs have the right of proof, but no right to come to the Court to obtain administration, the gift is useless.

The Rules and Orders with reference to an originating summons help the plaintiffs' contention. In Order LV. rule 3, the persons entitled to take out such a summons are not confined to creditors, but are there described as any persons "claiming to be interested in the relief sought as creditors"—a much wider description than creditors alone, and including not only persons to whom something is immediately payable at law, but also those who have a claim or can enforce a liability in the nature of a debt.

[They referred also to rules 44 and 46 of the same order, and to the form of advertisement for claimants not being creditors, and that for creditors—Appendix L. Nos. 2 and 3.]

In the case of *Whitmore v. Osborrow* (1), under the old law, a person to whom at the time of the filing of the bill none of the moneys payable under a bill of exchange were then due was held entitled to an administration decree. At the time when the summons was taken out by the plaintiffs, which is the time to be looked at, there was an actual debt owing to them, the annuity accruing *de die in diem*.

Then in *Blount v. Hopkins* (2) a future

(1) 1 You. & C.C.C. 13; 12 Law J. Rep. Chanc. 21.

(2) 7 Sim. 51; 4 Law J. Rep. Chanc. 13.

and contingent liability was held to be a "debt" due within the meaning of that word in a will.

North, J., relied on *King v. Mallcott* (3) and *Norman v. Johnson* (4); but this case is distinguishable, because there the plaintiff had not, what the plaintiffs here have, an immediate right of proof.

[They also referred to *Read v. Blunt* (5), *Burrell v. Delevante* (6), and *Thomas v. Griffiths* (7).]

Buckley, Q.C., and *Farwell*, for the executors, were not called upon.

COTTON, L.J.—The question here is whether Mr. Justice North was right in refusing to grant an administration decree. The case is put thus: It is said that under the 10th section of the Act of 1875 there is a right to prove in the event of an administration order being granted for the value of this annuity; and then, that that right enables the trustees for this lady—although, as I read the Act, they have not any right independently of the Act—to have a value put on this annuity. Independently of this section the executors could not pay the annuitant, the estate being insolvent, the value ascertained by the tables. That was not a liability, and they could not pay it, but they must wait and pay the sums from time to time as they become due; and, as far as I can see, the right to prove for the value of the annuity, ascertained properly, as it will be, is dependent on an administration order being granted. The section runs thus: "In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules

(3) 9 Hare, 692; 22 Law J. Rep. Chanc. 157.

(4) 29 Beav. 77.

(5) 5 Sim. 567.

(6) 30 Beav. 550; 31 Law J. Rep. Chanc. 365.

(7) 2 De Gex, F. & J. 555; 30 Law J. Rep. Chanc. 465.

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shall prevail" (among other things) "as to the valuation of annuities, &c., as may be in force for the time being under the law of bankruptcy"—that is to say, where the Court is administering the assets of a deceased person whose estate is insolvent, that section enables this valuation to be made, and enables the person entitled to the benefit of the annuity to prove for the value as so ascertained. In my opinion, that gives no greater right to the trustees for the annuitant, or to the annuitant, to bring an action than such trustees or annuitant would have independently of this section. It is very true that when there is an administration order—that is to say, when the Court is administering the assets—it enables the value and the burden of that annuity to be ascertained as it would be in bankruptcy, and proof may be made for that sum. I do not know what the view of Parliament was, but I should think it was that if the estate were insolvent the probability would be that some creditor would obtain an administration order; or if no creditor obtained such an order, that the executors, for their own protection, would do so. But however that may be, if the Act of Parliament does not give the annuitant a greater right than he had before for the purpose of getting an administration order, we cannot give it him.

What debt could the trustees who applied for this administration order have proved as due to them? It is said that this annuity must be considered as accruing *de die in diem*. Yes; but that is to meet that which is provided for otherwise by the Apportionment Act, giving the trustees in case of this lady's death a right to prove for the accrued portion of the annuity, considering it as an interest accruing *de die in diem*. In my opinion, as there is no payment which can be sued for now, as there is no claim for a sum which is now due, the executors having paid as each quarterly payment became due the full amount, there would be no right to bring an action at law against the executors, and therefore no right to an order for the administration of the estate. I am simply dealing now with this section of the Act of Parliament. It may be that this matter was never thought

of by the Legislature when it passed the Act; or it may be that the Legislature did not intend to give the annuitant a right independently of there being an administration by the Court, although if there were such an administration there would be a right to come in and prove—and that, I think, is the true effect of this section to which I have referred.

Then it was said that we must look at the Rules and Orders, and rule 3 of Order LV. was very much relied on. That is an Order enabling certain things to be done on an originating summons which without this Order could only be done on action brought. It is said here that an originating summons for the administration of the estate in the nature of a creditors' action may be taken out by any person claiming to be interested as a creditor, and the plaintiffs say, "We claim to be interested as creditors." But they cannot rely on that rule as giving them, if they are not otherwise entitled to obtain this relief on action brought, a right to obtain it by originating summons. If they claim as creditors, and are not creditors, it cannot be said that this rule was intended to give them a right which they can only have if they are creditors, because it can never be said that the effect of this rule is that a person can come and say wrongfully, "I claim as creditor, therefore I am entitled to this order."

Then other rules of the same Order are referred to which provide for advertisements for creditors and claimants among other things, and it is said they shew that these trustees for this lady could come in and prove their debt. So they could, but although in the latter rule the advertisement must be answered by the trustees, yet it does not mean that we are to construe this rule 3 so as to enable them to come in and obtain the administration order as if they were constituted creditors, entitled under the old law to get a decree for the administration of the estate. It may have been a mistake, or it may have been the intention of Parliament, not to give any right except where there was an administration order; but, in my opinion, neither by this Act nor with the assistance of these rules can the trustees of this annuitant, so long as what is due to them

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is paid, come and get an administration order so as to enable them to obtain the benefit of the rights which can only be theirs if an administration order is granted.

Then it was said that the cases help the appellants. It is admitted that there is no case in which a person, not entitled to say that he or she is a creditor, has ever got an administration order. The first case, and I think the best for the plaintiffs, was that of *Whitmore v. Oxborrow* (1). There, as I pointed out, there was a debt of 800*l.* cash, and 2,592*l.* cash too, but cash secured by bills of exchange payable at succeeding intervals of six months for a considerable period of time. There was there a *debitum in presenti, solvendum in futuro*, and although that was perhaps rather a strong decision of Vice-Chancellor Knight-Bruce, yet it does not at all apply to this case, where there is no debt due at all to the annuitant, who is simply entitled to this annuity upon a covenant to pay her this annuity—not as a mode of paying a certain sum due, but a covenant that a certain annuity from time to time should be paid to her as long as she lives. That, in my opinion, will not enable us to make the order asked for.

The only other case I need refer to is *Blount v. Hipkins* (2). What the Vice-Chancellor there decided was that, having regard to the terms of the will and the property left by the will, the liability to pay certain calls, although not then due and not constituting in law a debt, might be considered a debt within the meaning of the will he had to construe. Here we have to say whether this is a debt which will support a decree for administration, not whether within a certain will which we have to construe, and having regard to the provisions of that will and the property which has been dealt with, this annuity was intended to be provided by the will of the testator. That case does not help us either, and the other cases which were referred to, if they were correct decisions, will not justify us in making the decree here asked for. In my opinion the case fails, and the appeal must be dismissed.

LINDLEY, L.J.—I am unable to come to any other conclusion, though I cannot

help feeling struck with the curious state in which the law is as regards this matter. The Act of Parliament, after all, is the thing which we must look to for the purpose of determining this question. Great reliance has been placed on Order I.V. rules 3 and 4; but, notwithstanding all that has been said about those rules, I cannot understand them as doing more than enabling persons who might obtain relief by action to get the same relief by summons. They are mere rules of procedure, and do not create creditors or claimants or anything of that sort, and we are thrown back on the Act of Parliament, the Judicature Act, 1875, section 10. That repeals a previous section in the Judicature Act of 1873, and I have looked at that to see what the alteration was. The alteration in reference to this point is immaterial. Under the old Act the section ran, "In the administration by the Court of the assets," and so on—and so it does here; what Parliament has done must be looked at, and what it has not done must also be looked at. Let us take the last first. Parliament has not in any way affected the administration of assets except in legal proceedings. It leaves executors to administer assets out of Court just as they did before, but it says that when you come to administer assets in Court, whether under a winding-up or in bankruptcy, or under an administration order or decree, certain modifications shall be made; and speaking generally, and rather roughly, it says that as regards debts provable, and the valuation of contingent debts and so on, the rules in bankruptcy are to apply—that is to say, there is to be one set of rules observed by the Court, whether in bankruptcy or in winding-up or administrations. It says nothing about executors. Here, unfortunately for the appellants, there is no order or decree for the administration of this estate by the Court, and the reason is obvious enough—namely, that the executors are in a position to pay all the creditors 20*s.* in the pound; and there never will be, so far as I can see, any decree or order for administration. The effect of that upon the present appellants is curious. If there were a decree for administration, then under this

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Act of Parliament this lady would be entitled to say, "Value my annuity and give me the value of it." As there is no such decree for administration she is not entitled to that, but only to be paid her annuity as it becomes due, and in time, I suppose, there will be a deficiency of assets if she lives long enough; and it does seem strange that her right should be made to depend on whether there is an administration order or not. But that is an anomaly not peculiar to this case. We all know that until an order is made for administration, executors can prefer one creditor to another to an extent to which they cannot after proceedings have been commenced. The case seems to be this, that the Act of Parliament has not said that executors shall out of Court observe the same rules as they are to observe in Court.

In my opinion this appeal fails and must be dismissed.

LOPES, L.J.—The trustees for this lady are not entitled to an administration decree unless they can establish a provable debt. They have no provable debt, and therefore cannot be considered to rank as creditors. All that is due has been paid each quarter-day. Reliance was placed on rule 3 of Order LV. That rule, in my opinion, only applies to that which, before the rule, would have been the subject-matter of an administration action, and does not extend relief further than it would have been obtained by a bill for administration. As has been observed, the state of the law is somewhat anomalous, and presses, no doubt, harshly on this lady, but that is a matter for which this Court is not responsible.

I think the appeal fails.

Solicitors — Winter & Co., for appellants;
Tathams & Pym, for respondents.

[IN THE COURT OF APPEAL.]

COTTON, L.J.	}	GARRARD v. EDGE.
LINDLEY, L.J.		
LOPES, L.J.		
1890.		
March 12, 20.		

Patent Action—Invalidity of Patent—Particulars of Objections—Costs of meeting Objections—No Certificate that Objections were reasonable and proper—Disallowance of Costs—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 29, sub-s. 6—Rules of Supreme Court, 1883, Order LXV. rule 27, sub-rule 20.

Where in a patent action the defendant pleaded no infringement of the plaintiff's patent, and that it was invalid, and delivered particulars of objections to the validity of the patent, and the action was dismissed on the ground of no infringement, and the question of the validity of the patent was not considered by the Court, the disallowance by the Taxing-Master of the defendant's costs of his particulars of objections to the validity of the patent, on the ground that there was no certificate that the particulars were reasonable and proper as required by the Patents, Designs, and Trade Marks Act, 1883, s. 29, sub-s. 6, is not such a disallowance of the costs under Order LXV. rule 27, sub-rule 20, as to give the Taxing Master jurisdiction to deal with the costs occasioned to the plaintiff by these particulars. In such a case the plaintiff ought, if he desires to raise the point, to ask the Judge to direct the Taxing Master to see whether, by reason of any proceedings which have been improperly, vexatiously, or unnecessarily taken by the defendant, he has been put to extra costs, and to tax these costs and to allow them.

Decision of KAY, J., affirmed.

This was an appeal from a decision of Kay, J.

To an action for infringement of a patent the defendants pleaded no infringement of the plaintiff's patent, and also that it was invalid, and they delivered particulars of objections alleging prior user. The action was dismissed with costs, on the ground that the defendants had not infringed the plaintiff's patent, and the Court declined to go into the

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question of the validity of the patent. The plaintiff had, however, called witnesses to meet the defendants' objections to the validity of his patent. No certificate was asked for or granted at the trial of the action, as provided by section 29, sub-section 6, of the Patents, Designs, and Trade Marks Act, 1883, that the particulars of objections to the validity of the patent "were reasonable and proper" so as to entitle the defendants to the costs of such particulars.

The Taxing Master in the first instance allowed the defendants their costs with reference to the particulars of objections to the validity of the plaintiff's patent, but afterwards disallowed all the costs of the particulars of objections without entering into the propriety of those costs or of the proceedings taken by the defendants, because no certificate had been granted that they were "reasonable and proper," as required by section 29, sub-section 6.

The plaintiff then brought in for taxation a bill for costs incurred by him in meeting the defendants' particulars of objections to the validity of his patent, and he claimed to be entitled to set off these costs against the costs payable by him to the defendant, on the ground that the costs caused by the particulars of objections were costs of "improper, vexatious, or unnecessary" proceedings within Order LXV. rule 27, sub-rule 20, and that he was entitled to set the costs off against the costs payable by him under rule 27, sub-rule 21.

The Taxing Master refused to tax these costs, and disallowed them altogether. On a summons to review the taxation, Kay, J., held that the Taxing Master had disallowed the defendants their costs of the particulars of objections to the validity of the plaintiff's patent, not because they were "improper, vexatious, or unnecessary" proceedings, but because no certificate had been obtained under the Patents, Designs, and Trade Marks Act, 1883, s. 29, sub-s. 6, that they were "reasonable and proper," and that it was a condition precedent before the plaintiff could be allowed his costs occasioned by the defendants' particulars of objections that he should shew under Order LXV. rule 27, sub-rule 20, that the defendants

had been disallowed their costs of the objections as "improper, vexatious, or unnecessary," and affirmed the decision of the Taxing Master.

The plaintiff appealed from this decision.

Marten, Q.C., and Swinfen Eady, for the appellant.—Section 29, sub-section 6 of the Patents, Designs, and Trade Marks Act, 1883, provides that on taxation of costs regard shall be had to the particulars delivered by the defendant, and he shall not be allowed any costs in respect of any particular delivered by him unless the same is certified by the Court or Judge to have been proven, or to have been reasonable and proper. Here the defendants have not obtained from the Court or Judge any certificate that the particulars delivered were "reasonable and proper," and in the absence of such a certificate it must be taken that the particulars were unreasonable and improper, and the Taxing Master ought, therefore, to have considered the question, and to have allowed the plaintiff the costs incurred by him in meeting the particulars of objections as occasioned by "improper, vexatious, or unnecessary" proceedings, within Order LXV. rule 27, sub-rule 20, and he had power under that rule to do so of his own motion, without any direction from the Judge. The fact that the defendants did not ask for a certificate with regard to their costs with reference to the particulars, we submit ought not to, and does not, take away from the Taxing Master the power to deal with the costs occasioned to the plaintiff by these particulars. Although the plaintiff, having failed in his action, must pay the general costs of the action, he is entitled to have the costs occasioned to him by these "improper, vexatious, or unnecessary" objections—*Badische Anilin und Soda Fabrik v. Levinstein* (1), *Simmonds v. Hickman* (2), and *In re Wormsley; Baines v. Wormsley* (3). [They cited also *Longbottom v. Sharv* (4) and *Boyd v. Horrocks* (5).]

(1) Law Rep. 29 Ch. D. 366, 417.

(2) Law Rep. 29 Ch. D. 417n.

(3) 47 Law J. Rep. Chanc. 844.

(4) 58 Law J. Rep. Chanc. 734; Law Rep. 43 Ch. D. 462.

(5) 6 Pat. Cases, 143.

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Aston, Q.C., and *Chadwyck Healey*, for the respondents.—The defendants did not ask for or obtain a certificate as to their costs of the particulars of objection, and, therefore, under section 29, sub-section 6 of the Patents, Designs, and Trade Marks Act, 1883, they could not claim to be entitled to these costs, and it was on the ground that they had not got the necessary certificate that the Taxing-Master did not allow them these costs; but that is a very different thing from the costs being disallowed on the ground that the particulars were “improper, vexatious, or unnecessary” proceedings, so as to give the Taxing Master power to deal with the plaintiff’s costs occasioned by such proceedings under Order LXV. rule 27, sub-rule 20. The Taxing Master did not consider at all whether the defendants’ proceedings were reasonable and proper, or unreasonable and improper. Order LXV. rule 27, sub-rule 26 does not give the Court any new jurisdiction as to costs, and before the plaintiff can be allowed costs occasioned by proceedings of the defendants under sub-rule 20 he must shew that the defendants have been deprived of their costs of such proceedings because they were improper, vexatious, or unnecessary. He cannot shew that here. Further, the sub-rule does not apply to cases which come under section 29, sub-section 6 of the Patents, Designs, and Trade Marks Act, 1883. Under that section the Judge has to consider whether the particulars delivered are reasonable and proper; he cannot delegate his duty to the Taxing Master. If he thinks the particulars unreasonable he has power to disallow the costs, but he has not done so here. We submit that the decision of *Kay, J.*, was right. They cited *Foster v. The Great Western Railway Company* (6).

Marten, Q.C., replied.

Cur. adv. vult.

CORRON, L.J. (on March 20).—This case comes before us by way of appeal from an application to reverse the Taxing Master’s certificate, and it comes under somewhat special circumstances. The action was brought to restrain an alleged infringe-

(6) 51 Law J. Rep. Q.B. 223; Law Rep. 8 Q.B. D. 515.

ment of a patent, and the defendants succeeded. There were a good many objections taken to the validity of the patent, on which the Court did not decide in favour of the defendants; and for some reason or other the defendants did not ask for a certificate under section 29, sub-section 6 of the Patents, Designs, and Trade Marks Act, 1883, that their objections were reasonably and properly taken. The Judge certainly could not have found that they were proved, and he was not asked to find that they were reasonable and proper.

Then, on taxation, the Taxing Master allowed the costs incurred with reference to these objections taken by the defendants; but afterwards, in consequence of the provisions of the section I have referred to, he struck them out without entering into the question of the propriety of those costs, or of the proceedings taken by the defendants. The sub-section provides that “on the taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant, and they respectively shall not be allowed any costs in respect of any particulars delivered by them, unless the same are certified by the Court or a Judge to have been proven, or to have been reasonable and proper, without regard to the general costs of the case.” These costs were disallowed, I suppose, at the instance of the plaintiff. But then the plaintiff brought in a bill of costs with reference to the proceedings which he had taken in consequence of the objections delivered by the defendants, and he contended that under rule 27, sub-rule 20, he was entitled to charge the defendants with the costs of the proceedings which he, the plaintiff, had taken to meet the objections taken by the defendants.

The Taxing Master declined to enter into the question at all, because he considered that as he had not been called upon, and could not be required to tax the costs brought in by the defendants with reference to the objections which they had taken, and on which the Judge did not decide at all, he had no power to act under rule 27, sub-rule 20, and the Judge, on appeal to him, thought that the Taxing Master was right. It is said with

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reference to the costs of proceedings taken by the defendants, if on taxation it is found, either at the instance of the Judge or of the Taxing Master, that those objections were improper, unnecessary, or vexatious, then any costs which they have caused the other party to incur will be ordered to be paid by them. But here, as I said before, the Taxing Master never had power to enter into the question of the taxation of the defendants' costs, whether the proceedings were in any way vexatiously or improperly taken by them, and therefore he considered that he could not enter into the question which the plaintiff wished to bring before him. With that the Judge agreed, and in my opinion he was right, because although it is very true that power is given by the rule to the Taxing Master of his own mere motion to enter into the question if he finds that proceedings by one party are vexatiously or improperly taken, and to see what expense is caused to the other party by those proceedings, yet there is, in my opinion, a condition precedent to his having the power to enter into the question what, if anything, ought to be paid to the other party in consequence of the improper proceedings—namely, that the defendants' costs must have been disallowed on the ground that the proceedings in respect of which they were incurred were improper, vexatious, or unnecessary. It was said that these particulars must be taken to be improper and vexatious with reference to this rule because the Judge has not certified that they were proven, or that they were reasonable and proper; and that the mere absence of the certificate of the Judge which would enable the defendants to carry in their costs, and to be allowed such of them as the Taxing Master did not strike out, of itself shews that these particulars were vexatious and improper. But I cannot agree with that. The Act of Parliament says that regard shall be had to the particulars of objections delivered in the case of the defendant, and that then if he does not get the certificate he shall not be allowed on taxation any costs of those particulars. But that is for an entirely different object from what was aimed at by sub-rule 20. It does not at

all follow that, because the defendant has not liked or wished or thought it desirable to ask for a certificate, or because the Judge has not granted a certificate, the matter must be considered as coming within sub-rule 20, so as to enable the other party, the plaintiff, to charge the defendant with the costs of any proceedings which he has taken in consequence of the objections raised, but as to which the defendant has not got a certificate. It is very true that that may seem to be hard on the plaintiff, but in my opinion he took the wrong course. If he wished to raise the point, he ought to have asked the Judge to direct the Taxing Master to see whether by reason of any proceedings which had been improperly taken by the defendant he had been put to extra costs, and to tax those costs, and to allow them to him as against the defendant. He did not think fit to do so, just as the defendant did not think of asking for a certificate that although the objections were not proved, yet they were properly taken. For some reason the plaintiff—whether because he did not think of it, or because he did not think it prudent to do so—did not ask the Judge to give any such direction. That, in my opinion, having regard to sub-rule 20, is what ought to be done. The Judge can direct the Taxing Master to look into the costs, and to see whether any proceedings were vexatiously or improperly taken; and if he does do it, the Taxing Master in taxing the costs of any party can consider whether the proceedings to which those costs relate were proceedings which were vexatiously or improperly taken. But if it does not become the duty of the Taxing Master to tax the costs of any party, he cannot enter into the question under this rule whether these costs have been improperly or vexatiously incurred, and have put the other party to unnecessary costs which the party causing these costs ought to pay. Of course, if the plaintiff thinks that in consequence of improper or vexatious objections taken by his opponent he has been put to unnecessary and improper costs, he can ask the Judge, if there is a decision in favour of the defendant, and the defendant does not ask for a certificate that those objections were properly taken,

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to direct the Taxing Master to see whether any proceedings have been vexatiously or improperly taken by the defendant, and to direct that he, the plaintiff, shall get from the defendant the costs of any proceedings which he has taken in consequence of the objections improperly taken by the defendant. In my opinion here, that was the view which the Taxing Master took, and which Mr. Justice Kay took, and I think that was right. I do not read the whole of the sub-rule, but the case turns upon this provision: "In such a case the party shall pay the costs occasioned thereby to the other parties, and in any case where such question shall not have been raised before and dealt with by the Court or Judge it shall be the duty of the Taxing Master to look into the same . . . for the purpose aforesaid." He is to see as to the costs which he can tax, and which it is his duty to tax, whether or not there have been any costs relating to the proceedings improperly taken. Here, as I stated, in consequence of the course which was taken by the defendants, he could not enter into this question. The costs of the proceeding in respect of which the defendants did not get a certificate never came for taxation in such a sense that the Taxing Master could judge whether or not such proceedings were vexatiously or improperly taken. In my opinion the appeal fails. In future, parties, if they refuse to raise such a question as this, should see that they get a direction from the Judge so as to enable and direct the Taxing Master to look into what the plaintiff here is desirous should be looked into, which of course he can do on the Judge's direction.

LINDLEY, L.J.—I think there is a difficulty in applying sub-section 20 of rule 27 of Order LXV. to patent cases. That rule is generally expressed as applicable to all actions, and there is nothing at all in the rule about notices of objections in patent actions. They are not specially dealt with at all, and the difficulty arises from having to apply that rule to a case in which particulars of objections are specially dealt with. They are specially dealt with by section 29 of the Patents, Designs, and Trade Marks Act, and, when

you come to consider and work the two together, there is a little difficulty about it, but I am not at all prepared to say that the true construction is not that which has been said to be correct by the Taxing Master, Mr. Justice Kay, and my learned brother. There is a difficulty about it, but not a difficulty so great as to lead me to express a contrary opinion. I think when you come to spell it out that that view is correct, and that if ever a plaintiff wants to get costs occasioned by improper objections he must ask for them. That has this immense convenience, that the Judge, who knows all about the case, can give directions; whereas the Taxing Master, who knows nothing about it, would be exceedingly embarrassed in applying this rule to patent cases when the point raised is, as here, that the particulars of objections have not only not been certified as being proper, but have put the other party to extra costs. It is a very difficult matter for the Taxing Master to settle, and a comparatively easy one for the Judge to settle when he has tried the case. I think, therefore, the appeal fails.

LOPES, L.J.—Having regard to what has happened in this case, and to section 29, sub-section 6 of the Patents, Designs, and Trade Marks Act, 1883, there has been no such disallowance within the meaning of sub-section 20, rule 27 of Order LXV. of the Rules of the Supreme Court, as to give the Master jurisdiction to deal with the costs in this case. Of course, this depends on the construction of the rule, and I think that Mr. Justice Kay and the Taxing Master have both properly and correctly construed that rule. I think, therefore, that the appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors—Francis & Johnson, for appellant; Robinson, Preston & Stow, agents for Alfred Pointon, Birmingham, for respondents.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
 LINDLEY, L.J. }
 LOPES, L.J. } *In re HARGREAVES ;*
 1890. } *MIDGLEY v. TATLEY.*
 Jan. 29. }

Appointment under Power—Validity—Perpetuity — Originating Summons — Jurisdiction—Rules of Supreme Court, 1883, Order LV. rule 3.

A testatrix devised real estate unto and to the use of trustees, upon trust to receive the rents and pay the same to her sister M. during her life, and after her death to pay the rents to her children as therein mentioned; and after the death of M. and all her children, upon trust to pay the rents to her sister E. for life, and after her death to pay the rents to her children as therein mentioned; and after the death of M. and E. and their children, the trustees to hold the property on trust for such person or persons as the longest liver of M. and E. and their children should by deed or will appoint. The question having been raised whether the power of appointment was invalid as infringing the rule against perpetuities,—Held, reversing the decision of KAY, J., that there was jurisdiction to determine the question on an originating summons under Order LV. rule 3, and that the power of appointment was invalid, as the person to exercise it might not be ascertained within the period prescribed by law.

Avern v. Lloyd (37 Law J. Rep. Chanc. 489; Law Rep. 5 Eq. 383) overruled.

This was an appeal from a decision of Kay, J.

A testatrix devised real estate to trustees, to have and to hold the same unto and to the use of them and of the survivor of them, and the heirs and assigns of such survivor, upon trust to receive the rents, and to pay the same to her sister Mary during her life, and after her death to pay the rents to her children respectively in succession in order of seniority during their respective lives; and after the death of Mary and all her children, upon trust to pay the rents to the testatrix's sister Eliza during her life, and after her death to pay the rents to her children succes-

sively in like manner; and after the death of the sisters Mary and Eliza and their children, the trustees were to hold the property in trust for such person or persons as the longest liver of the sisters Mary and Eliza and their children should by deed or will appoint, and in default of appointment upon trust for the heir-at-law of the testatrix absolutely.

Mary and Eliza survived the testatrix. The longest liver, who was one of the children of Mary, made a will appointing the estate to a trustee. The persons on whom the legal estate under the will of the testatrix had devolved took out an originating summons to have it determined to whom the property belonged.

Kay, J., held that he had no jurisdiction to determine the question on an originating summons.

The plaintiffs appealed from this decision.

L. Ryland, for the appellants.—We are entitled to have the question raised in this case determined on an originating summons. The case comes clearly within the provisions of Order LV. rule 3, sub-sections A, B, and G. The legal estate was in the trustees, and they held the property in trust for some one, and they were entitled to have the question determined who that some one was. The question is one which could properly be determined in an administration action, and therefore the Court has jurisdiction to determine it on this summons. *In re Davies*; *Davies v. Davies* (1) and *In re Royle*; *Royle v. Haynes* (2) shew what questions can be determined on an originating summons.

Uppohn, for the heir-at-law.—Kay, J., thought these proceedings were something of the species of proceedings for equitable ejectment, but it is submitted that that view is erroneous.

He cited *In re Powers*; *Lindsell v. Phillips* (3) and *Cunliffe v. Branker* (4).

F. Thompson, for the appointees.

(1) 57 Law J. Rep. Chanc. 759; Law Rep. 38 Ch. D. 210.

(2) *Ante*, p. 1; Law Rep. 43 Ch. D. 18.

(3) Law Rep. 30 Ch. D. 291.

(4) 46 Law J. Rep. Chanc. 128; Law Rep. 3 Ch. D. 393-400.

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[COTTON, L.J.—Do you object to having the question now determined by us?]

No. Then with regard to the appointment, I submit that it is a good appointment. In *Avern v. Lloyd* (5) it was held that in a gift to A. and B. for life, remainder to their issue for life, and after the decease of the survivor to the executors and administrators of the survivor of A. and B. or their issue who should happen to be such survivor, the last remainder was not void for perpetuity. That decision supports my contention, and it has never been overruled, although it has been commented on in some cases—*London and South Western Railway Company v. Gomm* (6), *Gilbertson v. Richards* (7), and *In re Harvey; Peck v. Savory* (8).

Ryland and *Upjohn* were not called upon on the merits.

COTTON, L.J.—I cannot agree with the view taken by Mr. Justice Kay, that he had no jurisdiction to decide this point. The trustees of the will to whom the whole legal estate was devised are in possession of the estate, and they ask the Court to decide to whom they ought to hand it over. The case is not one on which an action of ejectment could be brought. It may be that the heir-at-law might have brought an action of ejectment, if an appointee of the donee of the power had been in possession. I think the Court had jurisdiction to determine the question raised here on this originating summons.

Then as to the merits, I am of opinion that though the limitation of the life estate to the sisters and their children was good, the power of appointment given to the last survivors of the sister and their children was bad. The children of the sisters were not all in being at the time of the death of the testatrix, and the last survivor might not be ascertained within the period allowed by the rule against perpetuities—that is, within lives in being

at the time of the death of the testatrix and twenty-one years afterwards. I think the power is invalid and the property goes to the heir-at-law, but not under the trusts of the will. *Avern v. Lloyd* (5) is very like the present case, and Vice-Chancellor Stuart there said there was no question as to the validity of the limitation of the life estates in remainder to the unborn issue male and female of the testatrix's brothers John and Francis. The unborn issue clearly took life estates share and share alike; and as to the limitation to the executors, administrators, and assigns of the survivor of his brothers or their issue, male or female, who should happen to be such survivor, he said that considering that that limitation must take effect in the lifetime of the unborn issue to whom a good estate for life was given so as to give him an absolute estate in possession when he became survivor, it was not easy to see on what ground it could be considered too remote. The gift to the executors, administrators, and assigns of the surviving tenant for life attached to the life estate so as to give a contingent absolute interest to such tenant for life, and this contingent absolute interest vested in possession in the surviving tenant for life as soon as he was ascertained. Each of the tenants for life had as much right to alienate his contingent right to the absolute interest as to alienate his life estate, and the person claiming under an assignment of the whole estate and interest of the tenant for life would, as soon as his assignor became the survivor, be entitled to the possession and enjoyment as absolute owner. It seemed obvious that such a case was not within the principle on which the law against perpetuity rested, and that the limitation in question of the absolute interest did not fail as being too remote. But that decision is not consistent with the decision in *The London and South Western Railway Company v. Gomm* (6), and, in my opinion, it is not consistent with the law, and therefore the decision is wrong. No doubt, if the person to whom the ultimate gift was made must necessarily be ascertained within the legal period, the reasoning of Vice-Chancellor Stuart would apply. But the real ques-

(5) 37 Law J. Rep. Chanc. 489; Law Rep. 5 Eq. 383.

(6) 51 Law J. Rep. Chanc. 530; Law Rep. 20 Ch. D. 562.

(7) 4 Hurl. & N. 277; 28 Law J. Rep. Exch. 158.

(8) Law Rep. 89 Ch. D. 289.

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tion here is not whether the tenants for life, the sisters and their children, could release the power, but whether the person to whom the power was given might possibly not be ascertained within the legal period. I think he might not, and therefore the power is invalid.

LINDLEY, L.J.—I am of the same opinion. The person to exercise the power of appointment might not be ascertained within the time limited by law. *Avern v. Lloyd* (5) would be an authority in favour of the appointees, if the decision in it was right; but I cannot find that it has ever been followed, and in my opinion the decision was wrong.

With regard to the jurisdiction of the Court to determine this question on an originating summons, I think Mr. Justice Kay was under a misapprehension as to the jurisdiction of the Court. I think it impossible to say that this case does not come within the words and meaning of Order LV. rule 3. The trustees had the legal estate, and they wanted to know who their *cestuis que trust* were.

LOPES, L.J.—I entirely agree. The case comes within Order LV. rule 3, and I am of opinion that Mr. Justice Kay had power to determine the question.

On the merits of the case I am of opinion that the ultimate limitation is bad, because the person to exercise the power might not be ascertained within the period allowed by law. The appeal must be allowed.

Solicitors—Woodcock, Ryland & Parker, agents for Woodcock & Sons, Haslingden, for appellants, and heir-at-law; Wynne, Holme & Wynne, agents for Whitley & Co., Liverpool, for appointees.

KEKEWICH, J. }
1890.
Feb. 26. }

In re WALKER.
WALKER v. WALKER.

Trustee—Liability—Insufficient Security—Mortgage of Buildings—Report of able practical Surveyor—Trustee Act, 1888 (51 & 52 Vict. c. 59), ss. 4 and 5—Trust Legacy—Appropriation—Change of Investment.

When a trust legacy has been appropriated it is a breach of trust to vary the investment without reasonable cause; and upon the legacy falling into possession, the trustee is liable to indemnify the legates against any loss resulting from the change of investment.

A trustee is not entitled to the protection afforded by section 4 of the Trustee Act, 1888, unless the report or valuation upon which he acted in making an investment which ultimately proves insufficient, was made upon his own instructions and directed to the particular investment.

A trustee is not entitled to the protection afforded by section 5 of the Trustee Act, 1888, unless the investment which has proved deficient was a proper investment at the time in all respects other than value.

The duties of trustees with respect to the appropriation and investment of trust legacies considered.

William John Walker, who died on the 5th of October, 1871, by his will dated the 14th of July, 1868, directed the defendants, his executors, to set apart or invest and stand possessed of the sum of 600*l.*, upon trust to pay the income thereof to Maria Walker during her life, and, after her decease, to pay the income in equal shares to certain other persons during their lives, with remainder over as in the will mentioned; and he directed his executors to set aside and invest and stand possessed of the further sum of 600*l.*, and pay the income to and equally between his nieces, Elizabeth Burgess, Ellen Burgess, and Ann Burgess, during their lives and the life of the survivors and survivor of them, and from and after the death of the survivor of them, then to pay the said 600*l.* to Walter Walker, and if he should be

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then dead, then to pay the same equally amongst his children. The testator declared that it should be lawful for his trustees at their discretion, and without incurring any responsibility, to permit so much of his residuary personal estate as should at his decease be required to be invested for the purposes of his will to remain and continue, either in whole or in part, invested in or upon any securities which he might have at his decease; and he empowered them to call in and realise any securities whereon any of the trust moneys might be invested, and to invest the proceeds in any other of the stocks or funds or other Government securities of the United Kingdom, or on mortgages of freeholds in England or Wales, or on the debentures or debenture bonds of any corporation or company authorised to borrow money at interest, or on the debenture stocks or preference stock or shares of any railway or other company or corporation paying a dividend, and to vary the same as occasion should require, or as should be thought fit.

The defendants were the residuary legatees under the will.

Elizabeth Burgess, Ann Burgess, and Ellen Burgess were all dead, and Walter Walker had predeceased two of them, leaving three children—namely, the plaintiffs and Walter Burgess Walker, who had, in March, 1877, assigned his share in the legacy of 600*l.* to the plaintiffs.

The defendants, after paying the testator's debts and legacies, retained undivided an investment made by the testator himself, consisting of two bonds for 1,000*l.* and 200*l.* respectively of the South Yorkshire and River Don Railway Company; and in the year 1880, upon the plaintiffs applying for information with regard to the legacy of 600*l.* in which they were interested, and requiring that it should be separately invested, the defendants, in the first instance, told the plaintiffs that the legacy was invested in the bonds in question, and formed part of the investments made by the testator himself, but shortly afterwards they wrote to the plaintiffs' solicitors refusing to make a separate investment of the legacy. Without again communicating with the plain-

tiffs, the defendants, in June, 1881, sold the bonds with the accruing dividends for 1,486*l.* 0*s.* 8*d.*, and out of the proceeds invested a sum of 1,200*l.* in two mortgages for 600*l.* each on two freehold houses in course of completion at Tooting, both belonging to the same mortgagor.

The instructions given by the defendants to their solicitors at the time of making the mortgage investments were "to find a thoroughly good mortgage security." The solicitors at the time had in their hands a report of Messrs. W. H. & H. Brown, surveyors and valuers, which had been made to another client of theirs with respect to a number of houses, including the two houses in question, but the defendants themselves had no knowledge of Messrs. Brown or of the report.

His Lordship held, upon the evidence, that the trustees had, in the year 1881, appropriated the two bonds of the South Yorkshire and River Don Company to answer the two trust legacies given by the will, and that there was no reasonable cause to justify the realisation of the bonds in February, 1887.

It was not disputed that neither of the mortgages for 600*l.* was now sufficient to produce that sum.

Warmington, Q.C., and *Farwell*, for the plaintiffs.—The trustees, having changed the investment without justification after there had been an appropriation of the trust legacy, must indemnify the plaintiffs against the loss arising from the fact of the bonds not now being available to answer the legacy. The plaintiffs are entitled to one half of the present value of the two sums of bonds. The investment on the mortgages was itself a breach of trust. Neither mortgage was earmarked to answer a specific trust. The beneficiaries interested in either trust are entitled to resort to both mortgages. The trustees did not set apart each legacy as directed. Moreover, they advanced the trust-moneys without a proper valuation, and beyond the proper margin of value in the case of an investment upon buildings—*Leahey v. Whiteley* (1) and *In re Salmon*;

(1) 57 Law J. Rep. Chanc. 390; Law Rep. 12 App. Cas. 727.

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Priest v. Uppleby (2). The trustees cannot claim the benefit of the Trustee Act, 1888, section 4, for they are unable to shew that they acted upon the report of a person reasonably believed by them to be an able, practical surveyor. Brown's report was not addressed to them; they knew nothing of him; and it did not deal specifically with the property the subject of the mortgages.

Neville, Q.C., and *Bunting*, for the trustees.—The trustees admit their liability to pay 600*l.* to the plaintiffs, but they are not liable for anything beyond that. The plaintiffs are not entitled to the profit which might have been made by continuing the investment in the bonds. The trustees' power to vary investments may be exercised, even solely in the interests of a tenant for life, so long as the investment is kept within the trust limits. As to the mortgage investments, the trustees are entitled to the benefit of section 4 of the Trustee Act, 1888. They believed Brown's report was *bona fide* and independent, and their belief was reasonable.

[KEKEWICH, J.—The belief which, under the section, is to protect the trustees is a reasonable belief that the surveyor is able and practical, and he must be a surveyor employed and instructed by the trustees.]

If the trustees are not protected under section 4, yet they claim the benefit of section 5, and their liability is for the

loss (if any) incurred by the investment upon an insufficient security.

The Act received the royal assent on the 24th of December, 1888, and the writ in the action was issued in March, 1889.

Warmington, Q.C., in reply.—The sale of the bonds, not being for a proper purpose, was a breach of trust which must be made good. The trustees can claim no protection under the Trustee Act, 1888. Section 5, sub-section 1 (3), only applies where, but for value, the investment is in all respects proper. Here it was made in carrying out a change of investment, which was itself a breach of trust.

KEKEWICH, J.—There are two important questions in this case outside the importance of every case to the parties litigant—one depending on the Act, which has not yet received much judicial construction, and the other depending on the duty of trustees to whom is given what is generally called a trust-legacy. That is the question on which, so far as my researches have gone, there is extremely little learning to be found in the books, but on which, nevertheless, I think the law is reasonably clear. I have here a clear and simple case of a trust-legacy, and one which is made more clear and simple than often is the case, by reason of the residuary gift, which is to the trustees themselves, so that, so long as other trust legacies (of which there are several) or the other legatees, are properly dealt with, the trustees had only to account with themselves. The legacy is of 600*l.*, which is given, in a very few words, in trust for a person for life, and afterwards to the

other property, on which the trustee can lawfully lend."

Section 5: "(1) Where a trustee shall have improperly advanced trust-money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorised investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

"(2) This section shall apply to investments made as well before as after the passing of this Act, except where some action or other proceeding shall be pending with reference thereto at the passing of this Act."

(2) Law Rep. 42 Ch. D. 351.

(3) The Trustee Act, 1888, section 4: "(1) No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, provided that it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able, practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report, and that the loan was made under the advice of such surveyor or valuer expressed in such report. And this section shall apply to a loan upon any property of any tenure, whether agricultural or house or

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plaintiffs. The particular direction gave the trustees the option of either taking what the testator had left for security, and appropriating so much of his invested property as was equivalent to 600*l.*, taking care, of course, that it was a good investment in the terms of the trust; or, having converted the whole or part of his estate, of investing some of the proceeds of conversion, to the extent of 600*l.*, in one of the authorised investments. They might have done either. That is the common case. I am not prepared to say that, where trustees have several trust legacies of that kind, and have a large sum of debentures or other stock which is an investment authorised by the will, and one which they consider a good and satisfactory trust investment, they may not put aside the entire amount without dividing it into portions, which is practically impossible without sale, and simply appropriate it in their books—that is to say, if they have three trust legacies of 500*l.* each and 1,500*l.* stock, I am not prepared to say they may not properly appropriate 500*l.*, one third of that, say to Jane and her children, one third to Mary and her children, and one third to Elizabeth and her children, in their books. That does not seem to me to be open to the great objections which there are to a contributory mortgage, one only of which objections I dealt with in the case of *Webb v. Jonas* (4), because that was sufficient on that occasion. If, on the other hand, the trustees take a different course, and convert the personal estate, and are minded to invest part of the proceeds for the benefit of their trust legatees, then I apprehend their duty is perfectly plain—to invest that particular sum in a particular stock for the benefit of those particular trustees. There again there is not so strong an objection to a contributory investment when there is the same set of trustees for different children and grandchildren, as there is when there is a contributory mortgage in the names of two different sets of trustees claiming under two different instruments, which was the

case in *Webb v. Jonas* (4). But although the objection is not strong and not the same altogether, yet I apprehend the trustees who do not invest the sums separately, so as to earmark them in some way, are committing a breach of trust. That result is avoided frequently as regards investments in the public funds by changing the order of the trustees in the bank books, so as to constitute different stocks. It seems to me to be the duty of the trustees to do one or the other, and conveniently in the first place, but necessarily in the second, there must be an appropriation of a particular investment earmarked to the particular trust. The trustees in this case elected, as I think under the terms of the will they were entitled to do, to set apart an investment for this particular trust. They say now that they did not; and one question I have to decide is whether that is true or not. I have their distinct assertion signed by one of the trustees (whose authority is not repudiated) in a letter of the 7th of October, 1880, written in answer to an enquiry by the plaintiffs' solicitors, who were entitled to an answer, that the 600*l.* legacy was "invested by the trustees, Robert Walker Smith and myself, in the South Yorkshire and River Don Company." Further correspondence ensued, and eventually the plaintiffs' solicitors insisted on that 600*l.* being separately invested. As at present advised, I do not think they were strictly entitled to that; but on the other hand, they did not know how the matter stood exactly. Very little turns on that, except as an excuse on behalf of the trustees, which I will refer to presently. From first to last there was no departure from the original statement, that the 600*l.* was invested in this way, and possibly they have set apart too much. If so, they, as residuary legatees, were the only persons who could complain of that excess, and they cannot be heard now to allege that, although there might have been a breach of trust against stranger residuary legatees, that is any reason why the appropriation was not good as against themselves. They stated as clearly as possible, and in a way which they cannot repudiate now, that the 600*l.*

(4) 57 Law J. Rep. Chanc. 671; Law Rep. 39 Ch. D. 660.

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was invested in these bonds, and was half of the larger sum of 1,200*l*.

That was the understanding throughout. As to the first point, it is clear the 600*l*. was appropriated and invested in that way. Shortly after the correspondence, which ended by the solicitors insisting on a separate investment, the trustees, for some reason or other which it is difficult to ascertain, realised those bonds, and invested, not the proceeds of sale, but 1,200*l*., on mortgage. They admit now—and there has been no question about it, because before the trial there was an admission that, so far, that was wrong—that they could not invest the 600*l*. The time for appropriation was gone, for the best of all reasons—that the appropriation had been made once for all. However, they did invest only the 1,200*l*. I have been endeavouring to find out why that was done, and a great many reasons, but by no means consistent with one another, have been suggested, and I do not think any of them are satisfactory. The first reason given, and the one the trustees now seem to prefer, is that the solicitors, Messrs. Dibb & Co., had been importuning them, so that they thought they had better comply with their request—that they had looked into the matter, and that it would be better to invest this 600*l*. separately, and do, in fact, what was wished. But they did not invest it separately. If that was their object, they took the worst means to accomplish it, because they invested 1,200*l*. Although it is true they invested two sums of 600*l*. on two mortgages, they took no means to sever one from the other, so as to say one belonged to one trust, and the other to the other. They plead that the change of investment was made in order to separate the two legacies of 600*l*. each from the residuary estate. If that was their reason, they entirely failed to accomplish their object, and took no trouble to do so. One would have thought that there was another reason—one that Mr. Neville has fairly argued might have entered into their heads as a good reason—namely, that by changing the investment they would have increased the income of the tenant for life; and, so long as they exercised their powers honestly, I should

not find fault with trustees who sold out stock, and who invested the money on a good trust mortgage for the purpose of getting, and thereby getting, an increased income for the tenant for life. Whether 3*l*. per annum was enough increase to justify the change, I will not pause to enquire, but one of the trustees told me distinctly that that had nothing to do with it; he never considered whether it would increase the income of the tenant for life; and my conclusion is that it had not anything to do with the change of investment. I do not believe that that was the object at all. Somebody suggested a mortgage. It does not seem to have come from their solicitors, Messrs. Learoyd, in the first instance, upon the evidence before me, but from the trustees talking it over. What they said, and why they thought of this, has not been explained. Messrs. Learoyd had instructions to find a good security. When those instructions were given, how, and for what purpose, is all left in the dark. That is an unsatisfactory way of dealing with trust property. My conclusion is, without using the word in an offensive sense, that this was a wanton change of investment—one which the circumstances of the case did not require, and one for which the trustees had not themselves any good and sufficient reason. However, the change was made; the bonds were realised, and the 1,200*l*. invested on two mortgages of 600*l*. each. It is immaterial to this part of the case whether they ought or not to have made the change.

Now I have to consider whether, having the money in their hands, they ought properly to have invested it as they did? In the first place, I need hardly repeat that it was improper to invest the two sums of 600*l*. in such a way that they really made 1,200*l*., so that the plaintiffs have to go against two mortgages instead of one. They cannot lay their hands on their own 600*l*., half of the proceeds. That is a question of non-investment and loss, rather than of improper investment. What did they do? They instructed Messrs. Learoyd to find good security, and Messrs. Learoyd laid before them some valuation by Messrs. Brown. Messrs. Brown were not instructed by the trustees. The trustees knew nothing about them, and I do

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not know that they ever saw them—I should think probably they did not. The money was invested in this way, and the question is, whether it comes within the Trustee Act. It is admitted to be an insufficient security now, whatever it was then. It was a security on unfinished houses—houses which were not properly a trust security; and, even if they were so, it was not a commendable transaction on the part of the trustees. I need not pursue it further, because I think the change was wrong, and therefore the question whether the second investment was wrong or not is comparatively of little importance as regards the character of it. As regards the Act of Parliament, that may make a great difference. There are two sections of the Act to be considered, and they are entirely separate. One is the 4th section, by which a trustee is indemnified “if in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of property.” Then further down it goes on, “that the loan was made under the advice of such surveyor or valuer expressed in such report.” Now this report does not suggest a loan, and does not advise one on this property. It is about divers other properties as well as this, and advises a loan on the whole of the property taken together, which is an entirely different thing from a loan on one or two of them. There is the report of a surveyor, and I take him to be an able and practical surveyor, but I cannot take it, upon the evidence, that the trustees believed him to be an able and practical surveyor, because they knew nothing about it. The surveyor was certainly not employed or instructed by an independent owner—at least, that has not been proved—nor by the trustees; and I cannot adopt the construction that the words “reasonably believed” apply to instructing and employing as suggested by Mr. Neville. I do not think they do grammatically, or that that is the right construction. Therefore the case is not within the 4th section. Then as regards the 5th section of the Act, a different question arises. That is

a beneficial section, the object of which is to provide that when a trustee has advanced more money on mortgage of the property than was reasonably prudent, and the estate fails, then he is not to be chargeable with the whole, but only with so much as would have been a loss if you take the real value at the time of investment, and not the value he put upon it. That is the substance of it. Supposing, for instance, a man invests 100% on property that would bear only 80%, he is not to lose the whole 100% because of that. That is a reasonable provision on behalf of trustees. But the whole section depends on this—“where a trustee shall have improperly advanced trust money on a mortgage security which would at the time of investment have been a proper investment in all respects for a less sum than was actually advanced thereon.” That I understand to mean, that the impropriety consists in the amount invested. If the investment is otherwise improper—as, for instance, if a man invests on mortgage of trade buildings, when he is only entitled to invest on mortgage of agricultural land, he cannot claim the benefit of the section and say, “I might take the value at two thirds of the advance, although not the whole.” He must establish the propriety of the investment independently of value; and then he has the benefit of the section to save him from any loss greater than that which would have been incurred by advancing too large a sum on what otherwise would be a proper security. That does not apply. The result is, that the trustees ought not to have sold these bonds; they sold them without excuse, and must make the amount good. So that the plaintiffs are absolutely protected, I see no reason to direct the trustees to re-purchase the bonds.

They must account to the plaintiffs for the value of the bonds sold as at this time, and they must also account for the interest the bonds would have earned—interest on the 600% at $4\frac{1}{2}$ per cent. That is, until to-day. From to-day there will be an order on them to make good that sum; and as regards the interest, that will follow the usual rule in such cases. There will be judgment for that sum. If there is any question about the exact sum—there

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ought not to be, because it can be ascertained in the usual way—there must be an account; and the trustees must pay the costs of the action.

Solicitors—Paterson, Snow, Bloxam & Kinder, agents for Dibb & Co., Leeds, for plaintiffs; Learoyd, James & Mellor, agents for Learoyd & Simpson, Huddersfield, for defendants.

[IN THE COURT OF APPEAL.]

COTTON, L.J.	} EDDOWES v. THE ARGENTINE LOAN AND AGENCY COM- PANY.
LINDLEY, L.J.	
LOPES, L.J.	
1890.	
March 26.	

Practice—Affidavit—Jurat—Defect—Omission of words sworn “before me”—Order XXXVIII. rules 6 and 14.

The Court being satisfied that an affidavit was sworn before the person who signed the jurat, though it was not so stated in it, made an order under Order XXXVIII. rule 14 that the affidavit should be received.

Decision of KEKEWICH, J., affirmed.

This was an appeal from a decision of Kekewich, J., refusing an application by the defendants that an affidavit made by the plaintiff should be taken off the file on the ground that it was irregular.

The plaintiff resided in the Argentine Republic, and the affidavit was made in answer to interrogatories delivered by the defendants for her examination, and the irregularity in question was in the form of the jurat, which was as follows: “Sworn at Rosario de Santa Fé, Argentine Republic, in the British Vice-Consulate, this 20th day of January, 1890. (Signed) H. M. Mallett, British Vice-Consul.”

The affidavit was sealed with the seal of the Vice-Consul. Some blanks which had been left in the draft were filled up apparently in the same handwriting as the signature “H. M. Mallett,” and some alterations in the affidavit were initialed

“H. M. M.,” also apparently in the same handwriting.

The defendants contended that the words “before me” ought to have been inserted in the jurat, and that, therefore, the affidavit was defective, and could not be received, as there was nothing to shew on the face of it that it was duly sworn before a person authorised to administer oaths.

Channell, Q.C., and *Glenn*, for the appellants.—The affidavit must be taken off the file, as there is nothing to shew that it was actually sworn “before” the Vice-Consul—*The Queen v. Bloxham* (1), *Graham v. Ingleby* (2), *Pilkington v. Hunswoorth* (3), and *Cheney v. Courtois* (4). Order XXXVIII. rule 14 does not apply to such a serious defect as this, but only to minor details such as those mentioned in rules 8 and 9.

[*LOPES, L.J.*—In *Empey v. King* (5) the affidavit was received, though the words “before me” were omitted.]

That affidavit was stated to have been sworn at the chambers of the Judge who signed the jurat, and it was distinguished on that account from an affidavit sworn before a commissioner.

Warmington, Q.C., and *O. L. Clare*, for the respondent.—The case must be considered with reference to the Commissioners for Oaths Act, 1889 (52 Vict. c. 10), and sections 5 and 6 of that Act shew what the jurat of an affidavit should contain. It does not appear that the words now in question are necessary. If the Vice-Consul signed this jurat, and the oath had not been taken before him, he would be guilty of great impropriety. The blanks are filled up, and the alterations initialed in the same handwriting as the signature purporting to be that of the Vice-Consul, which shews he went carefully through it. Therefore it is almost certain he did administer the oath himself, and the case comes within Order

- (1) 6 Q.B. Rep. 528.
- (2) 1 Exch. Rep. 651; 17 Law J. Rep. Exch. 313.
- (3) 1 Y. & C. Exch. 612.
- (4) 13 Com. B. Rep. N.S. 634; 32 Law J. Rep. C.P. 116.
- (5) 13 Mee. & W. 519.

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XXXVIII. rule 14. The cases cited were all decided before this rule came into force.

Channell, Q.C., replied.

COTTON, L.J.—This is an appeal from a decision of Mr. Justice Kekewich refusing to order this affidavit to be taken off the file on the ground that there is no sufficient proof of its having been properly sworn.

The jurat to the affidavit expresses that it was sworn at a certain place in the Argentine Republic on a certain day, but it does not say that it was sworn before the Vice-Consul whose signature appears at the bottom. The jurat ought to have contained the words which are found in the ordinary form adopted by commissioners—namely, “before me”—and it is said, as they are not there, we ought not to allow this affidavit to remain upon the file.

But rule 14 of Order XXXVIII. provides that “The Court or a Judge may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof.” That is intended, in my opinion, to cure such a defect as this. If we are satisfied that this affidavit in fact was sworn before a person who had authority to take the oath in this particular place, we are authorised, notwithstanding there is a defect in the form of the jurat, to order it to be put on the file or direct that it may remain on the file.

Now in this affidavit there is the signature of the Vice-Consul, “H. M. Mallett,” in peculiar handwriting, and that which I read from the jurat is in his handwriting. But that is not all. There are a considerable number of alterations in this affidavit which are identified by his initials “H. M. M.,” in the same writing evidently as that writing which appears as his at the end of the jurat. Besides this, not only are there alterations made by some one else identified by his signature, but there are also additions to the affidavit, blanks filled up by him in his handwriting. Therefore, I have no hesitation in saying I am satisfied that this affidavit was in fact sworn, not only at the office of the

Vice-Consul at Rosario in the Argentine Republic as stated in the jurat, but that it was sworn before him personally, and therefore I have no hesitation in saying that in this particular case, notwithstanding the informality in the jurat, we can and ought to order this affidavit to remain on the file. If it is necessary that there should be any order or signature of the Judge or the Court, we can and we will do what is necessary for the purpose of giving the parties the benefit of this order.

In my opinion, this appeal fails, and must be dismissed.

LINDLEY, L.J.—I am of the same opinion. With reference to this defect in the jurat, it is quite true that the Consul omitted to say “sworn before me.” What he has said is “Sworn at Rosario de Santa Fé, Argentine Republic, in the British Vice-Consulate, this 20th day of January, 1890,” and he then signed it. There are signs upon the original document itself which shew that the Vice-Consul looked through it, and looked through it with attention. It is suggested, because he has not said in the jurat “Sworn before me,” that it might have been sworn before his clerk or an official. Of course, it might, for anything I know. But what is the reasonable inference? Is the reasonable inference that it was sworn before him, or is there a reasonable inference the other way? There being no evidence the other way at all, it strikes me, if you look at it as a matter of reasonable probability, the reasonable probability is all in favour of everything having been rightly done, for it would be, in my judgment, a very serious and gross breach of duty on the part of the Vice-Consul if he signed and sealed that document and it had not been properly sworn.

Cases have been referred to shewing that affidavits in which the jurat has been defective have not been allowed to be rectified. There are such cases undoubtedly; and a vast amount of expense has been incurred and a great amount of injustice has been done in endeavouring to rectify affidavits and documents like this sworn abroad, by reason of some defect or omission by some clerk or official before whom

Eddowes v. Argentine Loan &c. Co., App.

they were sworn. It was to cure that very thing that rule 14 was put into Order XXXVIII., and rule 14 is addressed in terms to this very defect. "The Court or a Judge may" (bear in mind this has nothing whatever to do with criminal procedure—this is for civil purposes only) "receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof."

Now, what is this but a defect or irregularity in the form of the jurat? The jurat is defective in form. Is there the slightest reason for supposing there was any defect in fact—the slightest reason for supposing that this affidavit was not sworn before the Vice-Consul? None whatever. I think the Judge, in the exercise of his discretion, would say, "I cannot look at it if there is the slightest reason to suppose there was anything seriously wrong, and I take it for granted there was not." It appears to me, therefore, that that very rule was put in for the purpose (judging from the language of it, for I have no personal knowledge of the matter) of curing such slips and defects. It appears to me that, though these words ought to have been inserted, that rule applies to such a case as this.

That being so, I am of opinion that this appeal must be dismissed, with costs.

LOPES, L.J.—This is an application by the defendant that the plaintiff's affidavit may be taken off the file, on the ground that it is improperly sworn, because it is defective, and defective in this, that it has not the words preceding the signature of the Vice-Consul "before me."

Now, having regard to the cases which have been cited, I express no opinion as to what would have been the result of this application, except for Order XXXVIII. rule 14! To my mind the case would have been a very difficult one. But rule 14, in my opinion, covers this case, and it seems to me that it is clear it covers it when certain circumstances connected with the affidavit are considered. On looking at the affidavit we find that it is signed

in the proper place by the Vice-Consul, that there are alterations in different places in the affidavit initialed by him in his handwriting, and that there are blanks in the affidavit which have been filled up by him which are also in his handwriting. Now, having regard to these facts, could any reasonable person for one moment doubt that the affidavit was sworn before him, although the words "before me" do not appear?

Then, does rule 14 apply? I think it does. I believe that the true intent of the rule was this, that a discretion should be reposed in the Judges to receive affidavits when they were of opinion that the defects in them were not, having regard to the surrounding circumstances, defects of substance.

I think that was the object of the order, and a very useful object too, because there can be no doubt that very often injustice has been done owing to the rejection of an affidavit because of some defect which in point of fact has not been a defect in substance. The omission of these words is a defect, but it is a curable one. I think, therefore, that this appeal fails, and must be dismissed, with costs.

COTTON, L.J.—There will be a declaration that the affidavit was properly received notwithstanding the omission of the words "before me" in the jurat.

Solicitors—Hurrell & Mayo, for appellants;
Wynne, Holme & Wynne, for respondent.

NORTH, J. }
1890.
Jan. 22, 23. }

In re CRAWSHAY.
CRAWSHAY v. CRAWSHAY.

Power of Appointment—Fraud upon Power.

*A., who had, under a deed of 1828, a power to appoint 35,000*l.* among his children, executed his will in 1865, by which, after reciting the power, he appointed that 10,000*l.*, part of the 35,000*l.*, should go and belong to his daughter B.; but his will was that the same should be paid to the trustees of another legacy thereinbefore bequeathed to B., and be held by them upon the same trusts. Those trusts were for B. for life, then for her children as she should appoint, or in default of appointment equally, with other remainders and provisions usual in settlements. Then, after other appointments of shares of the 35,000*l.* to other children, and a gift of the residue of that sum to his son C., the testator declared that in case he had exceeded his power in not appointing the 10,000*l.* to B. unconditionally, and in case B., or others entitled to object, should object to the settlement thereof, then he appointed the 10,000*l.* to C. absolutely, who would, he was assured, settle the same voluntarily in the manner in which he, the testator, had attempted to settle the same. After the testator's death, B. and C. joined in executing a deed to carry out the testator's wishes, but there was no evidence that C. had had any knowledge of the terms of the testator's will until after his death:—Held, that the appointment of the 10,000*l.* to B., but to be paid to and held by the trustees for purposes in excess of the power, being invalid, the gift over to C., an object of the power, took effect, notwithstanding the expression of the testator's confidence that he would settle the fund, there being nothing to shew that such confidence was based upon any arrangement between A. and C. so as to make the appointment a fraud upon the power.*

Originating summons.

By indenture of settlement dated the 7th of August, 1828, and made between William Crawshay of the one part and four trustees of the other part, trusts were declared of a sum of 35,000*l.*, secured by a bond, into which W. Crawshay had en-

tered with the trustees, for payment of the amount within six months after his death. The trusts were for all and every or any such one or more of the seven children (named) of the settlor as the settlor should by deed or will appoint, and, in default of appointment, for the seven children equally.

By indenture of settlement dated the 17th of October, 1849, and executed in anticipation of the marriage, which was solemnized shortly afterwards, between Jessy Crawshay, one of the seven children of William Crawshay named in the settlement of 1828, and Alfred Crawshay, after reciting (among other things) that no appointment had been made under the settlement of 1828, and that one of the seven children therein named had died an infant, and that William Crawshay had agreed to settle 10,000*l.*, payable in his lifetime or within six months after his death, and had secured payment of the same by his bond given to the trustees of this settlement, all Jessy Crawshay's share in the 35,000*l.* was vested in the trustees, and this share and also the 10,000*l.* provided by her father, W. Crawshay, was settled upon trusts for the benefit of Jessy Crawshay, and her husband and children, and otherwise as therein mentioned.

By his will, dated the 21st of October, 1865, William Crawshay, after reciting that he had secured 10,000*l.* to his daughter Jessy, then the widow of Alfred Crawshay, on her marriage with him, bequeathed to her the further sum of 150,000*l.* Three per Cent. Consols, and directed that that legacy should be paid to four trustees therein named, and should be held by them upon trust, as to the dividends and annual produce, for his daughter Jessy during her life for her separate use, without power of anticipation; and after her death, upon trust, as to the principal of the legacy, for her children or remoter issue as she should by deed or will appoint; and in default of appointment upon trust for her children at twenty-one or marriage, and in default of children then as Jessy Crawshay should by deed or will appoint, and in default of appointment for her next-of-kin. The testator directed a settlement of the legacy to be executed, with clauses as to maintenance, advancement, accumu-

In re Crawshay.

lation, and otherwise, as usual in settlements of personal estate. The testator then declared that whereas under or by virtue of a deed of settlement dated the 7th of August, 1828, he had the power to appoint by his will the sum of 35,000*l.* to or amongst any one or more of his children as therein mentioned, his will was, and by virtue of the said power and of every or any other power enabling him in that behalf, he appointed that the sum of 10,000*l.*, part of the last-mentioned sum, should go and belong to his daughter Jessy, but his will was that the same should be paid to the trustees thereinbefore named and appointed with reference to the legacy thereinbefore bequeathed to her, and be held upon the trusts and for the intents and purposes thereinbefore declared of or concerning that legacy. He also appointed two other sums of 10,000*l.* and 7,000*l.*, parts of the same 35,000*l.*, similarly to two other daughters, Amelia and Annette, and directed them to be paid to trustees and settled in similar terms. The testator then appointed and declared that as to the residue of the said sum of 35,000*l.*, the same should go and belong to his son, Robert Thompson Crawshay, his executors, administrators, and assigns, absolutely. The will then proceeded, "and in case I have exceeded my power in not appointing the said sums of 10,000*l.*, 10,000*l.*, and 7,000*l.* unconditionally, but in directing the settlement thereof respectively as aforesaid, and in case my said daughters, Amelia, Jessy, and Annette respectively, or their respective husbands, or others having any right or power to object to the settlement thereof as aforesaid, shall so object, or shall not confirm such settlement thereof if required so to do, then I appoint that the said sums of 10,000*l.*, 10,000*l.*, and 7,000*l.* respectively shall also go and belong to my said son Robert Thompson Crawshay absolutely, who will, I am assured, settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid, so as thereby to carry out my wishes." The testator then made provision for other children.

The testator died on the 4th of August, 1867.

By indenture dated the 7th of November,

1867, and made between the executors and trustees of William Crawshay of the first part, the trustees of Jessy Crawshay's legacies named in the will of the second part, and Jessy Crawshay of the third part (R. T. Crawshay being a party both of the first and second parts), after reciting that the sum of 148,500*l.* Consols, balance of the 150,000*l.* Consols bequeathed by the will, after payment of legacy duty, was about to be transferred to the trustees, that sum was settled in accordance with the testator's will; and Jessy Crawshay and Robert T. Crawshay, according to his interest (if any) under the will or the deed of the 7th of August, 1828, or otherwise, settled the 10,000*l.* appointed by the will to Jessy Crawshay, upon the same trusts, in accordance with the will.

Jessy Crawshay, by her will dated the 29th of January, 1885, by virtue of the power of appointment given to her by her father's will, and of every other power or authority enabling her in that behalf, and by virtue of her ownership so far as the same extended, appointed and bequeathed the trust fund, consisting of the 148,500*l.* Consols and 10,000*l.*, in manner therein mentioned among her children, including certain appointments in favour of her daughter Jessy Sandeman, wife of Robert F. Sandeman, and her issue, and the testatrix thereby declared that any child or grandchild of hers who should object to or try to defeat the exercise of the powers of appointment and other the provisions and intentions of that her will should forfeit all benefits conferred on him or her by that her will, and that every appointment or bequest made to him or her or for his or her benefit should for that purpose be considered as having been made to her said daughter Jessy Sandeman instead. Jessy Sandeman was appointed residuary legatee.

Jessy Crawshay died on the 17th of July, 1889.

The present summons was taken out on the 16th of November, 1889, by the trustees of Jessy Crawshay's legacies under her father's will, the defendants being the trustees of Jessy Crawshay's marriage settlement, the children and grandchildren of Jessy Crawshay, and the trustees of such of them as had executed

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marriage settlements; and the questions submitted for the decision of the Court were, first, whether the defendants, the trustees of Mrs. Crawshay's marriage settlement, were entitled to have the 10,000*l.* paid or transferred to them; secondly, whether the plaintiffs, the trustees of the legacies, held the said sum, or any or what part thereof, upon the trusts declared by William Crawshay's will and the deed of trust of the 7th of November, 1867.

Bramwell Davis and *R. Winslow*, for the plaintiffs, stated the facts.

S. Brice, Q.C., and *R. F. Norton*, for Mrs. Sandeman.—The 10,000*l.* passes on the trusts declared by the will of Mrs. Crawshay, in pursuance of the powers of the deed of 1867, which was executed to give effect to her father's will. If the father had appointed the sum unconditionally to Mrs. Crawshay, it would have passed to the trustees of her marriage settlement. But he did not do so, and they have no claim. The attempt to settle the fund contained in William Crawshay's will is ineffectual, as not being in accordance with the power in the deed of 1828; and the fund, therefore, passed under the gift to Robert Thompson Crawshay, who executed the deed of 1867, which governs the destination of the fund. There is nothing to shew that this gift to Robert T. Crawshay was in pursuance of any bargain; the language of the will only shews that the testator believed that his son would desire to act in accordance with his express wish—*Blacket v. Lamb* (1). But if the appointment to R. T. Crawshay was for any reason invalid, then the 10,000*l.* went to him under the gift of residue—*Carter v. Taggart* (2), *In re Harries' Trust* (3), *Champney v. Davy* (4), *Freme v. Clement* (5), and *In re Turner's Settled Estates* (6). Whichever

view is correct, the fund passes under the deed of 1867.

Higgins, Q.C., and *Stokes*, for other parties in the same interest.

Everitt, Q.C., and *Cunliffe*, for the trustees of Mrs. Crawshay's marriage settlement.—The effect of William Crawshay's will is to appoint the 10,000*l.* to Mrs. Crawshay, with an ineffectual attempt to induce her, or R. T. Crawshay for her, to settle it. That attempt is an attempt to commit a fraud on the power by putting pressure on the appointee to do that which the appointor had no right to require—*Wallgrave v. Tebbe* (7), *Tee v. Ferris* (8), *Moss v. Cooper* (9), *Topham v. The Duke of Portland* (10), and *Rowbotham v. Dunnnett* (11).

[*NORTH, J.*, referred to *Lomax v. Ripley* (12) and *Jones v. Badley* (13).]

The settlement of 1867 is consequently invalid, but the appointment to Mrs. Crawshay remains good—*Sadler v. Pratt* (14), *Wooldridge v. Wooldridge* (15), *In re Marsden's Trust* (16), and *Churchill v. Churchill* (17). The residuary appointment to R. T. Crawshay did not carry this fund—*Page v. Leapingwell* (18), *Petre v. Petre* (19), *Wright v. Weston* (20), *Morgan v. Gronow* (21), *Scholfield v. Spooner* (22), and *Wilson v. Kenrick* (23). *Freme*

(7) 2 Kay & J. 313; 25 Law J. Rep. Chanc. 241.

(8) 2 Kay & J. 357; 25 Law J. Rep. Chanc. 437.

(9) 1 Jo. & H. 352.

(10) 39 Law J. Rep. Chanc. 259; Law Rep. 5 Chanc. 40.

(11) 47 Law J. Rep. Chanc. 449; Law Rep. 8 Ch. D. 430.

(12) 8 Sm. & G. 48; 24 Law J. Rep. Chanc. 254.

(13) Law Rep. 3 Chanc. 362.

(14) 5 Sim. 632.

(15) Johns. 63; 29 Law J. Rep. Chanc. 689.

(16) 4 Drew. 594; 28 Law J. Rep. Chanc. 906.

(17) 37 Law J. Rep. Chanc. 92; Law Rep. 5 Eq. 44.

(18) 18 Ves. 463.

(19) 14 Beav. 197.

(20) 26 Beav. 429.

(21) 42 Law J. Rep. Chanc. 410; Law Rep. 16 Eq. 1.

(22) 53 Law J. Rep. Chanc. 777; Law Rep. 26 Ch. D. 94.

(23) 55 Law J. Rep. Chanc. 525; Law Rep. 31 Ch. D. 658.

(1) 14 Beav. 482; 21 Law J. Rep. Chanc. 46.

(2) 16 Sim. 447.

(3) Johns. 199.

(4) 48 Law J. Rep. Chanc. 268; Law Rep. 11 Ch. D. 949.

(5) 50 Law J. Rep. Chanc. 801; Law Rep. 18 Ch. D. 499.

(6) 54 Law J. Rep. Chanc. 690; Law Rep. 29 Ch. D. 205.

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v. *Clement* (5) was disapproved in *Holyland v. Lewin* (24).

E. Wilkinson and *Cozens-Hardy, Q.C.*, and *G. Murray*, for other parties.

Norton, in reply, referred to *Pryor v. Pryor* (25), *The Duke of Portland v. Topham* (26), *Goldsmid v. Goldsmid* (27), *Wright v. Goff* (28), *Birley v. Birley* (29), and *Roach v. Trood* (30).

NORTH, J., stated the facts, and continued:—Now, the testator directs the 10,000*l.*, which he in the first instance appointed to his daughter *Jessy* absolutely, to be paid to four special trustees, whom he had appointed in a previous part of the will with reference to a legacy of 150,000*l.* which he had bequeathed to his daughter *Jessy*, to be held by them upon the trusts and for the intents and purposes which he had already declared of and concerning that legacy. Therefore, the 10,000*l.* is to be paid by the executors to the special trustees, and not to *Jessy* at all; and when it is paid to the special trustees, it is to be held by them upon the same trusts as those declared of the 150,000*l.*, which include a larger class than the settlement of 1828, and powers which are not comprised in that. *Jessy* is not to receive the money and to proceed to settle it, but the money which the testator gives to *Jessy* he gives to her by means of this direction, that it is to be paid to trustees named by him, and to be held by them upon the trusts therein-before declared of the larger legacy, under which *Jessy* takes only a life interest. Then the testator, after appointing 10,000*l.* and 7,000*l.* in a similar way to two other daughters, appoints that the residue of

the 35,000*l.* shall go and belong to his son, *Robert Thompson Crawshay*, absolutely. Now, stopping there, we have the gift to *Jessy* followed by a direction that whatever is given to her is to be paid to trustees, who are to hold it upon certain trusts, under which her interest is only a limited one; and, if the will had stopped there, it might have been said that, as under the first words of gift *Jessy* took absolutely, subject to the trusts afterwards created, if those trusts failed, the original gift remained untouched, as in *Lassence v. Tierney* (31) and *Carver v. Bowles* (32), and a great many other similar cases.

But the will does not stop there, for the testator goes on to say, "And in case I have exceeded my power in not appointing" *Jessy's* 10,000*l.* "unconditionally, but in directing the settlement thereof as aforesaid." That shews clearly that he thought that in doing what he had previously done, he might possibly be held by construction of law to have exceeded his power. In what way? Because he had not given the 10,000*l.* to the daughter absolutely, free from any condition. This shews that, in his view at any rate, the only gift to her was as part of the arrangement, and for the purpose of the arrangement, for effecting a settlement of the 10,000*l.*; and it shews also that, considering there was some doubt as to his power to do what he had done, he thought it necessary to provide for what was done in case the law should prevent what he had already attempted to do from taking effect.

Then he says: "In case I have exceeded my power in not appointing the fund unconditionally"—in other words, "If what I have done cannot take effect, and the 10,000*l.* is undisposed of"—"and in case my daughters *Amelia*, *Jessy*, and *Annette* respectively, or their respective husbands, or others having any right or power to object to the settlement thereof as aforesaid, shall so object, or shall not confirm such settlement thereof if required so to do"—which comes to this, "If I have exceeded my power, and if, by

(24) 53 Law J. Rep. Chanc. 530; Law Rep. 26 Ch. D. 266.

(25) 2 De Gez, J. & S. 205; 33 Law J. Rep. Chanc. 441.

(26) 11 H.L. Cas. 32; 34 Law J. Rep. Chanc. 113.

(27) 2 Hare, 187; 12 Law J. Rep. Chanc. 113.

(28) 22 Beav. 207; 25 Law J. Rep. Chanc. 803.

(29) 25 Beav. 299; 27 Law J. Rep. Chanc. 569.

(30) Law Rep. 3 Ch. D. 427.

(31) 1 Mac. & G. 551.

(32) 2 Russ. & M. 304.

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reason of an objection on the part of any person entitled to object, that which I have attempted to do cannot be confirmed, then something else is to be done." It is quite clear that there cannot even now be any confirmation, by all the persons who would be interested in the fund in default of appointment, of the disposition by way of settlement previously made. It is true that Jessy Crawshay did all she could to confirm it, but unluckily she had not an absolute interest. In my opinion, the testator was dealing with failure by reason of some invalidity in the previous appointment, and the absence of confirmation by all persons whose consent would be necessary to make the appointment valid. He contemplates the possibility that he might not be able to procure a confirmation from every person interested in disputing it, and he goes on to deal with the fund in a different way. If that is so, he says that Jessy's 10,000*l.* "shall also go and belong to my son Robert Thompson Crawshay absolutely." That is clearly a disposition of the 10,000*l.*, which he had already appointed in a way which he now treats as possibly invalid.

Now Robert Thompson Crawshay was an object of the power, and, so far as I have yet gone, the gift to him is clearly good. It is suggested that it is bad by reason of that which follows, and which I will consider presently. But pausing at this point, there is a clear gift to him of the 10,000*l.* in an event which the testator contemplated as possible, and which has actually happened; and, in my opinion, he takes the 10,000*l.* under that gift, and not under the gift of the residue of the 35,000*l.* I do not think it necessary to consider whether, supposing there had been no express gift to Robert Thompson Crawshay, in the event which has happened, of the 10,000*l.* settled upon Jessy, that sum would, in case the prior disposition thereof had failed, have passed to Robert under the gift to him of the residue of the 35,000*l.*

But in my opinion he cannot, in the event which has happened, take Jessy's 10,000*l.* under the appointment of the residue, because it is clear that the testator did not consider that in that event it

would go to him under the gift of residue, for in that particular event the testator gives the 10,000*l.* to Robert in express words. I hold that the 10,000*l.* cannot go to Robert as part of the residue of the 35,000*l.*, there being another express gift of it to him, which is inconsistent with its passing under the gift of residue.

Then, however, arises the question whether Robert can take the 10,000*l.* at all, by reason of the words which follow. The direction is, first, that the 10,000*l.* is to go and belong to Robert absolutely, and then follow these words: "but who will, I am assured, settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid, so as thereby to carry out my wishes." That is entirely inconsistent with the notion that under the first gift to Jessy she had taken an absolute interest in the 10,000*l.* I think it is quite clear that she did not. But the question is, whether the 10,000*l.* thus given to Robert is so given to him for the purpose of his applying it for the benefit of persons who are not objects of the power, that the gift must fail.

The phrase "who will, I am assured, settle the same voluntarily" is capable of different meanings. It may mean, "I feel certain, not because that he has ever said anything to me or I to him on the subject; but I know that that is what he will do with it." That is one natural and simple meaning of the words. But the words "I am assured" may also mean "as he assures me" or "as my solicitor tells me." If the words mean "as he assures me"—that is, if they shew that there was a bargain between the two that, though this fund was given to Robert absolutely, with a statement that he might settle it voluntarily if he chose to do so, he had really bound himself to settle it according to the testator's wishes—then, in my opinion, the appointment would be void. But if, on the other hand, the fund is really given as it purports to be, to Robert absolutely, not subject to any trust, but that he might do what he liked with it, and if the word "voluntarily" is truly used, then, if he does settle it as the testator says he should like him to do,

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and as he endeavoured to do himself, that would be an entirely voluntary act on his part, and the appointment to him would be valid. There is no evidence of any conversation, or arrangement, or bargain, or even an understanding between the father and son, or that the son had any knowledge that there was any such provision in the will before the will was opened after the testator's death and the contents made known to the family; and even if the son did know of the provisions in the will before the testator's death, yet, unless it was made known to him under circumstances which shewed he had accepted a trust and had bound himself to carry out his father's wishes, I do not think his knowledge would make the gift invalid. In my opinion the real meaning of the words is, not that Robert was bound to settle the fund, but that it was given to him absolutely, and that the testator, having shewn what he wished to be done by trying to do it himself, and having on this hypothesis failed in doing it, left it entirely to the son whether he would or would not settle the fund upon the daughter. In point of fact, the son has settled it; but that is immaterial, if it was absolutely free to him to deal with the fund as he pleased.

A number of cases have been cited, and one or two of them seem to me material. In *Pryor v. Pryor* (25) the law was no doubt correctly laid down. Lord Justice Knight-Bruce said: "The donee of a limited power of appointment may well execute it in favour of an object of the power, though he believes and knows that the appointee will at once dispose of the property in favour of persons who are not objects of the power. But if, besides this belief and knowledge, there is a bargain between the appointor and appointee that the appointee shall make a disposition in favour of persons not objects of the power, and the just result of the evidence is that the appointment would not have been made but for the bargain, then the appointment is bad. The question is to which of these two classes of cases the present belongs." That is precisely the question in the present case.

The conclusion to which I come upon

the will is that which I have already stated. There is no evidence whatever, and I have to get as best I can at the intention of the parties as it is shewn upon the face of the will. I confess that *In re Marsden's Trust* (16) did appear to me at first to create some little difficulty; but I observe that even in that case Vice-Chancellor Kindersley said: "Unless it can be shewn that the trustee having the discretion" (meaning for this purpose the person having power to appoint) "exercises the trust corruptly, or improperly, or in a manner which is for the purpose, not of carrying into effect the trust, but defeating the purpose of the trust, the Court will not control or interfere with the exercise of the discretion. There may be a suspicion that the trust has been exercised in a particular manner, and from a certain motive, which, if it could be proved, would be held not to be a proper motive; but if it be mere suspicion, and not matter amounting to a judicial inference or conviction from the facts, the Court will not act upon it. But if, on the other hand, it can be proved to the satisfaction of the judicial mind that the power has been exercised corruptly, or for a purpose which defeats instead of carrying into effect the purpose of the trust, then the Court will not permit such an exercise of the power to prevail." Now in the present case there is no evidence to introduce any element even of suspicion, or, indeed, anything which is not to be found in the will itself. I have no materials for coming to the conclusion that the will is not honestly framed and expressed for the purpose of giving effect to it, and there is nothing behind it for me to consider.

In *In re Marsden's Trust* (16) the facts were very peculiar, and it has been treated by other Judges as a somewhat exceptional case—and I think it is so, for this reason. There the mother, who had under the settlement a power of appointment among children, desired to make a provision for the father out of the settled fund, his circumstances being such that she thought he ought to be assisted in that way. This intention was openly discussed. The father was not an object of the power, and therefore he could not

In re Cramshay.

take any part of the settled fund under an appointment. A solicitor was consulted, and he advised that an appointment could not be made to the father, and that project thereupon dropped. An arrangement was then made between the father and the mother that the whole fund should be appointed by the mother to the eldest child, a daughter, who was at that time an infant, who did not require any immediate provision to be made for her, and with this object, that when the mother was dead, the father might tell the daughter that the whole fund had been appointed to her under an arrangement between her father and mother, with the object of enabling the daughter to provide for her father. One cannot help seeing what an influence would have been brought to bear on the daughter when the father told her that, and that it would be practically impossible that she should resist doing that which it was the intention of her father and mother that she should do, and the doing of which, under the influence thus exercised upon her, would be an entire perversion and misapplication of the fund—taking it away from the persons in whose favour it ought to have been appointed, and giving it to a stranger. If an appointment of that kind is obtained by means of undue influence, of course it cannot stand, and I think that is shewn by the later cases. That, I think, is the true explanation of *In re Marsden's Trust* (16), and I do not think it is in any way inconsistent with the law as stated in *Pryor v. Pryor* (25). The same conclusion is, I think, to be drawn from *Roach v. Trood* (30).

In this case I come to the conclusion that an absolute appointment to Jessy was never made, that the only gift to her was by way of the direction that the trustees of another settled fund were to hold the sum appointed to her, and upon the same trusts, and that such a settlement was beyond the power of the testator. Under these circumstances, it appears to me that it was open to him to appoint the fund absolutely and unconditionally to Robert; and I think that that is what he did, and that the words which were relied upon as shewing that it was really appointed to

him conditionally do not lead to that result, and do not, therefore, operate to make the prior appointment bad.

Solicitors—A. R. & H. Steele; Lawrence, Graham & Long; Cunliffes & Davenport; Bell, Brodrick & Gray, agents for W. & E. Gray, York.

KAY, J. } *In re MEYERSTEIN'S TRADE*
1890. } MARK.
March 7. }

Trade Mark—Registration—"Satinine"—"Invented Word"—"Word having no reference to Character or Quality"—Descriptive Word—Patents &c. Act, 1888, s. 10.

The word "Satinine" being a descriptive word, not being an "invented word," and having reference to the character and quality of the goods (in this case starch, blue, perfumery, &c.) to which it was proposed to apply it, is not a word which can be registered under section 10 of the Patents &c. Act, 1888, which is substituted for section 64 of the Patents &c. Act, 1883.

Motion.

This was a motion by Messrs. Meyerstein & Co. for an order upon the Comptroller-General of Patents for the registration of the word "Satinine" in respect of goods in class 47 in the 3rd schedule to the Trade Mark Rules, 1883, comprising "starch, blue, and other preparations for laundry purposes," and in respect of goods in class 48 in the same schedule embracing "perfumery (including toilet articles, preparations for the teeth and hair, and perfumed soap)." The applicants had used the word principally for starch and toilet soap, in which they dealt, but which they did not manufacture themselves.

They had applied in 1886 to register the word under the Patents &c. Act, 1883, but the Comptroller reserved his decision until there should be further legislation as to what words were susceptible of registration.

In re Meyerstein's Trade Mark.

After the passing of the Patents, Designs, and Trade Marks Act of 1888, the applicants, in 1889, applied for registration under that Act. But the Comptroller refused to register the word, on the ground that it did not comply with the requirements of that Act, and that the word "Satin Glaze" had already been registered as part of a trade mark for laundry starch.

The applicants then served the Comptroller with notice of the present motion, on which they produced evidence that the word "Satinine" is not to be found in any dictionary.

Section 10 of the Act of 1888 repeals section 64 of the Act of 1883, and substitutes the following among other provisions:—

"1. For the purposes of this Act a trade mark must consist of or contain at least one of the following essential particulars:—(c) A distinctive device, mark, brand, heading, label, or ticket; or (d) an invented word or invented words; or (e) a word or words having no reference to the character or quality of the goods, and not being a geographical name."

Roger W. Wallace, for the motion.—"Satinine" is an "invented word," and does not describe the "character or quality of the goods"; is distinctive, and is not a geographical name.

The Attorney-General (Sir R. E. Webster, Q.C.) and *Ingle Joyce*, for the Comptroller-General, were not called upon.

KAY, J.—This is a word which describes the quality of the goods; and there is extremely little invention in the matter, for the only invention is putting at the end of a common word, "Satin"—which brings to every man's mind in a moment the notion of a glossy surface—the common termination "ine," which one finds in "saline," "saccharine," and numerous other English words. Certainly, if that is inventing a word, it is the easiest mode of invention one can possibly conceive. But I understand this Act of 1888 to be subject to the limitations which the decisions have put on the former Act—that you cannot possibly use any word, fancy word or otherwise, if it is a descriptive

word. This word "Satinine" is a word descriptive of a glossy surface. Now, it is proposed to be applied to, among other things, starch and blue, and articles of that kind used by washerwomen. Everybody knows that one effect of the use of starch is that goods which are washed and starched, and then ironed or calendered, have a much more glossy surface than the same articles would have if ironed or calendered without being starched. That is common experience; we all know that; and it would be a recommendation of a particular starch that it would produce a more glossy surface than other starch. If you speak of or describe starch by a name which suggests to the mind at once the production of a glossy surface, you are using a descriptive word; and that is made all the more plain by what the Comptroller says. He states that one of his reasons for objecting to register this word was that within his own knowledge there had already been registered as part of a trade mark the words "Satin Glaze" for laundry starch.

It seems to me plain, therefore, that these applicants are trying to obtain the registration of a word which would suggest to persons buying starch from them that it is starch which will conduce to the production of a very glossy surface. That is a description of the effect produced by the use of the article, and is, according to the decisions on the Act of 1883, a description of the article itself. The word is a descriptive word; and that is a very sufficient reason, in my opinion, for refusing, as the Comptroller has done, to register this word.

The application is refused, with costs.

Solicitors—W. A. Crump & Son; Solicitor to the Board of Trade.

NORTH, J. } *In re* THE NATIONAL PER-
1889. } MANENT MUTUAL BENEFIT
Dec. 18, 21. } BUILDING SOCIETY.

Trust Investment Act, 1889 (52 & 53 Vict. c. 32) — Scope of Act — Building Society.

The powers of investment conferred on trustees by the Trust Investment Act, 1889, are not applicable in the case of the funds of a building society incorporated under the Building Societies Act, 1874, whether such funds are standing in the name of the society or in the names of its trustees. Those powers are only exercisable by trustees who have funds in their hands for the purpose of investment.

Petition.

The above society was established in 1849, and registered under 6 & 7 Will. 4. c. 32. In April, 1880, it was incorporated under the Building Societies Act, 1874.

Rules of the society were duly certified under the first-mentioned Act, and, so far as material for the present purpose, remained unaltered. The 6th of these rules was in the following terms: "Whenever the money in hand shall, in the opinion of the board, be sufficient for the purpose, it shall be employed in advancing the shares of those members whose subscriptions are not in arrear, and the order in which members shall become entitled to advances shall from time to time be determined by the board, and all money not so employed shall be laid out in such investments, or advanced upon such legal or equitable securities, as the law permits, in the names of the trustees, but under the direction of the board."

This was a petition by the ten directors and three trustees of the society under 22 & 23 Vict. c. 35, which set out the above facts and sections 25 and 26 of the Building Societies Act, 1874 (the latter section as amended by 40 & 41 Vict. c. 63. s. 3), and stated that the trustees had a large sum of new consols invested in their names forming part of the surplus funds of the society, and that they had been requested by the directors to sell the same and to invest the proceeds thereof in various specified securities, which were authorised by the Trust Investment Act,

1889 (52 & 53 Vict. c. 32), but not by the Building Societies Act, 1874. The petition asked for the opinion and advice of the Court whether the directors and trustees of the society respectively might invest the surplus funds of the society upon the securities upon which trustees might invest in the absence of express prohibition, or upon any and which of such securities; whether they might invest the surplus funds of the society in the securities specifically mentioned; and whether the directors of the society were trustees, and whether the funds under their control and under the control of the trustees of the society were trust funds in their hands respectively within the meaning of the Trust Investment Act, 1889.

Swinfen Eady, for the petition.

NORTH, J. (on Dec. 21).—The question now is, whether the consols belonging to this society standing in the names of these three trustees can be sold by them and laid out in other securities within the terms of the Act of 1889. In my opinion they cannot. In the first place I think that the powers of investment contained in the Act are larger powers given to trustees who have already power to invest, and merely apply to trustees who hold funds for the purpose of investment. In respect of building societies under the Building Societies Acts, the general Act relating to trustees, which does not refer to building societies, cannot be intended to alter the powers of such societies which are regulated by section 25 of the Benefit Building Societies Act, 1874. In order to give larger powers than are contained in that section, I think there should be an express direction, or something that shews by necessary implication that there is an intention so to enlarge the powers. But I do not think this is the only answer. Even supposing the 25th section of the Building Societies Act would be affected by a general investment Act, does the Act of 1889 really apply to such a case? In my opinion it does not. I do not think the funds of a building society are trust funds. The property of a building society belongs to the society or its members, and its

In re National Permanent &c. Building Soc.

members do not hold the property on any trust. The property of such a society is quite different from that of a charitable institution. In my opinion the funds of the society are not trust funds at all in the sense used in the Trust Investment Act. And, further, it is to be noticed that the object of a building society is not to invest.

Then it is suggested that the trustees in whose names the consols stand are trustees for investment so as to bring the funds in their names under the operation of the Trust Investment Act. It will be recollected that the rule of the society relating to investments provided that funds should be invested in the names of trustees under the direction of the board of directors. That is the rule, which has not been altered, and is still subsisting so far as these investments are concerned. I do not think, therefore, that these trustees are trustees holding funds in their hands which they can invest. I do not think this Act applies to trustees who do not hold funds in their hands upon trust to invest. In my opinion the Act extends existing powers in respect of the kind of securities upon which trustees who already have limited power may invest, but it does not give power to trustees who have no power to invest independently of the Act. It seems to me that the trustees of the society are not trustees under the Act. Let me put this case by way of illustration. If there is a person absolutely entitled to a fund in the hands of another person, who does not wish to take the funds in his own hands, and does not wish to have the state of investment changed, it could not be contended that the bare trustee in that case could have the power given by the Act conferred on him.

Then it is suggested further that the ten directors of the society are trustees having trust funds in their hands within the meaning of the Act. In my opinion they are not. In point of fact, they are not trustees for investment, but are the agents of the society for the purpose of carrying on the business of the society. It is said they are in a fiduciary position. No doubt, if property of the society come to their hands is misappropriated, they will be liable for breach of trust. Then

so is any other agent. It seems to me, therefore, that the directors are not trustees within the meaning of the Act.

The result is that I come to the conclusion that the Act does not apply to a building society whose funds are invested in its own name or in the names of trustees who have no power of investment. That view is confirmed by section 5 of the Trust Investment Act, which provides that "every power conferred by this Act shall be exercised according to the discretion of the trustee, subject to any consent required by the instrument, if any, creating the trust." From that it appears that the Act is intended to apply to trustees who have a discretion independently of the Act.

Solicitors—Russell & Co.

NORTH, J. }
1890. }
Feb. 8. }

In re WORMALD.
FRANK v. MUZEEN.

Married Woman—Forfeiture—Gift of Life Interest for Separate Use without Power of Anticipation—Gift over "on her anticipating" the Income—Mortgage of Life Interest.

A married woman, who was under a will entitled to a life interest in a fund for her separate use without power of anticipation, with a gift over on her death or "on her anticipating the income," executed a mortgage of her life interest:—Held, that "anticipating" could not be treated as meaning "attempting to anticipate," and that, as the assignment was wholly inoperative by reason of the restraint on anticipation, there had been no forfeiture.

Adjourned summons.

This was an originating summons by the surviving trustee of the will of G. F. Wormald, deceased, to have it determined whether, in the events that had happened, a gift made by the testator of the income of his residuary estate to his sister, Mary Elizabeth Muzeen, had or had not determined.

In re Wormald.

The testator, by his will dated the 21st of March, 1874, gave his real estate and the residue of his personal estate to trustees, upon trust, out of the rents and income thereof, to pay an annuity of 300*l.* to his wife during her life, and to pay the remainder of such rents and income to his sister, Mary Elizabeth Wormald, "for her separate use, free from the debts and control of any husband, without power of anticipation, and for and during the term of her natural life, and from and after her decease, or on her anticipating the same rents and income or any part thereof," upon trust as to the said trust estate for all the children of his said sister equally as tenants in common, with a gift over in case there should be no such child who should attain twenty-one.

The testator died on the 24th of March, 1874. His widow died in July, 1881. At the date of the testator's death his sister Mary Elizabeth was the wife of William Muzeen, to whom she was married in 1867. She had only one child, a son, G. E. B. Muzeen, who had attained twenty-one. On the 3rd of June, 1889, Mrs. Muzeen executed an assignment of her life interest under the will to J. M. Richardson, by way of mortgage to secure a sum of 40*l.* and interest. At the date of the issuing of the summons Mrs. Muzeen's husband was still living. G. E. B. Muzeen had also mortgaged his interest under the will. The defendants to the summons were Mrs. Muzeen, and her son, G. E. B. Muzeen.

H. J. Hood, for the plaintiff.

Arnold White, for Mrs. Muzeen.—It was impossible for Mrs. Muzeen to anticipate her life interest. The assignment by her was only an attempt to anticipate, and there is, therefore, no forfeiture.

Dunham, for the son and his mortgagee.—Mrs. Muzeen, being a married woman, could not anticipate her life interest; the words "on her anticipating" must, therefore, mean on her "attempting to anticipate." By mortgaging her life interest she attempted to anticipate; her life interest is, therefore, forfeited.

NORTH, J.—I cannot adopt the view that "anticipate" means "attempt to

anticipate." The trust is for Mrs. Muzeen, "for her separate use, free from the debts and control of her husband," without power of anticipation; and during her life, and from and after her death, "or on her anticipating the same," the estate is to be on trust for her children. Has she anticipated her life interest? No, she could not do so, because at the date of the testator's death she was, and she has ever since been, a married woman. The husband to whom she was married at the date of the testator's death is still living. It is impossible, therefore, that she could anticipate her life interest. It is, however, suggested that the words "on her anticipating the same" mean "on her attempting to anticipate." Clauses providing for a forfeiture upon an attempt to anticipate, as well as upon an actual anticipation, are very familiar to us; the difference between the two things is well understood. I cannot add to this will a clause which is not to be found in it—namely, that the estate is to go to the children if Mrs. Muzeen attempts to anticipate her income without succeeding in doing so. It is the clear intention of the testator that she is to have the income during her life; but he does not intend that any one else shall have it. If she anticipates it, he intends that the capital shall go over to her children. There is no reason why I should give to the words a meaning which I am satisfied the testator never intended them to bear. The assignment by Mrs. Muzeen of her life interest was entirely inoperative, and did not in any way affect her life interest, and there has been no forfeiture.

Solicitors — Collyer-Bristow, Russell & Hill, agents for J. D. Whitehead, Pickering, for plaintiff; Morse & Sampson, agents for Jackson, Richardson & Ridge, Malton, for defendants.

NORTH, J. }
1890. } THE SCRIPT PHONOGRAPHY COM-
Apr 23. } PANY (LIMITED) v. GREGG.

Practice—Non-delivery of Statement of Claim—Order dismissing Action—Order not drawn up or served—Rules of Supreme Court, 1883, Order XXVII. rule 1; Order LXIV. rule 7.

When an order has been made in chambers dismissing an action unless the next step is taken by the plaintiff within a specified time, and the plaintiff does not take that step within the specified time nor appeal against the order, the order takes effect, and the time for taking the step cannot subsequently be extended, the action having become dead, notwithstanding that the order has not been drawn up or served upon the plaintiff before it became operative.

Dicta in Metcalfe v. The British Tea Association (46 Law Times Rep. N.S. 31) not adopted.

Adjourned summons.

This action was brought to restrain an infringement of the plaintiffs' copyright.

The writ was issued on the 25th of July, 1889, and on the 27th of July notice was given of motion for an injunction. On the 8th of August this motion was ordered by consent to stand to the trial. On the 18th of November the time for delivery of the statement of claim expired, none was delivered, and on the 22nd of November the defendant took out a summons to dismiss the action for want of prosecution. On the 26th of November this summons was heard before the chief clerk, both parties being represented by their solicitors, and the chief clerk endorsed the following order on the summons—"Usual order. Next step in twenty-one days, or action to stand dismissed with costs to be taxed and paid by plaintiffs. Defendant's costs in the cause of this application." The twenty-one days expired on the 17th of December, and on that day the plaintiffs took out the present summons by which they asked that the time limited by the order of the 26th of November might be extended to the 24th of December. The summons was returnable on the 18th of December, and on that day the chief clerk adjourned it to the

Judge. On the 21st of December the statement of claim was delivered, but the defendant's solicitors refused to receive it, and returned it. On the 20th of January, 1890, the summons of the 17th of December came before the Judge in chambers, and he adjourned it into Court. Shortly after this date the order made by the chief clerk on the 26th of November was drawn up by the Registrar in the presence of the solicitors for both parties, and, as drawn up, it was dated the 26th of November, 1889, and provided that, "It is ordered that the plaintiffs be at liberty on or before the 17th of December, 1889, to deliver their statement of claim in this action. And in default thereof it is ordered that this action do stand dismissed for want of prosecution without further order, with costs to be taxed by the Taxing Master and paid by the plaintiffs to the defendant. And it is ordered that the defendant's costs of this application be his costs in this action."

The order had not been served upon the plaintiffs. There was no appeal against it.

Church, for the plaintiffs.—The plaintiffs' summons was taken out before the twenty-one days limited by the order of the 26th of November had expired, and was in time in any event. But that order was not drawn up until after this summons had been before the Judge in chambers, and has never been served yet. Such an order does not take effect till after it has been drawn up and served. Until that has been done it is open to the defendant to abandon it—*Metcalfe v. The British Tea Association* (1). The subsequent drawing up of the order shews that the defendant did not treat the action as dead. If necessary, this application should be treated as an application for an extension of the time for appealing against the order of the 26th of November, and I ask that that time may be extended. If the action is dismissed, the only result will be to put the plaintiffs to the expense of bringing a new action.

Sebastian, for the defendant.—The application is out of time, and there is no jurisdiction to grant it, for the action was dead when the summons was made return-

(1) 46 Law Times Rep. N.S. 31.

The Script Phonography Co. v. Gregg.

able. The observations in *Metcalf v. The British Tea Association* (1) as to the drawing up and service of the order were merely *obiter dicta*, and not applicable to the practice in the Chancery Division. The application there was for an extension of the time for appealing against the Master's order; and that such an application may be granted in a proper case appears also from *Burke v. Rooney* (2) and *Carter v. Stubbs* (3). But those cases all apply to an extension of the time for appealing, and leave untouched the earlier cases of *Whistler v. Hancock* (4), *Wallis v. Hepburn* (5), and *King v. Davenport* (6), in which it was laid down that after an order dismissing an action for default in taking some step within a specified time has become operative, the action is dead, and no extension of the time for taking that step can be granted. An expressed consent by the defendant to extend the time for delivery of the statement of claim would not have operated to keep the action alive—*King v. Davenport* (6); still less can the subsequent drawing up of the order of the 26th of November have such an effect. The order when drawn up took effect from the date when it was made—Order LII. rule 13; but no drawing up was necessary—Order LV. rules 74 and 74a. This order was made on the 26th of November, and became operative on the 17th of December. There was no adjournment to the Judge, and there has been and is no appeal. The time for appealing was twenty-one days from the 26th of November—*In re Johnson* (7) and *In re Giles* (8)—and there is no ground for extending the time.

Church, in reply.

NORTH, J.—It appears to me that the cases of *Whistler v. Hancock* (4) and *King v. Davenport* (6), and cases like them, have

(2) 48 Law J. Rep. C.P. 601; Law Rep. 4 C.P. D. 226.

(3) 60 Law J. Rep. Q.B. 161; Law Rep. 6 Q.B. D. 116.

(4) 47 Law J. Rep. Q.B. 152; Law Rep. 3 Q.B. D. 83.

(5) Law Rep. 3 Q.B. D. 83n.

(6) 48 Law J. Rep. Q.B. 606; Law Rep. 4 Q.B. D. 402.

(7) *Ante*, p. 99; Law Rep. 42 Ch. D. 504.

(8) *Ante*, p. 226; Law Rep. 43 Ch. D. 391.

settled the law on the point which is now before me. The Court cannot, after the action is gone, entertain an application the result of which would be to set it on foot again. The time for delivering the statement of claim expired on the 17th of December, 1889. The summons to extend the time was not returnable till the 18th of December, and under these circumstances the application was too late, and I have no jurisdiction to extend the time. It has been suggested that I can extend the time for appealing from the chief clerk's order of the 26th of November, 1889, but I see no reason for giving any facilities to the plaintiffs or for allowing the recent proceedings to continue, instead of leaving the plaintiffs to bring a new action if so advised. I do not see how I can set up a dead action, and I must dismiss this application, with costs.

Solicitors—Wyatt Digby, for plaintiffs; Fallows & Rider, agents for G. H. Thompson, Liverpool, for defendant.

CHITTY, J. } *In re MORRIS (deceased).*
1890. } *MORRIS v. FOWLER.*
April 18, 19. }

Practice—Service—Notice of Motion to Attach—Service where no Appearance—Rules of Supreme Court, 1883, Order XLIV. rule 2; Order LXVII. rule 4.

Notice of motion to attach held to have been sufficiently served by filing pursuant to Order LXVII. rule 4, the respondent not having entered appearance.

Motion for leave to issue a writ of attachment against the defendant for disobedience to an order made on the 1st of March, 1890, directing the defendant to pay a sum into Court.

The defendant had not entered any appearance, and the proceedings in the action had been filed in lieu of service pursuant to Order LXVII. rule 4, but the order of the 1st of March had been personally served on the defendant.

The notice of motion had been filed

In re Morris.

under Order LXVII. rule 4, in lieu of personal service, and the question was whether such filing was sufficient.

E. E. H. Brydges, in support of the motion.—Filing under Order LXVII. rule 4 is sufficient “notice to the party” within Order XLIV. rule 2. Personal service of the notice is not necessary—*Browning v. Sabin* (1) and *In re A Solicitor* (2).

CHITTY, J., said that he was unaware of any instance in which leave to issue a writ of attachment had been given without actual notice to the respondent, and his Lordship directed the matter to stand over for enquiry to be made.

The matter was mentioned again on the following day, when counsel stated that he had been unable to find any direct authority on the point.

CHITTY, J., said that the applicant was entitled to an order. It was well settled that it was not necessary under Order XLIV. rule 2, that a notice of motion to attach should be served on the respondent personally. In the present case the respondent had not appeared at all, and the case, therefore, came within Order LXVII. rule 4, which provided that all notices, &c., in respect of which personal service is not requisite may be served by filing with the proper officer. He had caused search to be made in the Registrar’s office to see if any precedent could be found in any way negating the view he took. He was informed that none had been found. He made the order as asked, with costs.

Solicitors — Peacock & Goddard, agents for
Brydges & Mellersh, Cheltenham.

NORTH, J. } *In re* THE STANDARD PORTLAND
1890. } CEMENT COMPANY.
April 26. }

*Company — Winding-up — Petition by
Company — Second Petition by Creditor
with Notice — Costs.*

A creditor who presents a petition to wind up, with notice that a prior petition has been presented by the company, will have his petition dismissed with costs as against the company, notwithstanding that his petition has been advertised first.

Petition.

On the 2nd of April, 1890, the above company presented a petition to be wound up.

On the 3rd of April, 1890, Messrs. Martin & Baker, creditors of the company, presented a second winding-up petition. The second petition was presented with notice of the first petition. On the 4th of April, 1890, the second petition was advertised in the usual way; and on the 8th of April the usual advertisement of the first petition appeared.

Emden, for the first petition, asked to have the usual order made on his petition: and, as the second petition was presented with notice of the first petition, that the second petition might be dismissed as against the company, with costs.

Stallard, for the second petition.—I ask to have one order made on both petitions. My petition was advertised first, and “the advertisement, not the presentation of the petition, is the test of the priority of the proceedings” (1).

Swinfen Eady, for a large creditor.—Under the present practice, the second petition could not have been presented without notice of the one already on the file. The second petitioners, therefore, presented their petition at their own risk as to costs.

Dunham, for another creditor, referred to *The Wholesale Grocery Company* (2), before North, J., on the 14th of March, 1887.

NORTH, J.—I must dismiss this petition

(1) Buckley on the Companies Acts (5th ed.), 611.

(2) 31 Solicitors’ Journal, 326.

(1) 46 Law J. Rep. Chanc. 728; Law Rep. 5 Ch. D. 511.

(2) 49 Law J. Rep. Chanc. 295; Law Rep. 14 Ch. D. 152.

In re Standard Portland Cement Co.

with costs as against the company, because it was presented upon the chance of the first petition not going on. If the company had dropped their petition, the second petitioners would have had the benefit of their own petition. But, as the company did not drop their petition, I do not see why the costs of the second petition should be borne by the company.

As regards the creditors, I dismiss the second petition without costs. They will get their costs of appearance on the first petition. The usual order for a compulsory winding-up will be made on the first petition. The second petition will be dismissed with costs as against the company; but without costs as against all the other parties appearing on the first petition.

Solicitors—Chinery, Aldridge & Co., for first petition; Martin & Baker, for second petition; Nash, Field & Withers, O. F. Leighton, and Nelson, Barr & Nelson, for creditors.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
LINDLEY, L.J. } *In re THE UXBRIDGE AND*
LOPES, L.J. } *RICKMANSWORTH RAIL-*
1890. } *WAY ACTS.*
Jan. 18, 20, 25.

Railway Company—Abandonment—Winding-up Petition—Parliamentary Deposit—Notice to treat—Exercise of Compulsory Powers.

A railway company was incorporated by Act of Parliament in 1881, a section of which provided that if the company did not complete and open the railway before the time fixed, then the deposit money, or so much thereof as might not have been required for certain specified purposes, should be forfeited, &c., or, "in the discretion of the Chancery Division, if the company is insolvent, and has been ordered to be wound up, shall wholly or in part be paid or transferred to the liquidator of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors." An Abandonment Act was passed in 1888 which provided (inter alia) that forthwith, after the passing of the Act, the company

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should proceed to wind up their affairs, and pay, satisfy, and discharge all their debts, liabilities, and engagements, and that when the debts of the company were discharged and the affairs of the company wound up the company should be dissolved. Neither in 1881 nor 1888 was there any Act or procedure in existence under which a railway company, incorporated after 1867, could be wound up:—Held, that the above provisions of the Act of 1888, although not such as to enable the company or a creditor to present a petition for the winding-up of the company under the Act of 1862, nevertheless operated as a legislative order to wind up the company, and entitled creditors to the protection which they would have had, had the company been wound up under the Companies Act and a liquidator appointed.

A mere notice to treat served by a railway company on landowners, and not followed up by any other action in consequence of such notice, is not an exercise of compulsory powers, although a necessary step towards the exercise of such powers; and a landowner who has received such a notice is not thereby entitled to be paid compensation out of a Parliamentary deposit, in priority to other creditors, as a person "subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company."

A Parliamentary deposit forms no part of the assets of the company.

Decision of STIRLING, J., reversed.

Guest v. The Poole and Bournemouth Railway Company (39 Law J. Rep. C.P. 329; Law Rep. 5 C.P. 553) approved.

The Uxbridge and Rickmansworth Railway Company was incorporated in 1881 by an Act of Parliament (44 & 45 Vict. c. lxxv.), which, after reciting the payment into Court of a Parliamentary deposit of 5,838*l.* Consolidated Three per Cent. Annuities under the provisions of 9 Vict. c. 20, enacted by section 34 as follows:—

"Notwithstanding anything contained in the said Act (9 Vict. c. 20), the said deposit fund shall not be paid or transferred to or on the application of the persons or the majority of the persons named in the warrant or order issued in

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pursuance of the said Act, or the survivors or survivor of them (which persons, majority of persons, survivors or survivor as the case may be, are, or is, in this Act intended by the expression 'the depositors'), unless the company shall, previously to the expiration of the period limited by this Act for completion of the railway, open the same for the public conveyance of passengers."

Section 35: "If the company do not, previously to the expiration of the period limited for the completion of the railway, complete and open the same for the public conveyance of passengers, then and in every such case the deposit fund, or as much thereof as shall not have been paid to the depositors, shall be applicable, and, after due notice in the *London Gazette*, shall be applied towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the railway or any portion thereof, or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act, and for which injury or loss no compensation, or inadequate compensation, has been paid, and shall be distributed in satisfaction of such compensation as aforesaid in such manner and in such proportions as to the Chancery Division of the High Court of Justice in England may seem fit; and if no such compensation is payable, or if a portion of the deposit fund has been found sufficient to satisfy all just claims in respect of such compensation, then the deposit fund, or such portion thereof as may not be required as aforesaid, shall either be forfeited to her Majesty, and accordingly be paid or transferred to or for the account of her Majesty's Exchequer in such manner as the said Chancery Division thinks fit to order, . . . or, in the discretion of the said Chancery Division, if the company is insolvent and has been ordered to be wound up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver, or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof: Provided, that until the deposit fund has been paid to the

depositors, or has become otherwise applicable as hereinbefore mentioned, any interest or dividends accruing thereon shall from time to time, and as often as the same shall become payable, be paid to or on the application of the depositors."

By an Act passed in 1886 the time for completing the works and for exercising the compulsory powers was extended. The railway was, however, never completed or opened for use, and in 1888 an Act for the abandonment of the railway was passed—the Uxbridge and Rickmansworth Railway Abandonment Act (51 Vict. c. x.).

The following are the material sections:—

Section 3: "The abandonment by the company, under the authority of this Act, of the railways shall not prejudice or affect the right of the owner or occupier of any land to receive compensation for any damage occasioned by the entry of the company on such land for the purpose of surveying and taking levels, or probing or boring to ascertain the nature of the soil, or setting out the lines of railways, and shall not prejudice or affect the right of the owner or occupier of any land which may have been temporarily occupied by the company to receive compensation for such temporary occupation, or for any loss, damage, or injury which may have been sustained by such owner or occupier by reason thereof, or of the exercise, as regards such land, of any of the powers contained in the Railways Clauses Consolidation Act, 1845, or the Act of 1881, or the Act of 1886."

Section 4: "Where before the passing of this Act any contract has been entered into, or notice given, by the company for the purchasing of any land for the purposes of or in relation to any portion of the railways or works authorised to be abandoned by this Act, the company shall be released from all liability to purchase, or to complete the purchase, of any such lands, but, notwithstanding, full compensation shall be made by the company to the owners and occupiers, or other persons interested in such lands, for all injury or damage sustained by them respectively by reason of the purchase not being completed pursuant to the contract or notice; and the amount and application of the compensation shall be determined in man-

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ner provided by the Lands Clauses Consolidation Act, 1845, as amended by any subsequent Act, for determining the amount and application of compensation paid for lands taken under the provisions thereof."

Section 5: "Subject to the provisions of this Act and of section 35 of the Act of 1881, with respect to compensation to landowners and other persons injured, and for the protection of creditors, the High Court of Justice may, and shall, at any time after the passing of this Act, on application by the depositors mentioned in section 34 of the Act of 1881, order that the sum of 5,233*l*. Consolidated Three per Cent. Annuities mentioned in the said section 34 of the Act of 1881, or any other stocks or funds in which the same may have been invested, and the interest or dividends thereon, shall be paid or transferred to the depositors or as they may appoint in their behalf."

Section 6: "Forthwith, after the passing of this Act, the company shall proceed to wind up their affairs, and shall pay, satisfy, and discharge all their debts, liabilities, and engagements."

Section 7: "When all the debts, liabilities, and engagements of the company are paid, satisfied, or discharged, and the affairs of the company are wound up, the company shall be by this Act dissolved, and shall thereafter wholly cease to exist, and the Act of 1881 and the Act of 1886 shall be by this Act repealed."

Under the Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), by section 1, it was provided "that if any company authorised by Act of Parliament, heretofore passed, to make a railway, desire that the making and carrying on of such railway, or some part thereof, whether commenced or not, be abandoned, such company may . . . make application in writing to the Commissioners of Railways (1), setting forth the particulars of the railway, or portion of the railway, desired to be abandoned by them, and the grounds upon which such application is made."

By section 15, the Commissioners, upon proof of notice, and after the expiration of the time for hearing objections, "may, if they think fit, and upon such terms and conditions as they think fit, by warrant under their seal and signed, &c., authorise

the abandonment of the railway, or portion of the railway, described in such warrant."

Section 31: "Where any such warrant as aforesaid shall have been granted for the abandonment of the whole railway of any railway company in England or Ireland, any shareholder of such company may present a petition under the Joint-Stock Companies Winding-up Act, 1848, or any Act for the amendment of such Act, for the winding-up of the affairs of such company under the said Act, and for that purpose the railway company whose railway is so authorised to be abandoned shall, if the Court shall think fit so to order (notwithstanding anything to the contrary thereof in the said Joint-Stock Companies Winding-up Act or in the Joint-Stock Companies Winding-up Amendment Act, 1849), be deemed to be a company to which the said Act applies."

By the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 31, it is enacted: The Abandonment of Railways Act, 1850, shall extend and apply to all companies authorised to make railways by Act of Parliament passed before the present session, subject and according to the following provisions:—

"(1) Section 31 of that Act shall be read and have effect as if the Companies Act, 1862, were referred to therein instead of the Joint-Stock Companies Winding-up Act, 1848, or any Act amending the same.

"(3) Nothing in the said Act of 1850 or this Act shall be deemed to make it obligatory on the Board of Trade to authorise the abandonment of a railway, or part of a railway, on any application in that behalf; and the Board of Trade shall not authorise such abandonment in any case unless it appears to them just and expedient so to do; and the Board of Trade may, if they think fit, refuse in any case to authorise such abandonment, except on condition of the money deposited as security for the completion of the railway or the stock . . . being applied as part of the assets of the company."

By the Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), s. 4, it was enacted: "Where a warrant has been granted under the principal Acts (2) for

(1) Now the Board of Trade.

(2) Defined by section 3, so far as it extends

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the abandonment of the whole railway of any railway company, a petition for winding up the affairs of such company may be presented under the Companies Acts, 1862 and 1867, by the company, or by any person who under the last-mentioned Acts is authorised to present a petition for winding up a company, . . . and for that purpose the railway company whose railway is so authorised to be abandoned shall be deemed to be an unregistered company, which may be wound up under the Companies Acts, 1862 and 1867; and the provisions of the principal Acts which remain in force relating to winding-up shall be construed as if the Companies Acts, 1862 and 1867, and the winding-up under this section, were therein referred to."

And by section 10: "Section 31 (*inter alia*) of the Abandonment of Railways Act, 1850, and so much of the Railway Companies Act, 1867, as amends it, is repealed, without prejudice to anything already done thereunder."

Apart from the provisions of the Abandonment of Railways Act, 1869, there is no power in the Companies Act, 1862, to wind up a railway company incorporated by Act of Parliament, such companies being specially excepted by section 199 of the Act of 1862.

The Board of Trade had for some time previous to 1881 declined to grant a warrant of abandonment on the ground that the provisions of the Abandonment Acts applied only to the case of railways authorised to be constructed by an Act of Parliament passed prior to the Railway Companies Act, 1867; and consequently, when the Act of 1881 was passed, there was no existing Act under which a railway company incorporated by Act of Parliament since 1867 could be wound up.

The assets of the company consisted only of a sum of 5*s*.

Several claims were made against the deposit fund. The first claimant, McIntyre, had been engineer to the company, and had obtained a judgment against the company for a sum of 2,144*l*. 6*s*. 2*d*. in that capacity.

The other claimants, Way, Grainge, to England or Ireland, as "The Abandonment of Railways Act, 1850, and the Railway Companies Act, 1867."

and Harman, were landowners. Way had entered into an agreement with the company for the sale to them of land belonging to him, and had incurred costs.

Grainge and Harman were landowners who had received from the company notice to treat under the Lands Clauses Consolidation Act, 1845; but in no case had any of the lands been actually taken or injuriously affected.

Stirling, J., dismissed the application of all the claimants.

The claimants appealed by separate appeals.

G. Hastings, Q.C., and Farwell, for McIntyre.—There is no fund out of which any one can get anything except the deposit; and we submit that, by the joint operation of sections 34 and 35 of the Act of 1881, and section 5 of the Abandonment Act of 1888, the appellant is entitled to be paid out of the deposit the amount of his judgment debt.

The Legislature have, by the Act of 1888, provided a statutory winding-up. These railway companies are excluded from the operation of the Companies Act, 1862, and the jurisdiction of winding up these companies was given by the General Abandonment Act, 1850, s. 31, upon the warrant to be issued by the Board of Trade; and the Railway Companies Act, 1867, extends the Act of 1850, by section 31, to railways authorised before the session in which the Act of 1867 was passed. Then the Abandonment Act, 1869, refers only to companies authorised to be wound up under the Acts of 1850 and 1867, and has no reference to the present case.

The Board of Trade have now for some time refused to grant the necessary warrant to enable the presentation of a petition—*In re The Birmingham and Lichfield Junction Railway Company* (3). The company could not be wound up in the technical sense by any existing Act in 1881; so when the Legislature in section 35 of the Act of 1881 contemplated a future winding-up by the words "and has been ordered to be wound up," it could only have contemplated the enactment in a subsequent Act of Abandonment of some provision for winding it up. This is in accordance with the principle of

(3) Law Rep. 18 Ch. D. 155.

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statutory interpretation—*Maxwell on Statutes* (2nd ed.), p. 48. When there are two Acts relating to the same subject-matter, not only is the later Act construed by the light of the earlier, but the later sometimes elucidates the meaning of the earlier. The Legislature, by section 6 of the Act of 1888, does, in effect, order the company to be wound up. The reference to the "protection of creditors" in section 5 shews their intention that the creditors shall have the security of what is practically a winding-up order, and the Act does not say "by order of the Court." The Court could not do it under any then existing Act, but only under the authority of some subsequent Act.

Stirling, J., relied on the decision of Jessel, M.R., in *In re The Birmingham and Lichfield Junction Railway Company* (3); but that case was very different from this—there was no Abandonment Act providing for a winding-up.

Hastings, Q.C., and *Gaselee*, for Way.

S. B. L. Druce, for Grainge. — This claimant, having received notice, can claim against the deposit in priority to general creditors under section 35 of the Act of 1881, as having been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company. He has been put to costs in consulting a surveyor and solicitor. A notice to treat is, as a general rule, an exercise of the compulsory powers conferred on a company—*The Marquis of Salisbury v. The Great Northern Railway Company* (4) and *The Tiverton and North Devon Railway Company v. Loosmore* (5)—unless where followed by an agreement—*Guest v. The Poole and Bournemouth Railway Company* (6). But the taking under compulsory powers means a taking otherwise than by agreement; and there was no agreement in the present case.

G. Woods, for Harman.

Beale, Q.C., and *Ingle Joyce*, for the depositors.—The Parliamentary deposit is not assets of the company. A creditor

has no claim against the deposit except by statute. In order to claim against it in this case he must bring himself under section 35 of the Act of 1881. But the deposit is only to be applied as assets if the company has been ordered to be wound up. The winding-up there contemplated is a compulsory winding-up in the ordinary way by the Chancery Division. "Ordered to be wound up" is the phrase used throughout the Companies Acts, 1862, to denote such compulsory winding-up, and it does not include a voluntary winding-up. The Act of 1888 does not make the deposit available for general creditors, and does not order the company to be wound up. If that was the intention of the Legislature, nothing could have been easier than to have said so. There has been no order to wind up within the meaning of section 35 of the Act of 1881.

They referred to *In re The Bradford Tramways Company* (7), *In re The Potteries, Shrewsbury, and North Wales Railway Company* (8), *In re The Ruthin and Cerrig-y-Druidion Railway Act* (9), *In re The Lowestoft, Yarmouth, and Southwold Tramways Company* (10), and *In re The Birmingham and Lichfield Junction Railway Company* (11).

Graham Hastings, Q.C., and *S. B. L. Druce* replied.

Cur. adv. vult.

COTTON, L.J.—These are four appeals, which raise, in a somewhat different way as to one or two of them, the question as to what is to be done with regard to the fund now in Court, which was deposited under the Parliamentary rules when application was made for the Act to incorporate the Uxbridge and Rickmansworth Railway Company. The railway has been abandoned, and the value of the company's assets seems to be, or to have been, 5s. only; but with that we have not to deal.

(7) 46 Law J. Rep. Chanc. 89; Law Rep. 4 Ch. D. 18.

(8) 53 Law J. Rep. Chanc. 556; Law Rep. 25 Ch. D. 251.

(9) 56 Law J. Rep. Chanc. 30; Law Rep. 32 Ch. D. 438.

(10) 46 Law J. Rep. Chanc. 393; Law Rep. 6 Ch. D. 484.

(11) 54 Law J. Rep. Chanc. 580; Law Rep. 28 Ch. D. 652.

(4) 17 Q.B. Rep. 840; 21 Law J. Rep. Q.B. 185.

(5) 53 Law J. Rep. Chanc. 812; Law Rep. 9 App. Cas. 480.

(6) 39 Law J. Rep. C.P. 329; Law Rep. 5 C.P. 553.

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In the year 1888 an Act was obtained for the abandonment of the railway. The question turns really on section 35 of the incorporating Act, and certain sections of the Act of 1888. Under the Act of 1881 there was a Parliamentary deposit, which is referred to in section 34, and section 35 directed what was to be done with that fund in the event of the company not carrying its undertaking into execution. That deposit fund was not in any way assets of the company, but was only a deposit required to be made when application was made to Parliament to give this company Parliamentary powers. Prior to the passing of the Act of 1881 there had been in operation an Act of Parliament, the Act of 1850, enabling applications for a winding-up order to be made with the sanction of the Railway Commissioners, and subsequently of the Board of Trade, against railway companies which had been abandoned or had come to grief; but before the Act of 1881 was passed the Board of Trade had come to the conclusion that they would not grant the necessary certificate to enable application to be made for a winding-up order by petition as regards companies which were formed after 1867, I think, or at any rate before the Act of 1881. Whether they were right or wrong we have not to consider, but in fact it was known at the time of the Act of 1881 passing, and still remained the fact at the time the Act of 1888 was passed, that the Board of Trade had come to that conclusion. I think I ought to mention that an Act had been passed in 1869 with reference to the abandonment of a railway which had given special powers, when a warrant had been granted by the Board of Trade, to apply to the Court of Chancery in the ordinary way by petition for a winding-up order against a railway company.

Now what we have to say is whether or not, independently of the claim in terms given to compensate landowners by section 35, any claim can be made as against this deposit. Section 5 of the Act of 1888, I think one ought to read: "Subject to the provisions of this Act and of section 35 of the Act of 1881, with respect to compensation to landowners and other persons injured, and for the protection of creditors, the High Court of Justice may,

and shall, at any time after the passing of this Act, on application by the depositors mentioned in section 34 of the Act of 1881," order that the sum be handed over to them. Then upon such order being made the fund shall be handed to them. This Act does interfere in some way with the provisions of section 35, because section 35, after saying that out of the fund provision should be made to pay compensation to landowners injured by the action taken under the compulsory powers, did direct an alternative—namely, that what remained after making provision for that compensation should either be forfeited to her Majesty, or, at the option of the Chancery Division, if the company were insolvent and had been ordered to be wound up, or a receiver had been appointed, should wholly or in part be paid or transferred to such receiver, or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof. Unless, therefore, there is an order to wind up, or a receiver has been appointed, the deposit, or so much thereof as is not required for compensation for landowners, is not applicable as assets of the company, and creditors can have no claims as against such deposit, although they are creditors of the company.

Then practically it comes to this: what ought we to say as to this Act of 1888? Does it contain a provision ordering the company to be wound up? Undoubtedly section 35 does contemplate a winding-up in the ordinary way by an order of the Court when an application is made under the winding-up Act, because there is a reference to the liquidator, and that points to some one being appointed under a winding-up order, in order to distribute the assets of the company. But is it confined to that? If we can find in the Act of 1888 that which ought to be counted as an order to wind up the company, although it is not that kind of order to wind up which is contemplated by section 35, we ought not to say that that does not come within the provisions of this Act as an order to wind up the company, enabling us to say that the company has been ordered to be wound up, and thereby deprive the creditors of that which *prima facie* Parliament intended to give them—

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namely, a claim against the deposit as assets of the company. I have already mentioned that section 5 does interfere with the claim of the Crown. I think Mr. Justice Stirling considered that that was not so; but undoubtedly it does, because when the provisions of the Act of 1888, and of section 35 of the other Act, for the protection of creditors have been complied with, then the Crown cannot apply at all for what remains of this fund, but the Court of Chancery may, and shall, order what remains of this fund, after paying compensation to the landowners, to be handed over to the depositors. There the depositors do get a benefit. Do they get that benefit without making provision for the creditors of the company? Here we have the words in section 35 with respect to compensation to landowners and other persons injured, and for the protection of creditors, and it is subject to that being duly performed that the depositors can claim. Section 5 contains a reference to the protection of the creditors, which of course means payment to them of that which, *prima facie*, section 35 of the Act of 1881 gives them, and then the depositors have a right to this fund; but it would be strange if, when Parliament knew at the time that without special legislation no petition could be presented under the Act of 1862 so as to get a winding-up order, there were not in this Act something which would enable them, without that petition being presented, and without any order being made under that petition equivalent to the winding-up of the company, to get that benefit. Then is not section 6 something which enables us and requires us to say that the company has been ordered to be wound up? "Forthwith after the passing of that Act the company shall proceed to wind up their affairs, and shall pay, satisfy, and discharge all their debts, liabilities, and engagements."

That section would not enable the company or a creditor of the company to present a petition under the Act of 1862 for obtaining the winding-up order which is pointed at, and *prima facie* was meant, by section 35; but, in my opinion, that is a section which enables creditors of the company to say that the company has

been ordered to be wound up. It is very true it does not say that the company shall be wound up; but it does say that the company shall proceed to wind up their affairs, and shall pay and satisfy and discharge all their debts, liabilities, and engagements. That is not in terms that the company shall be wound up, but, in my opinion, it would be too narrow a construction to put upon this section to make a distinction between what this would have been if it were an order or an enactment for the company to be wound up, and say, "No, it is not an order for the company to be wound up, it is only that the company shall wind up its affairs." It orders the company to do that which, if it were wound up under the Act of 1862 and a liquidator were appointed, would be done by the liquidator. But here it is left to the liquidators of the company to do that which they are ordered to do—that is, what would have to be done if the company were wound up by a common order. In my opinion, having regard to the presumable intention of the Legislature at the time this Act was passed, when they recognise as still existing, in section 35 of the Act of 1881, something for the protection of creditors, we ought to give to this section 6 the meaning which I give to it—that there is a protection for the creditors which only exists in section 35 if the company is ordered to be wound up, as has been provided for by section 6. One must remember that at this time, without special Parliamentary authority, there could be no winding-up under the Act of 1862 by any order, because, as I say, the Board of Trade had refused to give, as regards companies incorporated since 1867, as this company was, any such certificate as would enable an application for that purpose to be made. In my opinion, therefore, the proper conclusion to arrive at is not to force the meaning of this section at all, but to give to it what, under the circumstances known to Parliament, is a proper and reasonable construction—that is, to treat it as an order by Parliament, and not by the Court of Chancery, that this company should be wound up. Therefore, in my opinion, the provisions of the Acts of 1881 and 1888 do apply, and the protec-

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tion for the creditors exists which would not have existed if there had been no order to wind up. It does exist here, because, in my opinion, the company has been ordered to be wound up, and then there is power to the Court of Chancery, which I think it ought to exercise, of ordering that this fund should be applied in satisfaction of the creditors of the railway company.

Of course, there will be a question here arising as to the different claims which we have now before us, because some of them, it is said, will have priority as regards others. As I stated before, compensation under section 35 to landowners must be paid before the fund is so cleared that it may, in the discretion of the Court of Chancery under that section, be either handed over to the Crown or be applied in payment of creditors.

Now let us look at these different claims. The first is McIntyre's claim. He was simply a creditor of the company, and not in any way a landowner. He had obtained judgment, and it is not necessary for us in that case to say anything about a meritorious creditor. He was a creditor who obtained judgment against the company. He has now no claim under the first part of section 35, but, in my opinion, he will come in under the words with regard to other creditors against this fund, and will take rateably with other creditors out of the residue of this fund, after providing for such compensation as landowners are entitled to.

Then we come to the other claimants, and I think I may say practically that the other claimants appear to be creditors of the company in respect of any loss or damage that they may have sustained, either by reason of the contracts entered into by the company with them, or in consequence of any notice to treat which has been given to them. I need not read the words, but section 4 of the Act of 1888 does say that compensation is to be made "to the owners and occupiers or other persons interested in land, for injury or damage sustained by them by reason of the purchase not being completed pursuant to the contract or notice." Notice to treat, that must mean; therefore they must have a claim as creditors in respect

of any loss they may have sustained in consequence of the contract not being completed, or in consequence of notice to treat having been served upon them. But it was urged that they were entitled to something more than that, because they say, "We come under the first part of section 35, which gives us a right to be paid in priority out of this fund before it comes to be divided between the creditors of the company." The only thing they rely upon is really this notice to treat, because nothing was done in exercise of the compulsory powers, if there was an exercise of compulsory powers by the railway company, beyond notice to treat. In my opinion it cannot be said that notice to treat is an exercise of the compulsory powers. It was argued that it was not necessary that there should be any exercise of compulsory powers. These are the words: "subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company." I cannot take that view. The mere fact that compulsory powers have been conferred upon the company does not, I think, fall within what is here referred to. Here, in the first place, we have compensation given to any landowners or other persons whose property has been interfered with, or otherwise rendered less valuable by commencement, construction, or abandonment of the railway, or any portion thereof. That does not mean because compulsory powers have been granted, but because there has been an exercise of them; and I think from what follows it would be wrong to say that "in consequence of the compulsory powers" means simply the existence of those compulsory powers. If that was so, directly the Act was passed powers would be granted, though they could not be exercised until the capital had been subscribed. In my opinion it would be quite wrong to hold, if there were found any loss or damage incurred, that a creditor could come and say, "this loss was thrown upon me because the Act of Parliament has been passed." That is not it. In my opinion there must be some exercise of the compulsory powers to enable persons to come in under section 35. One must remember, as I have said before, that

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this deposit fund is in no way an asset of the company. It is only that certain rights are given to certain persons as against the depositors, and against the fund which they deposit. Then, has there been an exercise of the compulsory powers? In my opinion, no. It is very true the power to give notice to treat is included in that group of clauses of the Lands Clauses Consolidation Act, 1845, which are headed, "With respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows." Then there follows a notice to treat. But although brought within that group of clauses, there may never be any step taken as regards compulsory powers, because if the company have not got their capital subscribed they cannot exercise any compulsory powers, and the notice to treat, as was the case in one instance here, may be merely the beginning of an agreement with the landowner to ascertain whether he is willing to make the contract with the railway company, saying, "I want that land; will you sell it me?" In my opinion it cannot be said that that alone is the exercise of compulsory powers. We are not deciding that for the first time, because we have a decision which was given in 1870. It was decided in the case of *Guest v. The Poole and Bournemouth Railway Company* (6) that notice to treat was not an exercise of the compulsory powers. It was said that that was not necessary to the decision of the case, that it was only that the company could not give the notice; but all the Judges—and they were Judges of considerable authority—in their judgment say that this was not an exercise of the compulsory powers. And in the events which have happened it is shewn not to have been an exercise of the compulsory powers at the beginning. It is very true it is a step towards the compulsory powers—that is to say, the compulsory power as regards the purchase of land cannot be exercised until the notice to treat has been given, but it cannot be exercised unless the capital has been subscribed. Subscribing the capital is not an exercise of the compulsory powers, although it is a necessary step towards the exercise of those powers; and just so a notice to treat is not an

exercise of the compulsory powers, though it is a step that must be taken before the compulsory powers can be exercised and put into force. So, in my opinion, all these persons here—the three landowner claimants—can only come in under section 4, so far as they can shew, as the judgment creditor, McIntyre, can shew, that they have suffered. He is simply a creditor, and they can only come in as creditors if they can shew that they have suffered loss in consequence of the notice to treat, or in consequence of an agreement to purchase not having been completed by the railway company.

I differ from the judgment of Mr. Justice Stirling and the opinion which he has expressed. In my opinion, what I have said is the right construction of these Acts of Parliament. It is very true—and I ought to have mentioned it before—that it would have been very much plainer if the Legislature in 1888 had said, "after this any creditor or shareholder may present a petition without any certificate from the Board of Trade"; but Acts of Parliament are not always as plain as they might be, and the true construction of this Act is, in my opinion, what I have expressed.

I think, therefore, we ought to make a declaration to that effect; but letting all the persons come in—the judgment creditor and the others—the judgment creditor as a creditor of the company by reason of his judgment, the other persons as having a right, on shewing injury or damage under section 4, to become creditors of the company.

In my opinion, therefore, these appeals should succeed.

LINDLEY, L.J.—This case before us raises two questions—first, whether these claimants are to be paid out of the money which is in Court and represents what is called the Parliamentary deposit; and secondly, supposing they are, whether they or any of them are entitled to any priority of payment over each other or over the persons who have not made claims on the fund. Both those questions turn upon the construction of two Acts of Parliament, one of which, to say the least of it, is anything but clear. The Parliamentary deposit is a fund which does not

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belong to the company. The creditors of the company have no more right to be paid out of the deposit than any other creditors, except by Act of Parliament. There is no *a priori* right on the part of the creditors of the company to be paid out of money provided by the depositors, and they must look to the words of the statute or statutes upon which they rely to give them any claim at all upon that fund. The mere fact that they are creditors of the company will not do. That is not *ad rem*. The Acts before us, to which Lord Justice Cotton has adverted, do give the creditors of the company certain rights—and the question is, what rights. Under the first Act of 1881, the Parliamentary deposit is applicable in this way. First of all, those landowners and persons who had really sustained injury by reason of the compulsory powers or the works done by the company were entitled to be paid in priority to everybody else. That is under section 35, which I will not read at present. Then, subject to that, the rest of the fund was dealt with in this way. It was in the discretion of the Court to hand it over to the Crown, but if the Court was of opinion that it would not be just to hand it over to the Crown, then the Court could, if the company was insolvent and ordered to be wound up, apply the deposit in payment of the creditors of the company. The governing idea there was this, that subject to the payment of those who were entitled to priority, the balance of the fund was to be handed over to the Crown or to the creditors of the company if the company was insolvent. That is the governing idea. The language used is, “insolvent or ordered to be wound up,” one method of disposing of the assets of insolvent companies being by a winding-up. But there can be no question that when those words were used what was contemplated would be an order to wind up in the ordinary sense of that expression. There was only one sort of order familiar to lawyers or to draughtsmen of Acts of Parliament, and that was an order to be made by the Chancery Division under the Companies Act, 1862. It was overlooked that such an order could not be made without a special Act of Parliament, and when we come to 1888, when the Legis-

lature passed an Act enabling this railway company to abandon this undertaking, the same thing was overlooked. Now in 1888 the position of affairs was this. The railway company was not a registered company under the Act of 1862—whether it could be is well known to be one of those thorny points which have not been decided. It was not registered anyhow, and, not being registered, there was no possible procedure by which it could be wound up at all. It could not present a petition under the Companies Act, 1862; no creditor could do it—it could not be done. Now in 1888 the Legislature was in this position. It intended the affairs of this company to be wound up, but overlooked the fact that it could not be done. It ordered the company to proceed to wind up its affairs. Now what does that mean? We are driven into this corner. We must either say that this means nothing, or that it is a legislative order to wind up substituted for the order contained in section 35. There is no alternative. We must either say the Act of Parliament is moonshine, and utterly useless, and not workable, or we must say this is a statutory order to wind up, substituted for an order under the Act of 1862. That, I do not hesitate to say under those circumstances, is the true construction and meaning of it. In other words, when we come to look at these two Acts of Parliament and work them together, as we must, we must hold that this company has been ordered to be wound up. It is insolvent enough in all conscience, and the time has come, and the contingency has arrived, for paying the creditors of the company out of the deposit.

As I understand the judgment of Mr. Justice Stirling, he seemed to be under the impression that it was still in the discretion of the Judge to hand the balance of this fund, after paying those who were entitled in priority to it, over to the Crown. I cannot say that is so on reading the section, because section 5 of the Act of 1888 does not merely say, “subject to the provisions of section 35 of the Act of 1881”; but it says, “subject to the provisions of that section, with respect to compensation to landowners and other persons injured, and for the protection of

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creditors," this fund shall go to the depositors. That seems to me to exclude the Crown entirely.

Therefore, the net result seems to me to be this, that this Parliamentary deposit is to be applied in the first place in payment of those persons who are entitled to priority under section 35 of the Act of 1881, and, subject to that, it goes to the creditors of the company. That lets in the whole of these creditors. They were all excluded by Mr. Justice Stirling; but I am of opinion that they should all come in.

Now I pass to the second question, whether any of them are entitled to priority. They are creditors of the company, and are entitled to come in against this particular fund, which is not an asset of the company, by the joint operation of sections 4 and 5 of the Act of 1888, to which Lord Justice Cotton has alluded. But for those sections they would not come in at all. Now, are they entitled to priority? Section 4 gives them no title at all to priority; these sections give them title to be paid as creditors *pari passu* with other creditors. To make out their claim to priority they must make out that they are amongst the class of people entitled to priority under section 35 of the Act of 1881. The persons so entitled are formed into two classes—first, all landowners and other persons whose property has been interfered with or otherwise rendered of less value by the commencement, construction, or abandonment of the railway. None of these claimants come under that clause. But the three landowners may come under the next class, who are thus described, "or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act, and for which injury or loss no compensation, or inadequate compensation, has been paid." They say they come under that, but I do not think they do.

In the first place, the language is peculiar. I think it is rather forcing the words to say that any of these gentlemen have been "subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the com-

pany." I think that is straining the language. But when we look at the interpretation which has been put upon the expression "compulsory powers" in *Guest's Case* (6), and acted upon invariably and without hesitation ever since, it appears to me that these gentlemen are excluded from the benefit conferred upon the second class of people by the section, and I do not think they can make out satisfactorily that they do come within the words "persons subjected to injury and loss in consequence of the compulsory powers of taking property conferred upon the company by this Act."

That being so, the net result is this. All these claimants are entitled to claim against this fund as creditors, but subject to the prior right of such persons, if any, as may be entitled to priority under section 35.

LOPES, L.J.—I have had an opportunity of talking this case over with the rest of the Court. I entirely agree with what has been said, and I have only one observation to make, which is this—it is an observation with regard to priority of landowners: in my opinion, even if notice to treat is an exercise of the compulsory powers—which I do not think it is—I do not think any injury or loss has accrued to any of these claimants in consequence of the notice to treat. I quite agree with the rest of the Court that this appeal should be allowed.

The Court made one order on the four appeals as follows:—

Discharge the orders of the Court below. Declare that, subject to the payment of the costs hereinafter directed to be taxed, the funds in Court are to be applied in the first place in payment of compensations to the landowners and others who shall establish loss or injury under section 35 of the Act of 1881, by reason of the abandonment of the railway; and that the surplus of the said funds is to be applied in payment *pari passu* of the creditors of the company.

Declare that MacIntyre, as a creditor of the company, is entitled, and that the three landowner claimants will be entitled on proving injury or damage under section 4 of the Act of 1888, to rank as creditors

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of the company, and to be paid out of the surplus of the said funds *pari passu* with the other creditors of the company.

Tax costs, &c.

Solicitors—Burchell & Co., Thompson & Groom, Gamlen & Burdett, agents for Woodbridge & Sons, Uxbridge, and Paterson & Sons, agents for W. Garner, Uxbridge, for appellants; Williamson, Hill & Co., for respondents.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
LINDLEY, L.J.
LOPES, L.J.
1890.
Feb. 13, 14.

In re DILLON.
DUFFIN v. DUFFIN.

Donatio Mortis Causa—Banker's Deposit Note—Money withdrawn upon presentation of Cheque—Form of Cheque indorsed on Note.

A banker's deposit note is a good subject of *donatio mortis causa*; nor is it the less so because it purports to be "not transferable," or because the depositor for the purpose of withdrawing the money is required by the bank to sign a cheque indorsed upon the note. The death of the donor before presentation of the cheque by the donee does not defeat the *donatio mortis causa*.

The principle according to which equity will not render its assistance in perfecting an incomplete voluntary gift has no application to a *donatio mortis causa*, and an instrument that does not pass by delivery may be the subject of a *donatio mortis causa*, and the executors of the donor will be considered as trustees for the donee for the purpose of giving effect to the gift.

Whether a cheque on a donor's own account can be a subject of *donatio mortis causa*, *quære*.

In re Mead; *Austin v. Mead* (50 Law J. Rep. Chanc. 30; Law Rep. 15 Ch. D. 651) distinguished.

Appeal from a decision of Kekewich, J., who held that the gift of a deposit receipt by the testator a few days before his death to the respondent Emma Duffin, his sister-in-law, was a good *donatio mortis causa*.

The deposit receipt was one given by the London and Westminster Bank for a

sum of 580*l.* lent by the testator, and was in the following form:—

London & Westminster Bank (Ld.),
"No. 374. 91 Westminster Bridge Road,
Lambeth, Aug. 25, 1886.
"580*l.*
"Received from Mr. Jas. Dillon, five hundred and eighty pounds sterling, to the credit of his deposit account.
"13*l.* 6 1
10 6
"For the London and Westminster Bank (Limited).

"A. F. E., *pro* Manager.
"Entered George Banks' account.

"This deposit receipt is not transferable. The amount is repayable on demand, but will bear no interest unless it remains undisturbed for one month. The rate of interest is subject to alteration, of which notice will be given by advertisement in the *Times* newspaper. When the money is withdrawn, or the interest paid, the depositor must sign the cheque on the back hereof, first affixing a penny draft stamp. If part only is withdrawn, a new receipt will be given for the balance."

On the back of the receipt was written a form as follows:—

"London, 18
"To the London and Westminster Bank (Limited).—Lambeth Branch.
"Pay to self or bearer [].

"580*l.* 0 0." [Stamp.]

The evidence given by Emma Duffin was to the effect that the testator was taken seriously ill on Wednesday, the 11th of January, 1888, and that she went to attend upon him. The testator then took out the deposit note from a chest which was in his room, and wrote the word "Bearer" on the indorsed cheque after the words "self or bearer," and underneath the words "Five hundred and eighty pounds and interest." He also wrote the date, and signed the cheque upon a penny stamp. He then handed over the receipt to Emma Duffin, saying, "Now, you understand, if I get well, you'll give it me back; and, if not, it will be all right." No other person was present at the interview; but one of the servants deposed that he had been sent out to buy a stamp at E. Duffin's request. The testator died on the following Saturday.

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The testator had made his will on the 9th of January, 1888, and appointed Francis Duffin, the said Emma Duffin, and Catherine Duffin, his executors. By that will he bequeathed to Emma Duffin a house in Walworth absolutely, and gave her a life annuity of 10*l*.

Some of the persons interested under the will disputed the gift, and an originating summons was taken out by one of the residuary legatees to have it decided whether there was a good *donatio mortis causa* to Emma Duffin of the deposit note and the money due upon it. On the 18th of March, 1889, Stirling, J., in chambers, made an order directing an enquiry whether the deposit note was effectually given to Emma Duffin as a *donatio mortis causa*, or whether the money secured thereby still formed part of the testator's estate; and it was directed that the evidence on the enquiry should be taken by affidavit, but cross-examination thereon to be in Court before the Judge.

The enquiry was adjourned into Court before Kekewich, J., and Emma Duffin and some other persons who had made affidavits on her behalf were cross-examined. No evidence was given on either side as to the practice of the bank or other banks in indorsing their deposit notes in this form, or the reason for so doing.

Kekewich, J., held, upon the evidence, that the statement of Emma Duffin was correct, and decided that the deposit note was effectually given as a *donatio mortis causa*.

Some of the beneficiaries appealed.

Cozens-Hardy, Q.C., and *Methold*, for the appellants.—We submit that this deposit note was not a good subject of a *donatio mortis causa*. The receipt was not transferable, and the money could only be withdrawn upon production of the cheque indorsed on the note—which fulfils every condition of a cheque—and which not being presented during the life of the testator is of no effect—*Hewitt v. Kays* (1) and *Beak v. Beak* (2), in the latter of

(1) 37 Law J. Rep. Chanc. 633; Law Rep. 6 Eq. 198.

(2) 41 Law J. Rep. Chanc. 470; Law Rep. 13 Eq. 489.

which cases the gift of the pass-book in addition to the cheque made no difference. In *Clement v. Cheesman* (3), Chitty, J., takes the same view, but draws the distinction between a cheque drawn by a man on his own bank, and not presented in his lifetime, which is not a good subject of *donatio mortis causa*, and a cheque drawn by another person to the order of the donor, and which would pass as the donor's own property. The authorities which have held that moneys due on a deposit note may be a subject of a *donatio mortis causa* are all of them decisions of Courts of first instance, and we ask this Court to overrule them—*Amies v. Witt* (4), *Moore v. Moore* (5), *In re Taylor*; *Taylor v. Taylor* (6), and *In re Farman*; *Farman v. Smith* (7). In the first case no reason is given for the decision; and in the second, Hall, V.C., merely followed the decision of a Court of co-ordinate jurisdiction, and in none of the cases is the form of note given. But in *Austin v. Mead* (8), which was the case of a deposit note in this very bank, Fry, J., differing from those cases, held that the gift of a part of the fund on deposit by a cheque was not a good *donatio mortis causa*. The deposit note here, as in that case, is not a simple deposit note; and whatever may be the law as to simple deposit notes, when, as here, the moneys can only be withdrawn on a cheque, there is no good *donatio mortis causa*. In *Moore v. Darton* (9) the money was not payable on demand as here, but only after six months' notice—and the donor had in that case handed over to the donee all documents, and done all she could.

Then, further, the evidence of the claimant is not corroborated.

Warmington, Q.C., and *Bramwell Davis*, for the respondent.—A deposit note is a good subject-matter of *donatio mortis causa*, and it is immaterial whether the note has any such indorsement on it as the

(3) 54 Law J. Rep. Chanc. 158; Law Rep. 27 Ch. D. 631.

(4) 33 Beav. 619.

(5) 43 Law J. Rep. Chanc. 617; Law Rep. 18 Eq. 474.

(6) 56 Law J. Rep. Chanc. 597.

(7) 57 Law J. Rep. Chanc. 637.

(8) 50 Law J. Rep. Chanc. 30; Law Rep. 15 Ch. D. 651.

(9) 4 De Gex & Sm. 517; 20 Law J. Rep. Chanc. 626.

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note in this case. The real thing given is the deposit note, a receipt for money by the bank, with a promise to pay, and payment of which could be enforced. The provision with regard to the cheque merely points out a particular method in which payment of the deposited money may be asked, and is introduced as a protection to the bank, to enable the bank to have the receipt of the holder; but the particular direction cannot alter the character of the deposit. There can be no rational distinction between a deposit note of a bank, and an unendorsed promissory note or bill of exchange given by a third person—or an unendorsed cheque drawn in favour of the deceased, all of which have for years past been held to be good subjects of *donatio mortis causa*.

The case of *Cassidy v. The Belfast Banking Company* (10), although not binding on this Court, is a case on all fours with the present, and is a distinct authority in our favour; the deposit note in that case had the words "Not Transferable" indorsed on it, and Pales, C.B., points out that the bank could not by the use of this prevent the money of the depositor being assignable by him, or, in the absence of assignment, paid to his representatives. Other authorities are *Veal v. Veal* (11), following *Rankin v. Weguelin* (12), cases of unendorsed promissory notes and bills of exchange. It cannot now be said that to make a good *donatio mortis causa* the legal as well as the equitable interest must be transferred, because under the documents in the different cases—the mortgage, *Duffield v. Elwes* (13)—receipt, *Moore v. Darton* (9)—policy of assurance, *Amis v. Witt* (4)—although the legal title was not transferred, the gift was held a *donatio mortis causa*. It is only the death itself that makes the title complete, and is the reason why there cannot be a complete transfer. A *donatio mortis causa*, from the very nature of the thing, cannot be an out-and-out gift.

Austin v. Mead (8) s no authority

(10) 22 Law Rep. Ir. Exch. 68.

(11) 27 Beav. 303; 29 Law J. Rep. Chanc. 321.

(12) 27 Beav. 309; 29 Law J. Rep. Chanc. 323.

(13) 1 Bli. N.B. 497.

against us, because in that case there was not a gift of the deposit note or of the money secured by it, but only a direction by cheque to pay a certain sum out of the money deposited.

They also referred to *In re Hughes* (14).

Cozens-Hardy replied.

COTTON, L.J.—I will deal first with the point raised as to the evidence brought forward to substantiate the claim of the lady who claims to be entitled to this *donatio mortis causa*. The only witness who can speak to what took place when the deposit note was handed over is the lady herself, and if her story is correct there can be no doubt that the deceased did hand over to her the deposit note. Mr. Justice Kekewich relied on the accuracy of her statement. It is said she made a mistake as to the exact time the gift was made; but there is nothing more usual than for a person speaking with general accuracy, and on most points with complete accuracy, to make a slight mistake as to the time of some particular occurrence in a matter like this. In my opinion it would be wrong, when Mr. Justice Kekewich, who saw this lady and heard her evidence, believed her story, for us on the grounds put forward to treat her evidence as unreliable. Then it is said that her evidence was not corroborated, and that the Court will not establish a claim against the estate of a deceased person on the evidence of the claimant alone, unless it be corroborated. I do not think that this proposition is now law. Besides, in my opinion, there is corroboration here, in the sense that the document produced bears the signature of the deceased. For what possible reason should he have signed this just before his death unless he meant to give it to her? It was contended that she was his executrix, and that it was to enable her in that capacity to get the money more easily; but I think that could hardly have been the reason. In my opinion the circumstance strongly corroborated her evidence. If so, there was no doubt a *donatio mortis causa*, if this document was capable of being the subject of one.

In considering that question, I will first deal with the difference between the pre-

(14) 36 W.R. 821.

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sent case and other cases cited in argument. I was surprised to find that no evidence was brought forward on either side to shew what was the practice of the London and Westminster Bank and other banks which put a memorandum of this kind on their deposit notes, or why they put it there. In the absence of such evidence, I come to the conclusion that in order to preserve convenient evidence when the money is withdrawn, they put this form of cheque on the note, that when filled up and signed it may be preserved as a receipt, and not that they make it a part of the bargain that they will not pay back the money unless the cheque is signed and produced. I think they would have no power to withhold the money altogether, in case from any cause the cheque is not signed, but they rightly require some reasonable explanation to be given to justify them in paying without the production of the document filled up in due form as required. I do not think the insertion of this provision has the effect of placing the account on which this money stands in the same position as a balance on an ordinary drawing account, so as to prevent the fund from being given away as *donatio mortis causa*.

It is said that this is the first time that the question, whether a deposit note is a good subject of a *donatio mortis causa*, has come before the Court of Appeal in England; and we are asked, and have power, to review the cases. There has, however, been a current of decisions in the Courts of first instance in England in favour of the donation, and there is a decision of the Court of Appeal in Ireland which takes the same view. But, to deal with the question on principle, why should not this document be a good subject of *donatio mortis causa*? It is true that the fact of the cheque having been filled in and signed does not give the donee a title at law to be paid, because it was not presented till after the death of the drawer. But why is there not a good *donatio mortis causa* apart from the cheque? The case of *Duffield v. Elwes* (13) is in point as to that. It shews that there may be a good *donatio mortis causa* of an instrument which does not pass by delivery, and that the executors of the

donor would be considered as trustees for the donee for the purpose of giving effect to the gift. The judgment of Vice-Chancellor Knight-Bruce in *Moore v. Darton* (9) is very instructive as shewing what kind of instruments may be the subjects of *donatio mortis causa*. There a document was executed when a deposit of money was made. The mere fact of the deposit would create a debt; but the document, besides acknowledging the receipt of the money, expressed the terms on which it was held, and shewed what the contract between the parties was. It was held that the delivery of that document was a good *donatio mortis causa* of the money deposited—and so, in my opinion, was the delivery of the deposit note in the present case. The delivery gives no legal title to the donee, nor did the delivery of the security in *Duffield v. Elwes* (13); but the House of Lords there laid it down that the executors became trustees for the donee, and that they are bound to do everything which may be necessary in order to enable the donee to get the money. No doubt that is anomalous. This would not be so in the case of a voluntary gift *inter vivos*. The Court does not give any assistance to mere volunteers in such cases, and would not interfere to compel either the donor or his executors to perfect the gift. The doctrine is anomalous, peculiar to the case of a *donatio mortis causa*.

It is true that here the assistance of the Court might be dispensed with, the donee herself being one of the executors; but I do not rely on that. Had the executors all been strangers, they must, according to *Duffield v. Elwes* (13), lend their names to enable her to recover the money, she having an equitable title to it. The same view was taken in the Irish case, *Cassidy v. The Belfast Banking Company* (10), by the Court of Appeal in Ireland, though in that case the proceeding was irregular, for the executors and not Cassidy would have been the proper plaintiff.

In my opinion the appeal fails and should be dismissed. The case of *In re Mead; Austin v. Mead* (8) was much relied on by the appellants, but is quite distinct from the present case, for there the

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donor did not intend to give the deposit note, but only to give by means of a cheque part of the money deposited.

LINDLEY, L.J.—I am also of opinion that the decision of Mr. Justice Kekewich was correct on both the points raised in this appeal before us. We were asked to overrule the Judge's decision upon the evidence. It would be very difficult—I do not say impossible—for us to do so, when he has seen and heard the witness and we have not. I am bound to say that, having attended to the evidence which has been read, I fully believe the lady's story.

Then it is said that, even assuming the deceased intended to make a *donatio mortis causa*, this deposit note cannot be made the subject of *donatio mortis causa*. Why should it not? There is at first sight this difficulty, that the note is not a negotiable instrument, and cannot, therefore, be sued on in the donee's own name; and, the gift being voluntary, the Court, according to its ordinary principles, will not compel either the donor or his executors to do anything to perfect it. But that difficulty was set at rest ages ago. Sir J. Leach decided in *Duffield v. Elwes* (13) that the Court would not, under circumstances like those of the present case, assist the voluntary donee to obtain the benefit of the gift; but that decision was reversed on appeal, and the reasoning of the Judge condemned, and Lord Eldon said that the principle that a Court of equity will not assist a volunteer to perfect an incomplete gift does not apply to a *donatio mortis causa*. Then why should not the Court assist the donee in the present case? It is said that there was no good *donatio mortis causa* because a man cannot make such a gift of his own cheque. I will assume that that proposition is correct, though I think it may some day require consideration. But assuming it to be correct, I think that it does not dispose of the present case. There is, indeed, upon the deposit note a form of cheque payable to bearer which has been filled up, stamped, and signed. But that is a mere means of preserving evidence of the payment of the money deposited; the thing that is given is the deposit-note, and not the cheque, and I

am perfectly convinced that a perfectly valid *donatio mortis causa* can be made of this deposit note. The authorities are all in favour of that view, but we were asked to overrule them. It would be a strong thing to do so after they have been acted on for so many years, but, apart from that consideration, I think that on principle we ought to affirm them. I agree that this appeal fails.

LOPES, L.J.—The first point here is whether this *donatio mortis causa* was proved. In my opinion the Judge was quite right in believing the story told by this lady. It is true that there was a certain discrepancy in her statements; but the learned Judge having seen and heard her, and considered the rest of the evidence, came to the conclusion that her story was to be believed, and I see no reason for thinking that conclusion erroneous. Her evidence was corroborated on almost every point on which, under the circumstances, any corroboration could be expected. Then there is the further question to be considered, whether this deposit note was a good subject of *donatio mortis causa*. The law, though I am not so familiar with it as my learned brethren, seems to be well established. It seems that the cheque of another person than the donor, a promissory note, and an ordinary deposit note are good subjects of *donatio mortis causa*. But exception is taken to the deposit note in this case on the ground of the form of the cheque upon the back of it. In my opinion that does not in any way alter the case; it appears to me to have been merely an arrangement by the bankers to enable them more conveniently to preserve evidence of the money having been withdrawn. I think it was clearly the intention of the donor to give the donee, not merely a cheque, but the deposit note. In my opinion the decision of the learned Judge was quite correct, and this appeal must be dismissed.

Appeal dismissed.

Solicitors—Gedge, Kirby & Millett, for appellants; Edward Chester, for respondent.

[IN THE CHANCERY DIVISION AND IN
THE COURT OF APPEAL.]

KEKEWICH, J.
1890.

Jan. 20.

COTTON, L.J.

LINDLEY, L.J.

LOPES, L.J.

1890.

March 13, 15,

18, 19.

THE AMERICAN BRAIDED
WIRE COMPANY v. THOM-
SON AND COMPANY.

*Patent—Infringement—Damages—Re-
duction of Price by Patentee—Loss by
Competition.*

A patentee had obtained an injunction restraining the defendants from infringing his patent, and an enquiry as to damages. The official referee found, as facts, that the patentee had from time to time, in consequence of previous reductions by the defendants, reduced his own prices down to, but never below, the defendants' prices for the time being; that he had done so in order to prevent himself from being driven out of the market by the defendants; and that, but for the defendants' competition and underselling, the patentee would (subject to certain allowances for probable increase of sales in consequence of the reduction in price and the connection and industry of the defendants) have made the sales which were made by him and also those made by the defendants at his own original prices:—Held (reversing the decision of KEKEWICH, J.), that the patentee was entitled to recover by way of damages (subject to the above allowances) not only the sums found to represent the profits on sales made by the defendants, calculated at the patentee's original prices, but also the loss caused to the patentee by the reduction in price which he was obliged to make in consequence of the defendants' illegal competition.

The United Horse Shoe and Nail Company v. Stewart (Law Rep. 13 App. Cas. 401) commented upon and distinguished.

The action was brought for the infringement by the defendants of the plaintiffs' patent for a wire bustle. At the trial Kekewich, J., held that the patent was invalid; but the Court of Appeal, on the 2nd of February, 1888, reversed the deci-

sion, and directed an enquiry as to the damages sustained by the plaintiffs by reason of the defendants' infringement of the patent. This decision was afterwards affirmed by the House of Lords. By consent the enquiry was taken before one of the official referees.

By his report the referee found that the prices originally charged by the defendants for the bustles which they sold were lower than those charged by the plaintiffs. On the 1st of January, 1887, the plaintiffs reduced their prices to those of the defendants. Thereupon, the defendants, on the 5th of January, reduced their prices, and on the 12th of January the plaintiffs again reduced their prices to those of the defendants. On the 10th of February, 1887, the defendants again reduced their prices, and on the 21st of February the plaintiffs followed suit, but they never reduced their prices below those of the defendants. The referee found "that the plaintiffs' reductions of prices were made in consequence of the defendants' competition and their selling at lower prices than those of the plaintiffs, and in order to prevent the plaintiffs from being driven out of the market by the defendants, and but for the defendants' competition and their selling at lower prices the plaintiffs would (subject to certain allowances afterwards mentioned) have made the sales made by the plaintiffs and also those made by the defendants at the plaintiffs' original prices."

The referee also found that the plaintiffs would have made on the bustles sold by them during the period in question (from June, 1886, to the 2nd of February, 1888), had they sold the same at their original prices, profits to the amount of 5,806*l.* 3*s.* 4*d.* more than the actual profits which they realised. The referee also found that the profits which the plaintiffs would have made on the bustles sold by the defendants during the same period, had the plaintiffs made the same and sold them at their original prices, would have been 2,819*l.* 16*s.* 6*d.*

The referee also found in the alternative that the profits which the plaintiffs would have made on the articles made and sold by the defendants during the same period, had the plaintiffs made the same and sold them at the prices which they were actually

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getting for the articles made by themselves, would have been 1,654*l.* 18*s.* 1*d.*

In making these estimates the referee allowed the defendants a deduction of twenty per cent., or a sum of 1,451*l.*, for increase of sales by reason of the reduction in prices, and a deduction of ten per cent. for sales due to the defendants' own exertions and connection in business, thereby reducing the amount of the damages found by more than 2,000*l.* The referee accordingly found that the damages sustained by the plaintiffs by reason of the defendants' infringements amounted to 5,806*l.* 3*s.* 4*d.*, plus 2,819*l.* 16*s.* 6*d.*—that is, 8,625*l.* 19*s.* 10*d.*

The defendants moved before Kekewich, J., to vary the report.

Aston, Q.C., Cohen, Q.C., and Lawson, for the defendants.

The Attorney-General (Sir R. E. Webster, Q.C.), Moulton, Q.C., and Roger W. Wallace, for the plaintiffs.

KEKEWICH, J.—In this case the official referee has reported two substantial results. First, that the sales by the plaintiffs of their patented article during the period to which the report and litigation refers—namely, a period of about nineteen months, commencing in the summer of 1886, and terminating in February, 1888—were decreased in exact proportion to the quantity of sales effected during the same period by the defendants, who are proved to have sold articles in derogation of the plaintiffs' rights. I should be extremely unwilling to differ from the official referee on such a point, after he has had all the witnesses before him, and full opportunity of examining all the documents, and also had the assistance of counsel on each side to criticise the facts and figures. I have, therefore, not examined the evidence on that point with that minuteness with which I should be bound to examine it if I had to come to a conclusion myself. It seems to me that if the official referee may fairly come, and as far as I can form an opinion he has fairly come, to the decision on this point at which he has arrived, I should accept it as a correct conclusion; and I do so all the more easily because though in the case in the House of Lords

to which I shall refer presently it was said that the sales by the appellants and respondents there, who were patentees and infringers, could not have been precisely the same, yet it was held that they might have been reasonably near one another. In this case, having regard to that possibility of difference, the official referee in estimating the damages has made an allowance which I think would fairly meet any argument on that point. Then he has further found that the reduction of prices was made by the patentees, the plaintiffs, in consequence of the sales by the defendants—that is to say, he has found that the plaintiffs might have sold all that they did sell, plus all that the defendants sold, at their own original prices; that those original prices, in other words, might have been maintained if the defendants had not been the rivals of the plaintiffs in the market, and selling articles in infringement of their letters patent. That, again, seems to me to be fairly justified by the evidence. He has found it as a matter of fact, and for the purposes of my judgment I accept it as a fact.

The much more serious question—and one which was not necessarily before the referee, though he has assessed the damages on a particular footing—is whether that reduction in prices may be properly regarded as an element in assessing the damages; whether, in fixing the prices of the articles sold by the plaintiffs as well as by the defendants for the purpose of assessing damages, the prices ought to be taken which the plaintiffs originally fixed, or whether those prices only ought to be taken which were in the result fixed by the competition. Mr. Aston urged upon me to consider that prices must have been reduced—that it was not known in the history of patents that the patented article should maintain its original price in the market for any lengthened period. I am not disposed to accept that proposition. This period was a short one—some nineteen months. It is proved that the particular article was one of some novelty, and early obtained fashionable notoriety and commanded a considerable market; and I do not think that there is anything before me to prove that the fashion, though proved to have dropped off later,

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still had in any way fallen during the particular periods so as on that score to have prevented the plaintiffs from maintaining their original prices. But what is said is this—that this consequence of competition is not the direct natural result which the law regards in estimating damages; that, to use a technical phrase, the damages arising from such a result are too remote. I do not intend to express any opinion of my own on that abstract proposition, because I think that I am bound to follow the decision of the House of Lords in *The United Horse Shoe and Nail Company v. Stewart* (1), and, whatever that decision may be, to follow it loyally, without in the slightest degree pausing to enquire whether I myself should, on the facts of this case, or on the facts of the other case, have arrived at another conclusion or not. I must not be understood as intimating an opinion one way or the other. The point was certainly discussed at considerable length in that particular case, and it is asserted on the one hand—that is to say, on behalf of the defendants—that that case governs the present. On the other hand, it is asserted that the broad language used by one of the learned Lords was not intended to apply to all cases of a similar character, but only intended to apply to the particular case. I find myself in a position of some little difficulty, because, on the one hand, I am bound to observe that in all cases, in all Courts, whoever the Judge may be, the necessity of his position obliges him to regard the particular facts of the particular case before him, and that all a Judge says, whether in a judgment delivered at the conclusion of the arguments, or more deliberately after consideration, must be more or less referred to the particular facts under consideration; and nothing can be more dangerous than to construe general statements as general when they have really only a particular application. On the other hand, it is the duty of Judges occasionally, and especially, if I may venture to say so, in the Supreme Court of Appeal,

to lay down principles, and to state what they conceive to be the settled law, and to apply that law to the particular facts of the particular cases; and if they lay down principles, or state what they conceive to be settled law, one must regard that, even though the particular application may not be apposite to the case in hand. I have to steer as well as I can between those two difficulties.

I turn to the report of the case in the 13th *Appeal Cases*. That, like this, was a patent action. The rights of the patentee had been decided, and what we call an injunction—an interdict—had been granted, and damages had to be assessed. For that purpose there was a new action, and the relief claimed in that new action is stated on page 402. The second head of relief, specifying what damages were claimed, is, “by the reduction of their prices, which they alleged was necessary, and the direct result of the unlawful acts of the respondents.” That was, therefore, before the Court as one of the issues in the action. The Lord Ordinary, according to the report before me—the only one that I think it worth while to refer to (that in the *Appeal Cases*)—did not devote any particular attention to that point, but he is stated (on page 404) to have held that the profit was to be recoverable—that is to say, the profit which he mentioned there as being the measure of damages or the means by which the damages were to be assessed, was to be the “difference between the cost of manufacture and the prices at which the appellants were at the time selling to their own agents.” He therefore determined that the original prices were not to prevail—that the appellants, the patentees, were not to have damages in respect of the reduction of prices, but that the profit which would have been made by them if they had sold was to be considered with reference to the prices which they were actually charging—prices which were not only much below their original prices, but were also lower than those which had been charged by the infringing defendants. When the case came before the Inner House on the reclaiming note, that point, of course, was open, there having been what in substance was an appeal on

(1) Law Rep. 13 App. Cas. 401. See for report of this case before Lord Ordinary 3 Pat. Cas. p. 189; before Court of Sessions, 4 Pat. Cas. 180.

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either side; but I do not find in the report in the *Appeal Cases*—and again I content myself with that—any particular reference to the point in hand. On appeal to the House of Lords it was referred to in the argument on behalf of the appellants, and, I suppose, it must have also been referred to on behalf of the defendants, the respondents; but there are a very few words at the end of the argument which are sufficient in the report for disposing of it. I do not find that the Lord Chancellor, in moving the judgment of the House of Lords, really refers to the point at all. He goes upon the other part of the case; but Lord Watson, I think, evidently had it in his mind, because, at the bottom of page 410, he notices the allegation of the plaintiffs that they were compelled to dispose of their own nails at lower prices than they would otherwise have obtained. So that the point of the reduction of prices was present to his mind. Beyond that, he does not in any way deal with the substantial question which I have to deal with here—whether the damages were too remote. He notices again, on page 414 towards the bottom, the conclusion or inference to which he came, that “even in the absence of competition by the respondents, the appellants’ sales would not have exceeded the limit they attained in 1882, and that their average could not have been maintained without a reduction of price,” pointing rather to his view that the reduction of price was not the necessary consequence of competition.

But Lord Macnaghten takes up the point *de novo*, as if it had not been, as I think it had not been, fully discussed by the other learned Judges, and deserved thorough consideration. He mentions it at the bottom of page 415, and he states there, “As regards the claim in respect of reduction of price, the learned Judges”—meaning, as I understand, the Judges of the Inner House; he could not have meant the Lord Ordinary, who sat alone—“did not reject it as being too remote, but they thought that it had not been proved that the competition of the respondents was really the cause of bringing down the price. They considered the reduction attributable in a great measure to the com-

petition of other nail manufacturers.” In the next paragraph he says, “I am unable to agree with this view;” but I do not understand that passage as referring to the one which I have already read. I think that that refers to the second part of the preceding paragraph, in which he says that the Judges, in the result, seem to have been of opinion that the appellants were only entitled to nominal damages. That is the view with which I understand him to say he is unable to agree. I do not think that first entire paragraph on page 416 has anything whatever to do with the reduction of price. To that he goes in the second paragraph, beginning “The sole question is.” Then he considers what the loss must be—the loss with regard to which damage is to be assessed, and he says, “The loss must be the natural and direct consequence of the respondents’ acts.” That is stating an elementary proposition as the guide to what follows: “In the first place I think the claim for loss of profit by reason of the reduction of price must be rejected.” So far, if nothing more, I should suppose he is stating that, having regard to all the evidence in the case, that was the conclusion at which he arrived; but he goes on to say, “I do not think that was the natural or direct result of the respondents’ acts.” He is there meeting the proposition which he had laid down before, that the loss must be the natural and direct consequence of the respondents’ acts, and expresses his opinion that it was not. Still, that might possibly be with reference to the particular case, but he goes on to illustrate what he means by stating facts which no doubt were proved in that case, and came before him for the purposes of that case, but which seem to me to be facts equally applicable to this, and facts which are intended not so much to illustrate the application of the principle to that particular case, as to limit and expound the nature of the principle as applicable to these cases in general. He points out that the patentees might, if they had the courage of their faith in their own patent, have maintained their prices, and if they could not sell at those prices they would thereby enlarge their damages against the defendants, when ultimately their claim for damages was esta-

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blished. The language upon which Mr. Moulton relies is this: Lord Macnaghten says that "it was not a reasonable course on their part to reduce the price so as to injure their own trade;" and Mr. Moulton says that here there was no injury to the trade of the patentees as there was there, because in this case the patentees never lowered their prices below what the infringers were demanding, whereas there they did, so that it would seriously injure the trade which they would otherwise have obtained. But I cannot think that Lord Macnaghten meant to distinguish between lowering prices below those charged by others, and lowering the prices so as to be in excess of those charged by the others. I think he meant this: they reduced the price so as to realise less than they would have realised if they had maintained their own prices; and they injured their own trade when they sold a dozen articles for less than the price which the articles ought to have fetched in the market. I think that the language applies equally to such a case as I have before me, as to the case which was then before the House of Lords. Again, he says: "In lowering their prices they seem to me to have been prompted by a desire to provide for the contingency of their failing in their action"—which might equally be the case here—"and by an anxiety to drive their rivals from the field whether they were right or wrong." It would be straining language hypercritically to say that an anxiety to drive their rivals from the field only pointed to reducing the prices so low that the infringers could not sell at all, and not to apply it to a case where the reduction of prices only goes so far that the patentees and infringers may sell on equal terms, and the patentees get the full benefit of such advantages as they have by being large manufacturers and so forth. It seems to me that Lord Macnaghten has intended to lay down this: that in the case of an action by a patentee against an infringer for damages, although the patentee may be entitled to the benefit of all sales made by the infringer as if they were made by himself, so that he will get all the profit so made by the infringer, yet, if he thinks fit to reduce the price, he is not entitled to recover the dif-

ference in price, because it is not the natural and direct consequence of the infringer's acts, and is therefore too remote. That seems to me the conclusion at which he arrived. It may be that that is in some respects hard upon the patentee, as it is suggested. It may be that, on the other hand, it obliges a patentee to take more prompt action, and to either have faith in his patent or give up the claim for damages altogether; but those consequences I do not think it would be right for me to enter into. I consider that Lord Macnaghten, one of three Judges giving judgment in the House of Lords, in a case *in pari materia*, has laid down the law, from which neither of the other learned Lords has in the slightest degree dissented, but to which I think I must take them to have assented, because the judgment was given in their presence and they did not deal with the particular matter. At any rate, it is the considered opinion of one of the Lords of Appeal, given in a judgment in the ultimate Court of Appeal, and I think is binding on me.

Therefore, I think I must adopt the alternative which the official referee had conveniently presented to me so as to prevent any necessity of referring it back to him. Of course, if the plaintiffs are not entitled to any claim in respect of reduction of prices, they get nothing at all as regards those articles which they themselves sold. Then as regards those articles which the respondents sold, they get damages in respect of them, but calculated, not with regard to the original prices, but to the prices actually charged. Those have been assessed at the sum of 1,654*l.* 18*s.* 1*d.* in the 4th paragraph of the official referee's report. I think that sum must be substituted for the larger sum which the official referee states in paragraph 5, and which is the aggregate of the two sums mentioned in paragraphs 2 and 3.

The case is now before me, as it were, on further consideration, and I have to deal with the costs, I understand, subsequent to the trial. The ultimate sum found due from the defendants to the plaintiffs is a large, substantial sum, and I do not see that the costs before the official referee would have been materially

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increased if these wrong-doers had been held liable on the lower rate instead of the higher. I think the defendants must pay all the costs before the official referee; but I think that they have succeeded substantially in varying the report here, and I think they ought to have the costs before me on this occasion, and those costs to be set off. I see that the plaintiffs' notice of motion asks that these costs may be taxed on the higher scale. Of course, this being a patent case, the costs of the original trial were taxed on the higher scale; but I do not see any reason for applying that rule to a case of enquiry as to damages before the official referee, and I think the costs must be taxed in the ordinary way.

From this decision the plaintiffs appealed.

The defendants presented a cross-appeal against the confirmation of the report.

The Attorney-General (Sir R. E. Webster, Q.C.) and Moulton, Q.C. (with them *Roger W. Wallace*), for the appellants.—The two principles that have to be applied are—first, that the damages must be the direct consequences of the acts of the wrong-doer; and, secondly, that if such damages can be reduced by the action of the party claiming them, it is the duty of such party to minimise them to the utmost of his power.

In this case the referee has found as a fact that the appellants would have sold, but for the defendants' competition, the goods they did in fact sell, and also those sold by the defendants, at the original prices. He has also found that the reduction by the appellants in price was forced on them by the defendants; that it always followed the defendants' reduction, and was the proper course for them to take for the purpose of minimising the damages the defendants would otherwise have had to pay.

The present case is clearly distinguishable from *The United Horse Shoe and Nail Company v. Stewart, &c.* (1), on which *Kekewich, J.*, relied. There the plaintiffs originally reduced their prices, not with the object of minimising the infringers' damages, but to drive competition, not only illegal, but also legitimate, out of the

market. The nails in that case were a common article of commerce, and it was only in the method of making them that the defendants had been infringers. In the present case the article was protected by the patent, and there could be no legitimate competition with the plaintiffs' sale.

They referred to *Sedgwick on Damages* (7th ed.), pp. 164, 175, and *The Yale Lock Company v. Sargent* (2).

Aston, Q.C., and *Cohen, Q.C.* (with them *Lawson*), for the defendants.—To enable the plaintiffs to shew that what they have lost is equal to what has been found by the referee, they must shew that they would have sold all they did sell, besides all that the defendants sold, at their original price. The onus of proving this lies upon them. It is an elementary proposition that wherever there is a monopoly, a reduction in the price of the articles increases the sale; and, further, the introduction of another article answering the same purpose as the patented article reduces the sale of the patented article. When endeavouring to estimate what the plaintiffs have lost, the Court must take into account what would have been their position if the patent had not been infringed. It was in evidence that there were from time to time during the period in question many new bustles, not made by the defendants, competing, and the extent of this competition is problematical. There are no facts shewn from which any reasonable inference can be drawn—a mere guess is not enough. The burden is on the plaintiffs of shewing what they have lost, and that they have not discharged; and that is what Lord Macnaghten means in his speech in *The United Horse Shoe and Nail Case* (1).

There are two things problematical here—what is the effect of the lowering of price, and what is the extent of the competition? As regards one set of bustles it has been proved that they increased their price. In ordinary cases, where the burden is on the plaintiffs to prove loss, if that loss cannot be proved with reasonable certainty, damages cannot be awarded in respect of that loss; and in a case where a patent is infringed, when it is wholly problematical what the loss is, damages

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cannot be awarded in respect of that loss, because a definite mode of procedure is given by which the plaintiff can recover in respect of the wrong done by the defendant. He can always recover the profits made by the defendant. The plaintiffs are, in fact, attempting to get an account of profits as well as damages.

[They commented on the evidence given before the referee. Their arguments and the result of the evidence are sufficiently given in the judgments of the Court.]

COTTON, L.J.—In this case the plaintiffs succeeded in establishing their patent, and we referred it to the official referee to ascertain the damages to which they were entitled for the infringement of their patent—they claiming damages, and not an account of profits. The official referee made his report, and proposed to give a sum of 8,625*l.* Mr. Justice Kekewich, though he confirmed the report, held that the plaintiffs were not entitled to that amount of damages, but were only entitled to 1,654*l.* 18*s.* 1*d.* An appeal is brought by the plaintiffs against that judgment, and a cross-appeal by the defendants against the confirmation of the report. The defendants are satisfied with the finding of Mr. Justice Kekewich as to the amount of damages they are to pay, but desire to set aside the report on the ground that it is contrary to evidence—that is, that the findings of fact are not supported by the evidence, and that we ought not to confirm them.

Although the plaintiffs opened their appeal first, and we did not quite know what the point of the defendants' appeal was, yet I will proceed to consider the appeal of the defendants first, because, in my opinion, it is desirable to know the facts before deciding what law is applicable, and what the law is. It has been argued strongly by Mr. Cohen, who pressed upon us every point he could, that to grant the damages which the plaintiffs asked for would be to give the damages on mere conjecture, and not, as ought to be done, on the facts proved. I quite agree with him in that—that one ought not to grant damages except on the facts proved; but then he pressed it too far. He wished to make out, as far as I understood him, though

he disclaimed it, that there must be mathematical evidence of the facts on which the damages are granted; but, in my opinion, what we have to consider is this: whether the official referee to whom the matter was referred, and who has heard the witnesses and considered the matter very carefully, had reasonable evidence to support the findings of fact at which he has arrived.

[His Lordship read portions of the findings of the report, and continued:]

The defendants say that no allowance is made for the competition caused, not by the defendants selling their infringements, but by other bustles coming into the market. There do seem to have been a good many bustles, which were in fashion then; but then it is said that that has not been taken into account by the referee, and that therefore his finding ought not to stand. Now, yesterday, after the Court rose, we saw the official referee, in order that we might not misunderstand this report, and by mistake, by not enquiring into the facts, go on a wrong footing. But what he said was this: That he did fully consider the competition of the other bustles which were not made by the defendants; but, in his opinion, on the evidence before him—and he has fully considered the matter—as regards the plaintiffs and their particular bustles, no effect could be attributed to the competition of those other bustles. I think one of the witnesses of the plaintiffs, whose evidence was relied on by the defendants, said, "Oh! there is no competition between a frock-coat and a tail-coat"; and that these bustles, which were made according to the patent, were bustles of a particular construction. They were said to be of this great benefit, that they let in the air, and, when compressed, immediately regained their shape, and that therefore they were much sought for in a particularly hot year such as the year in which they were introduced, and, therefore, that the competition of the other bustles had no effect at all, and was not in any way to be regarded in this matter. Mr. Moulton did contend that it came into the twenty per cent. which is mentioned in paragraph 2; but the true result of the evidence was this—and that is the result at which the official referee arrived,

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he having taken those into consideration, and I cannot say that he was not right in so saying—that the competition, such as it was, of those other bustles was not a matter to be regarded in this enquiry as to damages. Then is he right in saying that the plaintiffs would have sold their own bustles, and those which were taken as though they had been sold by them, which were sold by the defendants the infringers, at their original prices, if it had not been for the competition which he has taken into account—that is to say, the defendants' competition?

Now it appears that when the defendants from time to time reduced their prices, they did so notwithstanding that at the time they were making this reduction, and at the time they were issuing their circulars to say they were going to make the reduction, they had considerable orders for a large number of dozens at the old prices; and from that, and from other things, the official referee came to the conclusion that but for the competition of these bustles made by the infringers, the defendants, the plaintiffs could have gone on during the short period during which this lasted—not two years—selling all the bustles which in fact they did sell, and also the infringing bustles which the defendants sold, at the prices originally asked for them by the plaintiffs. That is a most material matter. But then the official referee has given the defendants the benefit of twenty per cent. for the increased sale which may have been caused by reducing the price of bustles. Of course, it is very probable that if there is a reduction in price there will be a larger sale. That appears on the evidence, but we cannot say that the referee is wrong in allowing only twenty per cent. for that; besides that, there is a ten per cent. allowed for the sales effected by the exertions of the defendants to their own customers—persons who would not have bought from the plaintiffs. I have gone through the facts which are really in dispute, and I now come to the remainder of this report, the question upon which really is—applying the law to the facts, which I have held to be proved—what damages are the plaintiffs entitled to?

I must mention, before I go into that

point, one matter which was argued by Mr. Aston, though not by Mr. Cohen. He said that what the plaintiffs were claiming here was at one and the same time to get an account of profits and damages. But that is entirely wrong. A patentee who succeeds cannot get an account of profits, and also damages, because the relief in each case stands on a different footing. If he takes profits he adopts that which was done by the infringers, and claims himself the profits which have been made by the exercise of the invention. But here profits are only referred to for the purpose of seeing what is the proper measure of damages to which the plaintiffs are entitled. In my opinion, the objection which was taken by Mr. Aston entirely fails. One must see—and that is the only question here—what is the proper amount of damages to which the plaintiffs are entitled, treating them as claiming damages only. I now take the judgment of Lord Macnaghten in *The United Horse Shoe and Nail Company v. Stewart* (1), not because it is a matter which depends upon his judgment, but because it has been very much relied upon by Mr. Justice Kekewich, and also here, that the loss must be “the natural and direct consequence of the respondents' acts.” That is the rule to guide us. Here what is found by the referee is this: That but for the wrongful acts of the defendants, the plaintiffs would have sold at the original prices those bustles which in fact they sold at the lower price, and those which the defendants themselves sold at a lower price—that is to say, they would have made all these sales unless the defendants had taken some of them instead of the plaintiffs, and they would have sold all that they did sell at their original price. That is what he finds, and that is the loss in respect of which the plaintiffs are entitled to damages, and in my opinion the loss on these findings is the direct and natural consequence of the wrongful acts done by the defendants. If there had been no interference or infringement by the defendants, the plaintiffs would have been the only persons who could have made these bustles. Then, if they could have sold at the higher price all which in

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fact they did sell at the lower prices, and all which the defendants sold at the price which they got, it is clear that the acts of the defendants have caused this loss to them, and that is the loss in respect of which they are entitled to damages.

But then there is another rule which must always be observed when damages are claimed by a person whose rights have been interfered with—namely, that he must do what he can not to increase the loss unnecessarily. Here, what the official referee has given to the defendants, in diminution of the claim which the plaintiffs are entitled to make for the direct consequence of the loss caused by the wrongful acts of the defendants, is this: he has brought into account, in fact, all that they themselves got by selling, and he has brought into account all the profits on the increased sales which were the consequence of the diminution of price; but can the defendants say that the plaintiffs ought to have made more profits? Can they say that they ought not to have acted as they did in order to get what profits they could, notwithstanding the wrongful acts of the defendants? Now, we know how it is that the plaintiffs have in fact only got the reduced price which they did. It is in consequence of the action of the defendants, who, as soon as ever the plaintiffs brought down their price to the price the defendants had adopted, again lowered their price, and forced the plaintiffs to reduce their price so as to prevent themselves from being kept out of the market and left to sell nothing. There was the evidence of Mr. Stokes, the person acting for the plaintiffs, and also travelling for them, that some persons said, "We cannot buy yours; the defendants are selling them at a cheaper rate, and we cannot of course take them"; and it is very evident that the plaintiffs here were put under the necessity of reducing their price in consequence of the wrongful act of the defendants in selling these articles, and selling them at a lower rate than that at which the plaintiffs, who were the rightful owners of the property, were selling theirs.

I must advert here to an argument that was pressed upon us—namely, that here the defendants say that they were only imi-

tating, or only making one set of bustles. There were one-row, two-rows, and three-rows, and they were only making three-rows. We have had the various bustles produced to us here, and we could see that there was so much similarity between all these bustles that if the plaintiffs reduced the price of one particular bustle they must necessarily, if they hoped to sell the others at all, reduce the price of those others. There were minute differences, no doubt, as between the different bustles which were sold by the plaintiffs; but when we looked at them there was that very great similarity that if one was reduced in price, unless they gave up the manufacture and sale of the others, they must necessarily have reduced the price of the others. Although it is true that at one time the price of one of these which had been lowered was, as was said, raised, yet that may have been in consequence of some particular fancy of the public, or the ladies, to take this particular bustle, which enabled the plaintiffs, notwithstanding the acts of the defendants, to raise the price of that particular bustle; and that was for the benefit of the defendants really, because it to a certain extent lessened the claim for damages which the plaintiffs make against them under the finding that they could have sold the whole of the bustles which in fact were sold at the original prices but for the acts of the defendants. Therefore, in my opinion, the plaintiffs are entitled here to have the larger amount of damages—namely, 8,625*l.*—which the official referee has given to them. Mr. Justice Kekewich gave them only 1,654*l.*, I think on a misapprehension of the reasoning of Lord Macnaghten in the case of *The United Horse Shoe and Nail Company v. Stewart* (1). As I have already stated, I think that Mr. Justice Kekewich misapplied that judgment. Lord Macnaghten was dealing with an entirely different case. He was not dealing with a case where the defendants were manufacturing an article which could only be made by the plaintiffs, but where they were manufacturing a thing which the plaintiffs had particular machinery for making; and there was in the market a competition of nails very similar to those which the plaintiffs made more cheaply by

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their machinery ; and the defendants had been making a good many of these nails, and selling them, using the machinery for which the plaintiffs had a patent. But the plaintiffs had not merely followed the lead of the defendants in reducing their prices, they had always gone a little before the defendants in reducing their prices, and had reduced their prices below those at which the defendants were selling. The prices were a certain sum, from which was deducted a varying discount, and the discount allowed by the plaintiffs was always greater than that allowed by the defendants. Therefore the Lord Ordinary came to the conclusion that the reduction of the price was made in consequence of the competition, not only of the defendants, but of other persons in the market. It was really an operation, therefore, in trade in order to oust others who were interfering with them by a lawful competition ; and that, I think, is what Lord Macnaghten is speaking of, because he is dealing with a case where the plaintiffs had sought to vie in the market with open competition, not only to meet the effects of the wrongful competition of the defendants, but generally to keep themselves ahead in their sales by lowering their prices, in consequence not only of the competition of the defendants, but in consequence of the competition of those who were lawfully selling and competing with the plaintiffs. In my opinion, therefore, that decision was not one applicable to this case. There the plaintiffs were seeking to get as damages from the defendants the loss which they had sustained by their own action, which is entirely different from what was done here, because here it is found (and it was not so found by the Lord Ordinary in the case in question) that the plaintiffs would have sold all that had been sold at the original prices if it had not been for the wrongful acts of the defendants.

That is the ground, and the only ground, of their claim for damages ; and the only other thing that comes into the matter is, by what amount are the damages payable by the defendants to be diminished ?—which is an entirely different question. On looking at Lord Macnaghten's judgment, it appears that he

was dealing with the claim for this reduction of price as a claim for damages on that ground, and not as explaining how it was that the plaintiffs got so little, in order to alleviate and diminish the damages to be paid by the defendants. In my opinion, that decision has no application to the present case, and we ought not on that account to cut down the claim of the plaintiffs to the smaller sum of 1,654*l.*, which is only the sum which the defendants in fact realised by the sales made by them. In my opinion, the appeal of the plaintiffs here succeeds, and the cross appeal of the defendants fails.

LINDLEY, L.J.—The questions which arise on this appeal are based upon a finding of the official referee, who was directed to take an enquiry as to damages in the usual form in a patent action. The successful patentee, whose patent has been infringed, has the option whether he will take an account of profits made by the person infringing his patent ; or, if that person has been selling at so low a price that the profits are small, the patentee is entitled to an enquiry as to the damages which he has sustained by reason of the wrongful acts of the defendants. The plaintiffs in this case elected to take the latter form of enquiry—namely, an enquiry as to damages, making no claim to profits at all. That is the enquiry with which the official referee had to deal, and the first question, and the question in my mind on which everything turns, is whether the official referee's finding as to the facts is right or wrong. The finding which is of importance is this. He says : " But for the defendant's competition, and their selling at lower prices, the plaintiffs would, subject to the allowances mentioned in paragraphs 2, 3, and 4, have made the sales made by the plaintiffs and also those made by the defendants at the plaintiffs' original prices." Now that is a finding of fact, and the first question is whether that is in accordance with the evidence or not. I understand that finding to mean this, that notwithstanding all competition from other sources, this is true in fact, that, but for the defendants' competition, the plaintiffs would have sold all those they did sell and all those which the defendants sold. That

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is what the finding really means, and the question is whether that is right.

Now, the evidence upon that is conflicting. That there was some competition in the trade by reason of other bustles being on the market besides these braided wire bustles is plain enough from the evidence; but then, when we ask ourselves whether the evidence warrants the conclusion of the referee, I am not prepared to say it does not. I am not at all prepared to say, after reading the evidence with some care, and hearing Mr. Cohen's observations on it, that the official referee is wrong in coming to the conclusion he does come to, that, after making all allowance for competition of other bustles, it is still true that, but for the defendants' competition, the plaintiffs would have sold all they did sell and all the defendants sold at the higher prices.

Now, that being the case, I accept that as a fact; and if that is accepted as a fact it appears to me that the difference between this case and the *Horse Nail Case* (1) is plain and obvious.

Now, assuming that to be the fact, what are the damages? And here I will make the observation that it appears to me to be an entire fallacy to say in this case that the plaintiffs are seeking damages for selling at reduced prices. They are not doing anything of the sort. In the Scotch case they were, and it was precisely that controversy and that contention of theirs which was negatived by Lord Macnaghten. In the Scotch case there was competition of the most formidable kind of other nails besides those made by the patentee's process, and entirely exclusive of the competition by the infringers of the patent. If one looks at Lord Kinnear's judgment, which is to be found at vol. 3 of the *Patent Cases*, p. 144, it will be seen that his reasoning is based entirely upon the absence of the fact which we have found here by the official referee. The patentees there were claiming, or seeking to claim, and endeavouring to substantiate not the damages properly referable to and occasioned by the wrongful act of the defendants, but they were claiming damages in respect of this reduction of prices. Lord Kinnear rejects and Lord Macnaghten rejects that, and when you come to look

at Lord Kinnear's judgment, which throws some light on Lord Macnaghten's judgment, it will be seen that they are addressing their minds to a claim of that kind, and are not dreaming of and not addressing their minds at all to the case where, notwithstanding competition of rival articles in trade, there is proved as a fact what we have found here by the official referee.

Now what are the facts? Is the official referee wrong in the principle which he has followed? He says, "I proceed on the assumption that the plaintiffs would have sold at the original prices all they did in fact sell, *plus* all that the defendants sold for them." He says: "Very well; that is an element in ascertaining the damage"—subject to what I shall presently mention—"that is the measure of damages which you have sustained by reason of the defendants' wrongful act." But then he says: "You cannot have all that, because you have not sustained in fact all that injury. You have sold some of these things at reduced prices; you must give credit for what you have received—of course you must." That reduces the damages which otherwise the plaintiffs would have claimed; and if the defendants say to the plaintiffs, "You were wrong in reducing your prices," the answer is, "You forced us," and that answer is perfectly conclusive. The defendants are not able to prove that the plaintiffs have increased their damages by what they have done, or that they might have reduced their damages still more. They have done nothing of the sort. What the official referee has done seems to me to be perfectly accurate. He has first of all looked on one side of the account, and said what would have been their loss if that loss had not been mitigated, and he gives the defendants credit for the sum by which it has been mitigated, and gives the plaintiffs the rest. That appears to me absolutely right, and absolutely in accordance with what Lord Macnaghten says is the sole question. "The sole question is, what was the loss sustained by the appellants by reason of the unlawful sale of the respondents' nails? The loss must be the natural and direct consequence of the respondents' acts. In the first place, I think the claim for loss of profit by reason of

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the reduction of price must be rejected." It appears to me that that is absolutely right, and I cannot—perhaps it is defective imagination—put to myself a case where it can be right that a plaintiff can claim as damages the loss he has sustained by reducing his prices. It has no analogy to this case at all. I see they tried to do it in the Scotch case, but when the plaintiff shapes his case right, and when he says, "I claim as damages the loss which I have sustained by your wrongful conduct," the plaintiff puts his case on a basis which is perfectly correct and is sound.

It appears to me, therefore, that Mr. Justice Kekewich has misunderstood that judgment of Lord Macnaghten, and that, but for that, he would have delivered the same judgment which we think is right, and that is to give the plaintiffs these very large damages. I had no idea myself, not being in the bustle trade, that the profits on the sales of bustles were so large; but it seems to be a most lucrative trade, and those who have done wrong to the plaintiffs must pay compensation for the wrong they have inflicted upon them.

LOPES, L.J.—This case really depends on the findings of the official referee, and the first question we have to consider in this cross appeal is this: Are the findings of the official referee to be set aside, or are they to stand? There is no doubt that there was much conflicting evidence which was laid before the official referee with reference to the views of the plaintiffs and defendants; but the evidence, taken as a whole, and carefully considered, to my mind is such as justified the official referee in finding as he has. The only doubt that I had was whether the official referee had taken into consideration the effect of the competition of what I may call the non-infringing bustles. We have had an opportunity of seeing the official referee, and in effect what he says is this: That there was really no competition, that nobody who wanted an infringing bustle would think of buying a non-infringing bustle; the superiority of the infringing bustle was too marked for any such competition. He says that this point was present to his mind, and on the evidence he came to the conclusion which we find

in his report. The official referee had an opportunity of seeing and hearing the witnesses, and hearing the very able arguments of the learned counsel who addressed him. I, therefore, am unable to say that the official referee was wrong in those findings. Then if the findings are to stand, what damages are the plaintiffs entitled to? They are entitled to all the loss occasioned by the wrongful act of the defendants.

Now what is that in this case? It is the loss of profits which the plaintiffs would have made at their original prices, for the official referee has found—and that is the most cogent part of his finding—that, except for the competition of the defendants, the plaintiffs would have sold at their original prices. But at the same time it has occurred, and properly so, to the official referee, that in consequence of the defendants' reduction in prices the sales both by the defendants and the plaintiffs have been increased—that there has been a greater sale of these patented bustles in consequence of the reduction by the plaintiffs and defendants than there would have been at the original prices. It has also occurred to the official referee—and I think rightly—that the plaintiffs have, by the sale of the defendants, benefited to some extent by the connection of the defendants; and taking these matters into consideration he has made a reduction on account of the greater sale that has happened in consequence of this reduction of price. Now when he has done this, in my opinion all that remains—that is, the 8,625*l.* 19*s.* 10*d.*—is the direct and natural result of the defendants' wrongful act.

Now the learned Judge in his judgment seems to have relied on the case of *The United Horse Shoe and Nail Company v. Stewart* (1). I think the learned Judge, if I may so, has misunderstood the opinion of Lord Macnaghten in that case, because it is upon his opinion that he has acted. It seems not to have occurred to the learned Judge that in that case there were no such findings as in this case. It was not there found that the plaintiffs were compelled to reduce their prices owing to the defendants' reduction; nor was it found that the plaintiffs would have sold at their original prices except for the

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competition by the defendants. Any loss in that case arising from the reduction in prices was not attributable to the defendants' wrongful act, but arose from the voluntary act of the plaintiffs, who, apprehensive of competition in other quarters, took the initiative there, and voluntarily reduced their prices when there was no reduction by the defendants. In that case the plaintiffs were claiming for a reduction which was most clearly not caused by the defendants' acts. I think when that statement is made, it entirely explains the distinction between that case and the present, and to my mind that case has no application whatever. I think that the plaintiffs are entitled to the amount of 8,625*l.* 1*s.* 10*d.*, which has been found by the official referee, and the result is that the plaintiffs' appeal succeeds, and the defendants' fails.

Solicitors — Burn & Berridge, for plaintiffs;
Witham, Lambert & Roskell, for defendants.

KEKEWICH, J. }
1890.
Feb. 24, 28. }

DUNCAN v. DIXON.

Infant—Marriage Settlement—Contract by Infant—Voidable Contract—Infants' Relief Act, 1874 (37 & 38 Vict. c. 62).

The Infants' Relief Act, 1874, does not apply to a marriage settlement executed by an infant; but such a settlement is, as against the infant, voidable only—that is to say, valid until repudiated within the time and in the manner allowed by law.

Ex parte Jones (50 Law J. Rep. Chanc. 673; Law Rep. 18 Ch. D. 122) explained.

The plaintiff, being at the date of the settlement hereafter mentioned eighteen years of age, domiciled in England, and entitled to certain personal property contingently upon her attaining twenty-one years or being married, and being also entitled to a reversionary interest in other property both real and personal, intermarried with the defendant, George Dixon, a domiciled Scotchman, on the 24th of April, 1878.

By a deed of settlement or marriage contract in the Scotch form, and executed on the 19th and 21st of January, 1878, by the defendant George Dixon, the plaintiff and her mother, as her guardian, and the trustees, all the plaintiff's property was brought into settlement. The income of the trust property was applied in accordance with that settlement until some short time after the dissolution of the marriage, which took place on the 2nd of August, 1883, by a Scotch decree, in an action at the instance of the defendant George Dixon. Thereupon the defendant George Dixon and the trustees asserted that the plaintiff had forfeited all interest under the settlement. The plaintiff by the present action claimed, with other relief, a declaration that the settlement or contract was void or voidable.

One child only had been born of the marriage—namely, the defendant George Clifford Dixon.

An order had been made that certain preliminary points of law should be argued and determined before the trial of the action, some of those questions relating to Scotch law only.

Two questions of English law were now argued as preliminary points—namely, first, whether the contract was void *ab initio*; secondly, whether the contract was voidable *ab initio*.

It was admitted on behalf of the defendants that, having regard to the decision in *Cooper v. Cooper* (1), it could not be disputed that the question of the capacity of the plaintiff to bind herself by the contract must be determined by the law of her domicile—namely, English law.

The preamble of the Infants' Relief Act, 1874, is as follows: "Whereas it is expedient to amend the law as to the contracts of infants, and as to the ratification made by persons of full age of contracts made by them during infancy, and as to necessities."

Section 1 of the Act provides as follows: "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with

(1) Law Rep. 13 App. Cas. 88.

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infants, shall be absolutely void: Provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as are now by law voidable."

Section 2 is as follows: "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

Warmington, Q.C., and *T. Ribton*, for the plaintiff.—The contract, not having been made under the Infants' Settlement Act, 1855, was void *ab initio*. The provisions of section 1 of the Infants' Relief Act, 1874, make all contracts with infants absolutely void. The preamble shews that the Act was intended to apply to all contracts of infants. If the first words of section 1, "all contracts," do not have their literal meaning, the subsequent proviso and exception are unnecessary and nugatory. It has been decided that the section applies to all contracts by infants, except those which are expressly excepted—*Ex parte Jones* (2).

The three contracts specified in the section are mentioned merely by way of example.

The decisions on section 2 of the Act illustrate the wide construction which the Courts place upon the Act—*Coxhead v. Mullis* (3), *Ex parte Kibble*; *in re Onslow* (4), *Northcote v. Doughty* (5), *Ditcham v. Worrall* (6), and *Kingsman v. Kingsman* (7).

S. Hall, Q.C., and *E. Ford*, for the defendants.—The settlement is, as against

(2) 50 Law J. Rep. Chanc. 673; Law Rep. 18 Ch. D. 109.

(3) 47 Law J. Rep. C.P. 761; Law Rep. 8 C.P. D. 439.

(4) 44 Law J. Rep. Bankr. 63; Law Rep. 10 Chanc. 873.

(5) Law Rep. 4 C.P. D. 385.

(6) 49 Law J. Rep. C.P. 688; Law Rep. 5 C.P. D. 410.

(7) 50 Law J. Rep. Q.B. 81; Law Rep. 6 Q.B. D. 122.

the plaintiff, voidable only, and not absolutely void. It is like a contract induced by fraud and valid until rescinded, and not invalid until confirmed—*Oakes v. Turquand* (8). Section 1 of the Act only renders void the contracts expressly there mentioned. The decisions of the Courts upon section 2 throw no light upon the present question.

The proviso in section 1 only operates to except contracts which would otherwise come within the first part of the section. The proviso was inserted as a matter of caution.

Warmington, Q.C., replied.

Cur. adv. vult.

KEKEWICH, J. (on Feb. 28).—On the argument of the point of law which has now to be decided, the Infants' Relief Act, 1874, was freely criticised. Further consideration has convinced me, not only that the questions then discussed were real and serious, but that there are many others of at least equal difficulty. It is not, however, convenient to discuss the provisions of the Act further than is necessary for the decision before me, and I must not be understood to intimate an opinion on any questions not decided. Nor is it necessary to discuss at length the law respecting infants' contracts independently of the Act. Suffice it to say that such contracts are, with some exceptions or qualifications, which there is no need here to specify, voidable—which term I understand to mean that they are valid until repudiated. It was suggested in argument that "voidable" may equally well signify "invalid until confirmed," but to my mind that, apart from the ordinary use of language, does not express the technical sense of the word. As regards those contracts which operate as covenants and affect property, I apprehend that you must look back to the date of the contract for the purpose of ascertaining its operation, and, unless there has been a subsequent repudiation within the limits of time and in the manner allowed by law, treat it as binding the property according to the expressed intention of the instrument. For that I

(8) 36 Law J. Rep. Chanc. 949; Law Rep. 2 E. & I. App. 325.

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have the high authority of Sir George Jessel, who, in *Smith v. Lucas* (9), says:—"If, therefore, this is a covenant to settle the future-acquired property of the wife, and nothing more is done by her, the covenant will bind the property. There is no reason, so far as I am aware, for distinguishing a voidable covenant from any other covenant; till it is avoided it is a binding covenant." There are, no doubt, to be found expressions of other Judges apparently in conflict with this—as, for instance, the language of Lord Cairns in *Codrington v. Codrington* (10); but it must be borne in mind that in cases of that class (to which this also belongs) the *quondam* infant is claiming to repudiate the settlement, and other parties are endeavouring to set up, adversely to that claim, conduct or acts equivalent to ratification. The language of judgments in such cases is directed to those contentions, and must not readily be construed as expressing a difference from Sir George Jessel's statement of the law. This so far brings the case in hand within section 1 of the Infants' Relief Act, 1874, that it takes it out of the proviso. In other words, the contract, being voidable, is not by the proviso excepted from the operation of the earlier part of the section. Before considering that earlier part, let me put aside the decisions which have been quoted on section 2—decisions mainly directed to the question whether a promise of marriage is a contract within it; and, if so, what is the proper application to such a promise of the provision respecting ratification. I do not say that it was useless to refer to those authorities. The case could not have been thoroughly argued without a reference to them, and at one time I thought that they would throw more light on the question for my decision than they now appear to do. In the result I pass them by with less hesitation, because I find it difficult to connect the 1st and 2nd sections of the Act together so as to make a coherent whole, and I do not understand how, if the 2nd section receives the wide construction which was given to it by the Lord

Chief Justice in *Coxhead v. Mullis* (3), there is much, if anything, left for the operation of the 1st section. This puzzle, if it be one, I must leave for solution elsewhere or on another occasion. The contract in this case is what is sometimes termed a marriage contract, but the more familiar description to us is that of a marriage settlement. Is a contract of that character within the purview of the Act? For the present purpose one need not closely distinguish between settlements purporting to operate by way of grant, and settlements operating only by way of covenant. The particular settlement is of the latter kind, and is therefore essentially a contract. It was said that this, and, indeed, every other contract into which an infant can possibly enter, must be within the statute, because it is an Act to amend the law as to contracts of infants, and therefore all contracts of infants must be affected by it. The argument having been advanced, I have thus noticed it; but a branch of law is no less amended because some sub-divisions of it are untouched by the amendments. Take at a venture the Trustee Act, 1888, which is stated to be an Act to amend the law relating to the duties, powers, and liabilities of trustees. One would not expect to find every duty, every power, and every liability brought within the purview of the Act, nor is it, in fact, thus extensive. A more plausible argument was raised on the words "all contracts," with which the 1st section commences. The next seven words are doubtless parenthetical; but omitting them, and omitting also the exception of contracts for necessities, it was urged that the particular contracts mentioned were mentioned only as examples, and without any intention to cut down the universality of "all contracts." This argument claimed and derived support from the proviso, of which, according to the ordinary rules of construction, the effect must be to except out of the earlier part of the section something which, but for the proviso, would be within it. Therefore, it is said, the section is intended to cover every contract by law voidable, and the contract in question being of that character the section covers that. The answer to this argu-

(9) Law Rep. 18 Ch. D. 531.

(10) 45 Law J. Rep. Chanc. 660; Law Rep. 7 E. & I. App. 854.

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ment is found in the true construction of the proviso. The meaning of the proviso that the enactment shall not invalidate any contract, &c., is that no contract which the enacting part would by force of language render void shall be so rendered if it falls within a specified class. It may be, and I think it is, difficult to determine precisely what is comprehended in that class, and the difficulty is increased by the sweeping exception with which the section concludes. Still, I think it would not be right to construe the proviso as enlarging the class of contracts falling within the enactment, when it can be fairly and properly construed without attributing to it that effect. The enactment, standing alone, is, in my judgment—but subject to a remark to be presently made—free from difficulty. The contracts specified are of three classes—first, contracts for the repayment of money lent; secondly, contracts for goods supplied; and, thirdly, accounts stated. To all contracts of these classes the enactment is expressly applied, and contracts of other classes remain unaffected. That seems to me to be the plain meaning of the language, and I can discern no reason for placing a forced construction on it. It is said that I am not at liberty to follow the bent of my own opinion on this point, and that it has been otherwise decided by Judges to whose authority I must bow. I must indeed bow to them, and should not hesitate to do so if I thought they had really decided, or even expressed a definite judicial opinion on that point, but I do not. In *Ex parte Jones* (2) Sir George Jessel used language which, apart from the contract, certainly favours the argument which I am rejecting. He says that the words of the Act apply to all contracts of an infant except those which are expressly excepted, and that the words “are of universal application.” But he was considering the question whether the words cover trade contracts for the supply of goods as well as those into which a non-trader, or a trader apart from trading, may daily enter; and there was no occasion for him to consider—nor do I think that he did consider—whether contracts wholly dissimilar to those specified in the section were intended to be governed by it. There really is no other authority

which can fairly be cited as deciding or expressing a definite opinion on the point. I have already eliminated the cases on the 2nd section, which include *Ex parte Kibble*; in *re Onslow* (4); but I revert to *Coxhead v. Mullis* (3) to say, first, that although Lord Coleridge notices the argument in favour of the restricted meaning of section 1, he does not either uphold or reject it; and, secondly, that, while applying it differently—because to different language—I venture respectfully to agree with him that it is better “to suppose that Parliament meant what Parliament has clearly said, and not to limit plain words in an Act of Parliament by consideration of policy, if it be policy, as to which minds may differ and as to which decisions may vary.” I think that the two questions of law submitted to me by consent ought to be answered by declaring that the marriage contract set out in the statement of claim was, as regards the plaintiff, voidable, as distinguished from void.

Solicitors—Bennett & Leaver, for plaintiff;
McKenna & Co., agents for Alexander & Co.,
Glasgow, for defendant.

CHITTY, J. }
1890. }
May 6, 7. }

LAWRENCE v. HORTON.

Ancient Lights—Obstruction—Mandatory Injunction—Injury completed before Writ issued.

The fact that a building which obstructs ancient lights has been completed before writ issued, will not prevent the granting of a mandatory injunction for its removal. The material point for consideration is the state of the new building when the plaintiff first complains.

Action to obtain a mandatory injunction for the removal of buildings which the plaintiffs alleged interfered with the access of light to their premises.

The plaintiffs were owners in fee of a house at Wolverhampton, eighteen feet in height, which was let and used as a

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milliner's shop, and also of four cottages at the back of this house, nine feet six inches in height.

The defendants were entitled to land at the back of these premises, on which stood a warehouse of about the same height as the cottages, and the plaintiffs claimed to have enjoyed for upwards of twenty years the access and use of light passing over the roof of this warehouse through the back windows of their house and through the windows of their cottages.

In 1889 the defendants pulled down their warehouse, and on the site of it built a new warehouse from twelve to fourteen feet higher than the old one, so as to seriously interfere with the access of light to the plaintiffs' cottages, and also to the windows of the ground-floor of their house, thus making it extremely inconvenient to use the same as a show-room, as it had been theretofore used.

The plaintiffs, on becoming aware of the defendants' intention to raise the height of their building, wrote forthwith on the 23rd of May, 1889, asking them to stop, to which the defendants answered that they had instructed their builders not to proceed on the side which affected the plaintiffs' buildings. Nevertheless such building was continued, and on the 28th of May the writ was issued, and served on the 1st of June, with notice of motion for an injunction, but in the interval the exterior of their new building had been completed and roofed in.

On the evidence the Court came to the conclusion that the effect of the raising the defendants' building was to cause serious injury to the plaintiffs.

Whitehorne, Q.C., and *Arthur Underhill*, for the plaintiffs, asked for a mandatory injunction.

Romer, Q.C., and *Wurtsburg*, for the defendants.—The Court does not, in general, grant a mandatory injunction when the building complained of is completed at the time when the writ is issued, except in a case where serious damage will result to the plaintiff from the existence of such building. In the present case damages would be sufficient relief.

[They referred to *Isenberg v. The East*

India House Estate Company (1), *Durell v. Pritchard* (2), and *The City of London Brewery Company v. Tennent* (3).]

Whitehorne, in reply.—When the right to an injunction is made out, the fact that the acts complained of were done before the issue of the writ is immaterial—*Smith v. Smith* (4).

CHITTY, J.—The question is as to the appropriate remedy to be applied to the wrong the defendants have inflicted on the plaintiffs. The wrong is an obstruction of the plaintiffs' ancient lights. It is said on the part of the defendants that damages are sufficient compensation—by which is meant, not the damages to the date of the writ, as was formerly the case with common law damages, nor the damages to the date of the assessment, which is the present ordinary rule, but compensation in lieu of injunction, which the Court can grant so as to relieve the defendants from any future actions on the part of the same plaintiffs and all those claiming under them. On the other hand, the plaintiffs say that in the circumstances of this case a mandatory injunction is the appropriate remedy.

It is quite clear that, in granting mandatory injunctions, the Court exercises its discretion with caution, as it does in all cases in which it grants injunctions; and, in deciding whether that is or is not the appropriate remedy, it has regard to all the circumstances of the case. It is not easy to lay down, and I should not attempt to lay down, any hard and fast rule; and I do not think it is for the benefit of the persons whose rights are taken away that there should be such a rule laid down; but I observe, from the turn of this case, that there seems to be an idea that, if a building can be run up before the writ is issued, it can be maintained in at least the position which it has reached at that

(1) 3 De Gex, J. & S. 263; 33 Law J. Rep. Chanc. 392.

(2) 35 Law J. Rep. Chanc. 223; Law Rep. 1 Ch. App. 244.

(3) 43 Law J. Rep. Chanc. 457; Law Rep. 9 Ch. App. 212.

(4) 44 Law J. Rep. Chanc. 630; Law Rep. 20 Eq. 500.

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time. That I deny altogether. I do not think it right to allow such a rule, to encourage men, whether by trickery or by using despatch, to run up, as is often done, the particular wall that is nearest to the plaintiff's buildings, leaving the rest of the building behind much lower—that is to say, not building in the ordinary way. I think, in regard to that side of the building, it is material to consider, as one of the circumstances of the case, the condition it is in at the time when the plaintiff first makes his complaint. If he finds the building is not then completed, and he makes his complaint and issues his writ before it is completed, in my judgment the Court is in a position, if the other circumstances are sufficient, to grant a mandatory injunction. It is not like the case, which may happen, of a building completed in ignorance of the plaintiff's rights. Again, I am not laying down any hard and fast rule with regard to such a case as this—I decline to do so. But I say the circumstance that the building is of a certain height when the plaintiff first complains does not enable the defendants, the wrongdoers, to say that at least it shall remain at that height, and that there shall be no mandatory injunction to pull it down.

[His Lordship then proceeded to consider the evidence and the conduct of the defendants in not stopping their building, and concluded to grant a mandatory injunction in the form of that granted in the case of *Yates v. Jack* (5).]

Solicitors—W. H. Underhill, agent for H. & J. E. Underhill & Lawrence, Wolverhampton, for plaintiffs; Sharpe, Parkers & Co., agents for Horton & Redfern, Birmingham, for defendants.

[IN THE HOUSE OF LORDS.]

1889. } THE MIDLAND RAILWAY
May 2, 3, 13. } COMPANY AND OTHERS v.
Dec. 9. } ROBINSON.

Railway—Mines and Minerals under and near Railway—Ironstone and Limestone—Open Quarrying—Notice by Owner of Intention to work—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77, 78, and 79.

“Minerals” in sections 77 and 78 of the *Railways Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 20), includes minerals which are got by open quarrying:—So held, by LORD WATSON and LORD HERSCHELL, dissentiente LORD MACNAGHTEN.

Limestone is a mineral within the same sections.

An owner is not justified in giving a notice under section 78 unless he has a bona fide present intention to work the minerals, but it is immaterial whether he intends to work them himself or by lessees or licensees.

Decision of the Court of Appeal affirmed.

This was an appeal from a decision of the Court of Appeal which affirmed one of Chitty, J. The proceedings in the Courts below are reported 57 Law J. Rep. Chanc. 441; Law Rep. 37 Ch. D. 386.

The action was brought by the appellants for an injunction to restrain the respondent from working ironstone and limestone under a railway belonging to the Midland Railway Company, and lands adjacent thereto, in such manner as to injure the railway.

The respondent was the owner of the land on both sides of the railway, and the railway was constructed on land acquired from his predecessor by the Kettering, Thrapston, and Huntingdon Railway Company under a Special Act which incorporated the *Railways Clauses Consolidation Act, 1845*. The minerals under the land so acquired were not included in the conveyance, and were the property of the respondent.

On the 25th of January, 1886, the respondent served upon the Kettering, Thrapston, and Huntingdon Railway Company notice under section 78 of the *Railways Clauses Consolidation Act, 1845*, of his intention to work the minerals, con-

(5) 35 Law J. Rep. Chanc. 539; Law Rep. 1 Ch. App. 295.

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sisting, *inter alia*, of ironstone and limestone, under the railway and lands adjacent. Some negotiations ensued which came to nothing, and on the 11th of August, 1887, this action was commenced by the appellants, the Midland Railway Company having meanwhile acquired power to work the railway.

A motion for an interim injunction was heard by Chitty, J., on the 2nd of December, 1887. By the evidence it appeared that the custom of the country was to work the limestone and ironstone by open quarrying. The minerals under the adjacent lands had been leased to a coal and iron company, and it was contended that the notice was bad because the respondent was precluded by the lease from himself working these minerals. Chitty, J., being of opinion that the respondent did *bona fide* intend presently to work the minerals either himself or by his lessees or licensees, held the notice good, and dismissed the action.

His decision was affirmed by the Court of Appeal.

Rigby, Q.C., and *Sir A. Watson (Phipson Beale, Q.C.*, and *W. Baker* with them), for the appellants.—The words “mines and minerals” in sections 77 *et seq.* of the Railways Clauses Consolidation Act, 1845, are confined to such as are got by underground workings, they do not include substances obtained by open quarrying—*The Lord Provost of Glasgow v. Farie* (1), *per Lord Macnaghten*, on similar provisions in the Waterworks Clauses Consolidation Act, 1847. This is in accordance with the ordinary meaning of “mines,” and “minerals” was not intended to have any more extensive meaning. It could not have been intended that a landowner should have the right to break up the surface of the railway and convert it into a quarry. The decision of *Kindersley, V.C.*, in *Darvill v. Roper* (2) is strongly in favour of the appellants, and *Bell v. Wilson* (3) also supports their contention. The distinction between mines and quarries is well

established. In old inclosure Acts both were frequently reserved. *The Midland Railway Company v. The Haunchwood &c. Company* (4) is the only authority for the respondent.

The notice was bad on several grounds. First, the respondent did not intend to work by himself. If his lessees or licensees were going to work they were the persons to give notice—*Smith v. The Great Western Railway Company* (5), *per Lord Cairns*. Secondly, there was no *bona fide* intention to work at all, for there could be no profitable working. The Legislature never intended that the landlord should be able to compel the purchase of the minerals by giving a merely vexatious notice when he had no real intention of working—*Dixon v. The Caledonian Railway Company* (6), *per Lord Watson*. Then the notice applies to the whole two miles of railway, and the respondent could not mean to work all that extent of land immediately. But the notice cannot be good as to part, and bad as to the rest. It is said that if the minerals cannot be worked beneficially the compensation to be awarded will be small; but there will be the costs of arbitration, part, if not the whole, of which will fall on the appellants.

Sir H. Davey, Q.C., and *Romer, Q.C.* (*Gye* and *W. Radcliffe* with them), for the respondent. — The judgments of Lord Watson and Lord Herschell in *The Lord Provost of Glasgow v. Farie* (1) are in favour of the respondent, and sum up all the authorities as to the meaning of mines and minerals. “Mines of ironstone” are expressly mentioned in section 77. Mines and minerals must have the same meaning in sections 77 and 78; if the former does not include minerals got by quarrying, neither does the latter, and railway companies would not be able to rely on its protection, but must acquire in the first instance much more land than is actually necessary for the construction of their lines. The question what are mines and minerals cannot depend upon the local custom as to the mode of working,

(1) 58 Law J. Rep. P.C. 33; Law Rep. 13 App. Cas. 657.

(2) 3 Drew. 294; 24 Law J. Rep. Chanc. 779.

(3) 34 Law J. Rep. Chanc. 572; Law Rep. 1 Chanc. 303.

(4) 51 Law J. Rep. Chanc. 778; Law Rep. 20 Ch. D. 552.

(5) 47 Law J. Rep. Chanc. 97; Law Rep. 3 App. Cas. 165.

(6) Law Rep. 5 App. Cas. 821.

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which may vary from time to time. It might be impossible when a landowner wanted to work minerals to say what was the custom of working at the time of the conveyance to the company. The object of the Legislature was to place the landowner as regards the minerals in the same position as if he had never sold the land, and the railway company is enabled to protect itself by purchase when its works are likely to be endangered, and is not bound to do so before. There is no substantial difference between quarrying and working underground within a few feet of the surface, each would destroy the railway. The principles applicable to the case are laid down in *The Great Western Railway Company v. Bennett* (7).

[LORD MAGNAGHTEN referred to *Pountney v. Clayton* (8), *per Brett, M.R.*, as to the difference between mining and surface digging.]

Those observations do not apply where open quarrying is in accordance with the custom.

As to the objection that the notice was too large, the appellants never took this during the negotiations, and the larger the better for them. Again, it is better for them to have one notice from and one arbitration with the landowner, than to have several from and with lessees and licensees. It is not necessary that the owner should intend to work by himself.

The following cases were referred to—*Aspden v. Seddon* (9), *Davis v. Treharne* (10), *Buchanan v. Andrew* (11), and *The Earl of Jersey v. The Neath Union* (12).

Rigby, Q.C., in reply, referred to *The King v. Dunasford* (13).

Cur. adv. vult.

LORD HERSCHELL.—The main question in this case is whether certain beds of

(7) 36 Law J. Rep. Q.B. 133; Law Rep. 2 E. & I. App. 27.

(8) 52 Law J. Rep. Q.B. 566, 568; Law Rep. 11 Q.B. D. 820, 833.

(9) 46 Law J. Rep. Exch. 353; Law Rep. 1 Ex. D. 496.

(10) 50 Law J. Rep. Q.B. 665; Law Rep. 6 App. Cas. 460.

(11) Law Rep. 2 H.L. Sc. 286.

(12) 58 Law J. Rep. Q.B. 573; Law Rep. 22 Q.B. D. 555.

(13) 2 Ad. & E. 568; 4 Law J. Rep. M.C. 59.

ironstone and limestone lying under and near the railway of the appellants are their property, or the property of the respondent.

The appellant company, the Kettering, Thrapston, and Huntingdon Railway Company, whose railway and undertaking are now under statutory powers worked by the other appellants, the Midland Railway Company, purchased from the respondent's father and predecessor in title, in the year 1865, certain land on which a portion of their railway has been constructed.

The purchase was made by virtue of the company's Act passed in 1862, which incorporated the Railways Clauses Consolidation Act, 1845. The grant of the land contained no special provisions relating to the mines and minerals under the same. This being so, section 77 of the incorporated Act operated to except from the grant any "mines of coal, ironstone, slate, or other minerals, except such parts thereof as were necessary to be dug or carried away or used in the construction of the works." It is admitted that there lay beneath the lands purchased, at depths varying from six to thirty-six feet, beds of ironstone and limestone, and it is not disputed that these are "minerals" within the meaning of the enactment just referred to. The principal question for your Lordships' determination is, whether these beds of ironstone and limestone are "mines of" ironstone and other minerals, according to the true interpretation of that enactment, and therefore excepted from the conveyance to the company.

I say this, because although considerable difference of opinion existed amongst those of your Lordships who were parties to the judgment in the case of *The Provost of Glasgow v. Farie* (1), I think all were agreed that the words "mines of" had relation not only to the word "coal," but to "ironstone, slate, or other minerals" also. The turning point, therefore, of the decision upon this part of the case must be the interpretation to be put upon the word "mines" in section 77 of the Railways Clauses Consolidation Act.

It is contended on behalf of the appellants that the word "mines" is to be construed as applying only to those minerals which, according to the custom of that

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part of the country where they are situate, would ordinarily be won by underground workings, and that it does not comprehend minerals which according to such custom would be got by surface operations. It is contended on the other hand that the word comprehends all beds or strata of minerals, without any reference to the method of working them.

I have already, in *Fair's Case* (1), expressed my opinion as to the construction to be put upon the same words in a very similar enactment contained in the Waterworks Clauses Act. After carefully considering the able arguments addressed to your Lordships in the present case, I have seen no reason to alter the conclusion I then arrived at. I desire only to say that when I stated that, in my opinion, the reservation extended "to all such bodies of mineral substances lying together in seams, beds, or strata as are commonly worked for profit, and have a value independent of the surface of the land," I did not intend by these latter words to suggest that the value of the mineral substances at the time of the reservation was the test whether they were reserved or not. I used them in order to emphasise the fact that it was not every scattered piece of mineral lying under the land that could be called a "mine," but only mineral substances lying in seams, or beds, or strata.

In dealing with this case it must be remembered that all that your Lordships have to do is to interpret the words of this enactment, and not to lay down (even if it were possible) any general rule as to the interpretation of the word "mines."

I doubt whether much assistance is to be obtained from the cases in which a construction has been put upon that word in instruments embodying merely agreements between the parties to them, unaffected by any statutory enactment. In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such a manner as is consistent with the surface remaining undisturbed. And if this be true of minerals lying deep below the surface, it would be obviously out of the question to permit it to be disturbed by winning

minerals which can only be wrought by surface operations. But in the case of mines reserved under section 77 of the Railways Clauses Act the case is different. It is clear that the mines reserved, if not purchased by the company, may be so worked as to interfere with the surface, the only limitation being that the working must be according to the usual manner of working such mines in the district where the same are situate.

The object of the 77th and following clauses was considered and explained in *The Great Western Railway Company v. Bennett* (7). Lord Cranworth said, "It was obviously the intention of the Legislature in making these provisions to create a new code as to the relation between mine-owners and railway companies where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface; and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered; nothing but the surface."

The effect of this legislation was obviously very advantageous to the railway companies, and inflicted no wrong upon the owner of the minerals. The company in the first instance paid only for the surface of the land, and for such minerals as had to be taken in the making of the railway. They enjoyed the support of the underlying minerals for an indefinite term without paying for it. The mineral owner, as I have said, suffered no wrong. He still retained the ownership of the minerals, and the right to work them, which was all that he possessed before. The only burden imposed upon him, if it can be so called, was that when desirous of working the mines he should give the company an opportunity of purchasing them. It appears to me that these considerations point to the intention of the Legislature having been to use the word "mines" in the widest sense that can properly be given to it. Why should the Legislature have reserved, and exempted the company from

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the necessity of purchasing, beds of minerals lying at such a depth below the surface, or with superincumbent strata of such a character that the minerals would ordinarily be worked by underground operations, and compelled the company at once to purchase and pay for beds of minerals which would, in ordinary course, be won by surface operations? It is urged that in the latter case the working of the minerals would remove the very thing which the company had bought, and directly interfere with the existence of the railway. But it must be remembered that the surface might be rendered just as unfit for railway purposes by subterranean workings as it would be by operations from the surface. The learned counsel for the appellants asked what the company could be said to have acquired by the purchase of the land, if its very surface could be directly interfered with by mining operations? I fully feel the force of this question and the difficulty which it involves. If this difficulty were altogether got rid of by the construction contended for by the appellants, I admit that a strong ground would be shewn for yielding to their contention. But it was properly conceded by the learned counsel for the appellants that this was not the case. Where a "mine," within the meaning attributed to that word by them, cropped out at or near the surface on a part of the railway, the same difficulty would arise. For it was not denied that this would be part of the mine, and therefore within the reservation. So, too, although a seam of minerals may lie at such a depth beneath the surface of the land purchased that it would ordinarily be got by underground workings, yet, owing to the works necessary for making the railway, be it a cutting or tunnel, the minerals may come to form the surface on which the railway rests. Such a seam would be a "mine" within the construction suggested, and therefore reserved to the landowner, together with the right to work it; and yet the same question might be asked, can it have been intended that such owner should have the right to take away the surface upon which the rails are laid?

It seems to me, too, that the appellants' construction, if adopted, would of itself

give rise to serious difficulties and inconveniences. When land was to be taken for the purposes of a railway, it would be necessary to ascertain what minerals lay beneath the land which would not, according to the usual manner of working in the district, be got by underground workings. For these would become the property of the railway company, and their value must of course be taken into account in fixing the price to be paid for the land purchased. And further, the question what minerals were reserved, and therefore whose the property in them was, might have to be determined many years after the purchase by an enquiry what was the usual mode of working in the district at the time of the conveyance, which perhaps might not have been the same as at the time when the controversy arose. And there are some cases where it might be almost impossible to say what minerals were and what were not reserved. Beds of slate, I believe, exist which have been worked both by surface workings at the face, and by levels driven underground. How much of such seams of slate would be reserved, and how much fall to be purchased by the company, would, I think, on the contention of the appellants, be a question almost impossible of solution.

But besides this, under section 78, the owner of mines not under the railway, but within the prescribed distance from it, is bound to give notice before working, so that the company may have the option of purchasing. If the word "mines" bears the meaning I have attributed to it, the company need not concern themselves about the existence of minerals, whether near the surface or not, within the prescribed distance. But if it is to have the more limited construction contended for by the appellants, it would be necessary for the company not only to ascertain what minerals lie under the lands adjoining any embankments or other works which would be injured by the working of what I will call surface minerals, but often to purchase these minerals, and the land under which they lie, for the protection of their works from subsidence.

Seeing, then, that the difficulties pointed out by the appellants are not avoided by adopting their view, and that its adoption

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would give rise to the difficulties and inconveniences I have pointed out, I think your Lordships will do well to construe the language used with the aid of the light that is thrown upon it by the intention of the Legislature as manifested in the provisions relating to mines and minerals lying under and near the railway. And the considerations upon which I have dwelt point to the conclusion I have already indicated, that the widest construction ought to be given to the word "mines" which is possible, without improperly straining the language used.

Is there anything in the terms of the enactment compelling the narrower construction for which the appellants contend? I think not. Applying oneself to the consideration of the word "mines," apart from the document or context in which it is found, I cannot think that its natural meaning imports such beds or strata of minerals only as are ordinarily got by underground working. If aid is sought from the lexicons, and the definitions there given are reviewed, I do not think that they afford support to such a construction. Dr. Johnson, I may observe, defines a "quarry" as a stone "mine." I see no reason to doubt the soundness of the view I expressed in *Farie's Case* (1), that in ordinary parlance the word "mines" is not used to describe unwrought beds of minerals. I think it is ordinarily applied only to beds of minerals which are being or have been wrought; but in the enactment with which we are dealing it is obviously impossible so to interpret the word. I have already pointed out why I think the meaning attributed to the word by the Courts, when contracts between individuals have been under consideration, does not afford a guide for construing this enactment.

These are my reasons for adhering to the construction which I put upon the words "mines of coal, ironstone, slate, or other minerals" in *Farie's Case* (1).

So far I have dealt with the case apart from authority; but it is not unworthy of consideration that the decided cases support the view adopted by the Court below. In the case of *The Great Western Railway Company v. Bennett* (7), Lord Chelmsford said: "That this section re-

serves to the mine-owner all the minerals, however near they may be to the surface, unless the company chooses to purchase them, appears very clearly from the exception of 'the parts necessary to be dug, or carried away, or used in the construction of the company's works,' as these will, of course, be the minerals lying nearest to the surface." I admit the force of the criticism of the appellants' counsel, that the words quoted by Lord Chelmsford do not necessarily lead to the inference he drew from them, inasmuch as in making the railway it might be necessary in cuttings or tunnels to carry away or use minerals lying far below the surface. But the fact remains that the noble and learned Lord intimated the opinion that all the minerals, however near they might be to the surface, were reserved. And the other learned Lords who took part in the judgment not only do not dissent from Lord Chelmsford's view, but use language which, I think, shews that they shared it. An opinion thus expressed ought not to be lightly departed from. It is impossible to say how many transactions in the last twenty years may have been carried through on this view of the law. There has been no judicial expression of a contrary opinion that I am aware of until quite recently in *Farie's Case* (1), whilst both in this country and in Scotland the point has been actually decided in accordance with the view taken by the learned Judges in the present case. Indeed, in the case of *The Caledonian Railway Company v. Dixon* (6), where the point was decided against the company by the Court of Session (14), although the case was brought to your Lordships' House by way of appeal upon another point, the railway company did not seek for a review of the decision of the Court of Session on the question now in controversy.

It remains for me to consider the subsidiary contention of the appellants, that the respondent was not in the present case "desirous of working" the mines. The first objection raised is that he had no intention of working them himself, that is, by his own servants, but only by lessees or licensees. I agree with

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the Court below that this objection cannot, upon the true consideration of the section, be sustained. Then it was urged that there was no real desire to work, but only to compel the appellants to purchase the minerals. I quite concur with what Lord Justice Cotton said, that "there must be not only an expression of desire, but an honest actual existence of the desire to work either by himself or his lessees, to justify an owner in giving such a notice. If he gave the notice when it was obvious that there were no minerals, or that he could not possibly intend either to let or work them himself, that would be vexatious, and the Court would not allow that to be acted upon." But in the present case the learned Judge who tried the action and the Court of Appeal have come to the conclusion that there was a real and *bona fide* desire to work. After considering the arguments insisted upon by the learned counsel for the appellants, I find myself unable upon this point to differ from the Courts below. I am not a little influenced by the fact that the minerals on either side of the railway in the immediate neighbourhood of those now in question have actually been gotten by lessees of the respondent. It is urged that the minerals under the railway were left unworked, because the respondent thought he had no right to them. This matters not as regards the point I am now concerned with. Indeed, it seems to me to make the case of the respondent stronger.

For the reasons I have submitted to your Lordships I think the judgment appealed from should be affirmed, and the appeal dismissed.

LORD WATSON.—I also am of opinion that both Courts below have come to a right conclusion in this case, and that the judgment of the Court of Appeal sustaining the decision of Mr. Justice Chitty ought to be affirmed.

Questions of nicety have arisen, and may yet arise, as to the particular substances meant to be included in the general words "or other minerals," as these occur in section 77 of the English, and section 70 of the Scotch, Railways Clauses Act, 1845. I do not think that

any substantial question of that kind is presented in this case. The substances to which the argument at the bar has been confined are "ironstone," which is one of the minerals specially excepted in these clauses, and "limestone," which appears to me to be so much *ejusdem generis* with the minerals enumerated that it must necessarily be held to come within the description of "other minerals."

The real point of difficulty which this case presents is due to the circumstance that the statutory exception is not of "minerals," but of "mines of minerals." It is mutually conceded that the ironstone and limestone below the appellants' railway, which the respondent has notified his intention to excavate, can only be worked, and according to the custom of the district would be properly worked, by open cast. But the appellants maintain that, according to the sound construction of the Act of 1845, no minerals are reserved to the landowner except such as are capable of being "mined," using that term in its strictest sense, as signifying operations conducted wholly underground and not open to the light of day. That is a proposition which your Lordships had recently occasion to consider in *The Lord Provost of Glasgow v. Farie* (1). In that case I came to the conclusion that every substance, being a mineral within the meaning of these clauses, is reserved to the owner irrespective of the method by which it may be wrought. I there said that, in the enactments of section 18 of the Waterworks Clauses Act, 1847 (which are in the same terms with sections 77 and 70 of the Railways Clauses Acts of 1845), the word "mines" must be taken to signify "all excavations by which the excepted minerals may be legitimately worked and got." I do not think it is necessary to say more than that I adhere to the views which I adopted in *The Lord Provost of Glasgow v. Farie* (1). But, on consideration, I think it is more accurate to say that the expression "mines of coal &c." is used by the Legislature to denote the minerals *in situ*, and has no reference to the manner in which they can be worked. The result is the same, and rests upon the same considerations. I concur in the reasons which have just

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been assigned for his judgment by Lord Herschell. After all, this is a mere question as to the period of time at which railway companies must acquire and pay for the subjacent and adjacent minerals necessary for the support of their lines. The general policy of the Railways Clauses Acts and their special provisions alike appear to me to point to the result at which the noble and learned Lord has arrived.

In my opinion the appellants have failed to substantiate their averment, that the respondent does not entertain a real and *bona fide* intention of working the minerals in question; and I therefore concur in the judgment which has been moved.

LORD MACNAGHTEN. — The principal question, if not the only question in this case, is, what is the meaning of the word "mines" as used in section 77 of the Railways Clauses Consolidation Act, 1845, and in the heading to that part of the Act? On this question I have the misfortune to differ from your Lordships. I abide by the views I expressed in *Farie's Case* (1). I continue to think that the word was used both in the heading and in the section in the sense which, if I am not mistaken, every English Judge who had occasion to consider the meaning of the word before *Farie's Case* (1) was decided took to be its ordinary signification. It seems to me that on such a point the opinions of such Judges as Vice-Chancellor Kindersley, Lord Justice Turner, and the Master of the Rolls (Sir George Jessel) are probably a safer guide than any definitions or illustrations to be found in dictionaries. Vice-Chancellor Kindersley was clear on the point. So was Lord Justice Turner, who agreed with the Vice-Chancellor on that question in *Bell v. Wilson* (3), and, dealing with an exception of "mines within and under the lands, whether opened or unopened," observed that those are "words which are ordinarily used with reference to underground workings." In *Errington v. The Metropolitan District Railway Company* (15), where, contrary to the view thrown

out by some of the noble and learned Lords in *The Great Western Railway Company v. Bennett* (7), it was held that railway companies could acquire mines compulsorily, the Master of the Rolls (Sir George Jessel) remarks: "There are no mines in the ordinary sense under these lands—at least, it is not shewn there are. What are called mines and what are minerals probably within the meaning of the Act of Parliament are some beds of gravel or some beds of clay lying near the surface, and it is said they can only be worked from the surface."

If it was really the intention of Parliament that all minerals, however worked, should be deemed to be excepted from conveyances to railway companies unless expressly mentioned therein, I cannot conceive why the word "minerals" is not to be found in the heading to this part of the Act, or why the word "minerals" was not used in section 77 instead of the expression "mines of coal, ironstone, slate, or other minerals," or why the Legislature in the heading and in that section avoided the use of the common, obvious, and well-understood expression "mines and minerals."

Whether the view of the appellants or that of the respondent be accepted, some difficulties and inconveniences unquestionably may present themselves. But I think the appellants were right in saying that the difficulties which attend their construction, however formidable they may appear in argument, are not really practical difficulties, and that those difficulties are reduced to a minimum since it has been decided that railway companies are not disabled from purchasing mines compulsorily if they think fit to do so.

It was said in argument that if the appellants' construction were adopted, railway companies might be exposed to danger by the working of surface minerals on adjacent lands. But, in answer, it was pointed out that if surface minerals are not within the enactment with respect to "mines lying under or near the railway," the ordinary rule as to adjacent support, so far as regards surface minerals, would be applicable.

Some reliance was placed on certain expressions in Lord Chelmsford's judgment

(15) 51 Law J. Rep. Chanc. 305; Law Rep. 19 Ch. D. 559.

Midland Rail. Co. v Robinson, H.L.

in *The Great Western Railway Company v. Bennett* (7), which seem to shew that in his Lordship's opinion all minerals of whatever kind, and however near the surface, were reserved by the Act to the land-owners. But it is to be observed that the question which has arisen in the present case could not possibly have arisen in that case, because the exception in the conveyance under consideration in that case did not follow the words of the Act. It excepted in terms both minerals and mines. The point, therefore, possibly was not present to his Lordship's mind. On the other hand, Lord Westbury's opinion seems to favour the appellants' construction.

That a railway company is not entitled to support from subjacent or adjacent mines is perfectly clear from the Act, as was pointed out in *Bennett's Case* (7). But I do not think that it necessarily follows from that circumstance that a mine-owner who is entitled to withdraw support by working his mines in the ordinary course, if the company do not compensate him, is entitled to enter upon the surface, which unquestionably belongs to the railway company, and break it up by working from the surface.

For these reasons, and the reasons I have expressed in *Farie's Case* (1), I should, but for your Lordships' opinion, be disposed to reverse the judgment under appeal.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—Beale & Co., for appellants; Capel Cure & Ball, for respondent.

STIRLING, J. }
1890. } *In re THE CARDIFF SAV-*
Feb. 18, 19, 20. } *INGS BANK; DAVIES'S*
March 28. } *CASE.*

Savings Bank—Winding-up—Contributory—Trustee and Manager—Liability—Misfeasance—Savings Banks Act, 1863 (26 & 27 Vict. c. 87), ss. 2, 3, 6, 10, 11, 21, 38, 39, and 55—Savings Banks Act, 1880 (43 & 44 Vict. c. 36), ss. 2 and 3—Savings Banks Act, 1887 (50 & 51 Vict. c. 47)—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 165 and 200.

D., a trustee and manager of a savings bank regulated by the Savings Banks Act, 1863, omitted to comply with the requirements of the Act as to the maintenance of checks in transactions of deposit and repayment, and as to the examination of accounts, and entrusted the business of the bank to the actuary, who committed frauds which resulted in the winding-up of the bank:—Held, that he was liable under section 165 of the Companies Act, 1862, to make compensation to the bank on the ground of misfeasance, but that he was not liable under section 200 as a contributory.

This case came before the Court upon the adjournment into Court of the question whether the respondent, Peter Davies, ought to be settled on the list of contributories in the winding-up of the Cardiff Trustee Savings Bank, and also upon a summons taken out by the official liquidator asking for—(a) A declaration that the respondent, formerly a trustee and manager of the above-named bank, and as being a contributory or otherwise under the provisions of the 165th section of the Companies Act, 1862, and having regard to the 11th section of the Savings Banks Act, 1863, was liable for—1. All moneys from time to time entered or initialled by him in the cash-book of the trustees and managers of the bank as having been repaid to depositors, but which, though withdrawn by the actuary from the funds of the bank, were not in fact so repaid, with interest thereon.

2. All moneys not accounted for to the bank which were received by the actuary out of office hours, or in office hours otherwise than in the presence of a

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trustee and manager, during the period while the respondent allowed the actuary to receive, or consented to his receiving, deposits in manner aforesaid; or, at all events, all moneys received and not accounted for as aforesaid in respect of which the respondent entered or initialled in the said cash-book as received from the depositors less amounts than the amounts actually received, with interest.

3. All interest from time to time paid by the bank to depositors in respect of deposits to the receipt of which the respondent was a party, and which were, in whole or in part, illegal or irregular by reason of their exceeding the statutory limits, with interest.

4. All interest from time to time paid by the bank in respect of moneys standing to the credit of accounts to the opening of which the respondent was a party, and which were illegal or irregular by reason of the depositor being entitled to some benefit from some other funds in the bank, or from funds in some other savings bank, with interest.

5. All loss and damage incurred by the bank by reason of the negligence or omission of the respondent, as such trustee and manager as aforesaid, in complying with the rules and regulations prescribed by the Savings Banks Act, 1863, as to the maintenance of checks and the audit and examination of accounts.

6. All moneys expended by the trustees and managers of the bank after the bank suspended payment in stamping the documents by which the several depositors affected to release the trustees and managers from personal liability, in payment of costs and expenses in connection with such releases, and in payments to Mr. D. R. Roberts for services in connection with the unauthorised winding-up of the affairs of the bank.

(b) A declaration how far the respondent was liable for payments, to which he was a party, made by the bank in respect of the principal of illegal or irregular deposits, or of principal moneys standing to the credit of illegal or irregular accounts, and for moneys paid to irregular depositors in the course of the winding-up of the affairs of the bank in respect of their

irregular deposits, and in respect of interest thereon, and for any loss incurred by the bank by reason of the sale of the bank premises in the course of the unauthorised winding-up.

(c) Necessary accounts, enquiries, and directions.

The Cardiff Savings Bank was originally formed in 1819, but was reconstituted after the passing of the Savings Banks Act, 1863 (1), and the rules under which

(1) The material provisions of the Savings Banks Act, 1863, are as follows:—

"6. No savings bank, subject to the proviso hereinafter contained with respect to the branch offices or local receivers of any savings bank, shall have the benefit of this Act unless in the rules and regulations for the management thereof it shall be expressly provided,—

"(1) That no person or persons, being treasurer, trustee, or manager of such savings bank, or having any control in the management thereof, shall derive any benefit from any deposit made in such savings bank, save only and except such salaries and allowances or other necessary expenses as shall, according to such rules and regulations, be provided for the charges of managing such savings bank, and for remuneration to officers employed in the management thereof, exclusive of the treasurer or treasurers, trustee or trustees, manager or managers, or other persons having direction in the management of such savings bank, who shall not, directly or indirectly, have any salary, allowance, profit, or benefit whatsoever therefrom beyond their actual expenses for the purposes of such savings bank.

"(2) That not less than two persons, being either trustees, managers, or paid officers appointed for that specific purpose, and where two only, except in the case of savings banks which are open for more than six hours in every week, one such person to be a trustee or manager, be present on all occasions of public business, and be parties to every transaction of deposit and repayment, so as to form at least a double check on every such transaction with depositors.

"(3) That the depositor's pass-book shall be compared with the ledger on every transaction of repayment, and on its first production at the bank after each twentieth day of November.

"(5) That no money be received from or paid to depositors except at the office or branch offices where the business of the savings bank is carried on under the authority of the board of managers, and during the usual hours for public business.

"(6) That a public accountant, or one or more auditors, be appointed by the trustees and managers, but not out of their own body,

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it thenceforth carried on business were certified by Mr. Tidd Pratt on the 19th of November, 1863. Its affairs were conducted by a president, seven trustees, and thirty-seven managers. Mr. Peter Davies, the respondent, became a manager in 1868 and a trustee in 1882. He carried on business as a draper at No. 10 Duke Street, Cardiff, the same street in which the offices of the bank were situated, and he took an active part in the management of the affairs of the bank from the date of his appointment as a manager down to the time when the bank ceased to carry

to examine the books of the bank, and to report in writing to the board or committee of management the result of such audit, not less than once in every half year, also to examine an extracted list of the depositors' balances made up every year to the twentieth day of November, and to certify as to the correct amount of the liabilities and assets of the bank.

"(7) That a book containing such extracted list of every depositor's balance, omitting the name, but giving the distinctive number and separate amount of each, and shewing the aggregate number and amount of the whole, checked and certified by such public accountant or auditors, be open at any time during the hours of public business for the inspection of every depositor, as respects his own account, to examine his own deposit-book therewith, and the general results of the same.

"(9) Provided, that where savings banks are established with agents or local receivers elsewhere than at the head office, the rules shall provide for the due receipt of and accounting for all moneys by such agents or local receivers on account of such savings bank respectively, and also for the presence of a second party in every transaction when money is paid or received, and also for the periodical examination of the depositors' books with the ledger once at the least in every year."

"11. No trustee or manager of any savings bank . . . shall be personally liable, except—

"(1) For moneys actually received by him on account of or for the use of such savings bank, and not paid over and disposed of in the manner directed by the rules of the savings bank.

"(2) For neglect or omission in complying with the rules and regulations required by this Act to be adopted as hereinbefore is provided in the maintenance of checks, the audit and examination of accounts, the holding of meetings, and keeping minutes of proceedings thereat.

"(3) And also for neglect or omission in

on business. From 1850 to the time of his death (the 26th of March, 1886) the actuary and paid officer of the bank was Mr. James Emerson Williams, who throughout his life enjoyed the respect and complete confidence of the trustees and managers of the bank, as well of his fellow-citizens at Cardiff, where he held various public offices. Upon his death, however, it was ascertained that he had been guilty of fraud, and had abstracted very large sums of money which ought to have been found in the coffers of the bank, whose assets were insufficient to meet the claims against it by many thousands of pounds. Under these circumstances the bank suspended payment in April, 1886. Subsequently, in or about September of the same year, arrangements were made by the trustees and managers, under which a large number of the depositors accepted payments of 17s. 6d. in the pound in some cases, and in others 17s. in the pound, in satisfaction of their claims. A certain number of the depositors, however, refused to accept these terms; the affairs of the bank were investigated by a commissioner (Mr. Lyulph Stanley) appointed under the Trustee Savings Banks Act, 1887; and ultimately, upon the petition of the Commissioners for the Reduction of the National Debt (presented under that Act), an order was made for the winding-up of the bank as an unregistered company under the provisions of the Companies Act, 1862, and the Acts amending the same.

The rules of the bank provided (rule 2) that the bank should be open for receipts and payments on every Saturday throughout the year, between the hours of 10 and 2 o'clock, or on such day or days in every week as the trustees and managers for the time being should in general or special meeting determine; and for the receipt of deposits only on every Monday and Saturday evening from 7 till half-past 8 o'clock. No day (other than those specified in the rules) for receipts or payments was ever appointed.

taking security from officers as hereinbefore provided."

[Sections 38 and 39 contain provisions against excessive deposits.]

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The rules embodied, in most cases in the very language of the statute, the requirements of section 6 of the Act of 1863. The rules required—1. That no money should be received or paid from or to depositors except at the office of the bank and during the usual hours for public business. 2. That one trustee or manager should, in addition to the actuary, be present on all occasions of public business, and be a party to every transaction of deposit and repayment. 3. That the depositor's pass-book should be compared with the ledger on every transaction of repayment. 4. That a list of depositors' balances should be extracted, and that such extracted list should be examined by the auditor once in every year; and 5. That a book containing such extracted list of every depositor's balance, checked and certified by the auditor, should be open at any time during the hours of public business for the inspection of every depositor as respected his own account. It appeared that the actuary was in the habit of receiving deposits and making repayments on other days than Saturday and Monday, and in the absence of a trustee or manager. The sums received or paid were entered in the depositor's pass-book, and also in the cash-book kept by the actuary; and this latter book was signed by the depositor. Afterwards the entries in the actuary's cash-book were copied into a cash-book kept by the trustees, and the transactions, though not taking place during hours of public business, were thereby made to appear to have taken place at a time when the bank was open for such business.

The respondent admitted in his cross-examination that he then knew he had entered in the trustees' cash-book a repayment of a larger sum than was really paid to the depositor, and that he often entered into the trustees' cash-book transactions at which he was not present. In reference to this matter he said: "I have done it on a Friday evening, and sometimes on a Saturday morning, during the earlier part of the business. The actuary found that the business of the bank had so increased, that, in order not to delay the business on Saturday morning, it was necessary that the books should be opened

ready for the trustees who would follow on the continuation entry; but it was more than that as well. Those sums which were entrusted to the actuary to deposit, he wished them to be entered at the commencement of the business on the Saturday. The attention of the actuary was called by the chairman to the practice of his taking money during the week on other days than Saturday, and the actuary said he could never carry on the business of the bank without doing so."

The result of this mode of conducting the affairs of the bank was that the actuary falsified his cash-book, and represented that he had made greater payments than he actually had made, and had received smaller sums than had actually come to his hands. In each case he retained the difference, and thus committed frauds to a very large extent. The following are examples of what took place:

In the pass-book of a depositor named Albert Cope a sum of 15*l.* 8*s.* 8*d.* was entered as having been repaid to him on the 19th of December, 1884, a Friday, and this entry was initialled by the actuary and posted to the ledger. In the cash-books of the actuary and trustees (the entry of the latter being in the handwriting of the respondent Davies) the repayment appeared under the date Saturday, December 20th, 1884, as of a sum of 45*l.* 8*s.* 8*d.* It appeared from an examination of the actuary's cash-book that the repayment was originally entered correctly as 15*l.* 8*s.* 8*d.*, and was subsequently altered (presumably after the depositor had signed the book) by the figure 1 in 15 being changed into 4. The result was that the balance handed over to the treasurers of the bank on the 20th of December at the close of business was less by 30*l.* than it ought to have been. Again, in the pass-book of a depositor named Eliza Snelling, there appeared an entry, under date the 1st of July, 1884, of a receipt from her of 45*l.* which was signed by the actuary. This transaction was entered in the cash-books of the actuary and trustees (the entry in the latter being in the handwriting of Peter Davies), under date the 5th of July, 1884, as a receipt of 40*l.* only. The receipt of

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45l. was duly posted to the ledger, but 5l., the difference between 45l. and 40l., never came into the possession of the bank, and was presumably retained by the actuary. In each of these cases the pass-book of the depositor agreed with the ledger of the bank, and in the ordinary course of things the frauds must have been discovered by the auditor; but the actuary kept back from the auditor a certain number of the ledgers of the bank, and the provision of the statute, requiring that a list of depositors' balances, made up every year to the 20th of November, should be extracted and examined and checked and certified by the auditor, and should be open for the inspection of depositors, was never complied with. The attention of the trustees and managers was expressly called by the auditor to this omission in 1884 and 1885.

The other questions raised by the summons are sufficiently referred to in the judgment of the Court, the Court being of opinion that they were not ripe for decision.

The Attorney-General (Sir R. E. Webster, Q.C.), Fischer, Q.C., and Ingle Joyce, for the liquidator.—The respondent must take the consequences of departing from the strict letter of the requirements imposed by section 6 of the Act of 1863, however laudable his motives may have been. Such breaches of duty except him from the exemption granted by section 11. If the Act had been complied with, it is impossible to suggest that the frauds of the actuary could have been committed. The respondent cannot evade liability by saying that he left everything to the actuary and the auditor. We submit that he is liable for breach of trust within the principle of *Clough v. Bond* (2), *Ghost v. Waller* (3), and *Bostock v. Floyer* (4). We also submit that the respondent is liable as a contributory. Although by the Act of 1887 the bank can be wound up under the Companies Act, there are no shareholders

in this association, and it is submitted that the proper course is to settle the whole of the trustees and managers on the list of contributories in respect of the amounts found due from them.

Buckley, Q.C., and Upjohn, for the respondent.—The case resolves itself into two questions: 1. Is the respondent liable, under section 165 of the Companies Act, for neglect of duty to repay the bank loss alleged to be sustained by his negligence? 2. Is he liable as a contributory under section 200? The Trustee Savings Banks Act of 1863 does not create a corporation, it provides for an institution; the nearest analogy is a building society. It may be that all the depositors are equally members of this institution, whose money is received and whose affairs are conducted by the trustees and managers. The scheme of the Act is that the trustees and managers are to receive moneys, which if they pay over according to certain rules, they are discharged. These rules, however, are between the trustees and managers and the bank only. The other side have to prove—first, loss to the bank; and secondly, that the loss arose by the default of the trustees and managers. Assuming a non-compliance with the Act, the damage is too remote. The proximate cause of the loss was not the negligence of the respondent, but the criminal act of the actuary—*Swan v. The North British Australasian Company, Limited* (5), *In re The United Service Company; Johnstone's claim* (6), *In re The Shields Marine Insurance Association; Lee and Moor's Case* (7), *In re The Hoylake Railway Company; Littledale's Case* (8), and *In re The European Society* (9). If there is any liability at all on the part of the respondent, it is under section 165, and not under section 200.

The Attorney-General, in reply, re-

(5) 2 Hurl. & C. 175; 32 Law J. Rep. Exch. 273.

(6) 40 Law J. Rep. Chanc. 286, 288; Law Rep. 6 Chanc. 212, 217.

(7) Law Rep. 5 Eq. 368.

(8) 43 Law J. Rep. Chanc. 529, 530; Law Rep. 9 Chanc. 257, 260.

(9) 48 Law J. Rep. Chanc. 118, 129; Law Rep. 8 Ch. D. 679, 708.

(2) 3 Myl. & Cr. 490, 496; 8 Law J. Rep. Chanc. 51, 53.

(3) 9 Beav. 497.

(4) 35 Law J. Rep. Chanc. 23; Law Rep. 1 Eq. 26.

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ferred to *Crisp v. Bumbury* (10) and *In re The Royal Victoria Palace Theatre Syndicate; Moore and De la Torre's Case* (11).

Cur. adv. vult.

STIRLING, J. [after referring to the history and constitution of the bank, proceeded as follows]:—The liquidator seeks to place Mr. Davies on the list of contributories in the winding-up, and he also charges him with misfeasance or breach of trust in respect of various matters which may be grouped under the following heads: First, neglecting or omitting to comply with the rules and regulations required by the Act of 1863, with reference to transactions of deposit and repayment. Secondly, neglecting or omitting to comply with such rules and regulations with reference to the audit and examination of accounts; thirdly, permitting deposits to be received which were illegal or irregular by reason of their exceeding in amount the limits imposed by the Act, or by reason of the depositors being entitled to some benefit from other funds in the bank or from funds in another savings bank; and fourthly, misapplication of the funds of the bank after it suspended payment in connection with the arrangements for effecting compositions with the depositors. [His Lordship then referred to sections 2, 3, 6, 10, 11, 21, 38, 39, and 55 of the Savings Banks Act, 1863, and section 2 of the Savings Banks Act, 1880, and came to the conclusion upon the facts set out in the statement that the rules and regulations required by the Act of 1863 to be adopted as regards the maintenance of checks and the examination of accounts were, to the knowledge of the respondent, not complied with; and he continued as follows:] The question arises, What is the liability of the respondent in respect thereof? Apart from statute, if the president, trustees, and managers had carried on the business of a savings bank, and had received by themselves or their agents sums of money from depositors, I apprehend that they would have become

indebted to the depositors for the sums so received, and that each of them would have been liable to the last farthing of his fortune for the debts so incurred; and the circumstance that the business was carried on from benevolent or public-spirited motives would not have served to exonerate any one of them from the fulfilment of such liability. The Legislature has, however, thought fit to intervene, and, regarding the promotion of thrift among persons of small means as a matter of great public importance, has enacted the statute to which I have so often referred, and by its provisions the liabilities of the trustees and managers of savings banks are limited in the following manner. [His Lordship read section 11 of the Act of 1863.]

On this occasion I have not to deal with any liability under sub-section 1, for, although attention was at first directed to it, it was ultimately admitted that the summons now before me was not framed with reference to that sub-section, and any liability of the respondent under that head will be unaffected by my decision on the present occasion. What I have now to deal with is the liability of Davies arising from his neglect or omission to comply with the rules and regulations referred to in sub-section 2.

It was contended that under section 200 of the Companies Act, 1862, Davies was liable as a contributory. That section provides that in the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable at law or in equity to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs, charges, and expenses of winding up the company.

The section has been the subject of judicial construction in several cases, and in particular by the Court of Appeal in *In re The European Society* (9). Lord Justice James there says: "It is said that, under the 200th section of the Act of 1862, all persons legally or equitably liable to contribute to the assets are contributories, and

(10) 8 Bing. 394; 1 Law J. Rep. C.P. 112.

(11) 43 Law J. Rep. Chanc. 761; Law Rep. 18 Eq. 661.

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may be put on the list as such. It is impossible to hold that any person who is a debtor to the company in liquidation can be put on the list of contributories. He is bound to pay moneys, which moneys when paid will be part of the assets of the company, and in that sense he is liable to contribute to the assets; but that does not make him a contributory within the meaning of the Act. Again, a person who has taken shares in the name of a trustee is, as between him and his own trustee, the person liable to contribute; but that does not make him a contributory as between him and the company. The company may get at him, as it has in several instances, through and in the names of the trustees. But still the equitable liability is to the trustees only, and there is no privity or direct right of any kind as between the company and the *cestuis que trust*. If an officer of the company has misappropriated assets, that is a very material point—he may be made to refund them to the liquidator as part of the assets, but that does not make him a contributory. The plain meaning of the Act is a legal or equitable liability to contribute in the character of a partner."

By that exposition of the meaning of the enactment I am bound, and I therefore hold that the liability referred to in section 200 is a legal or equitable liability to contribute in the character of a partner.

Is, then, this the nature of Davies's liability? In my opinion it is not. I think that section 11 of the Act of 1863 relieves him of such liability, and as the price of such exemption imposes another—namely, liability for neglect or omission in complying with the rules and regulations; and that this liability does not make him a contributory, any more than does the liability of an officer of the company to refund to the liquidator assets of the company which he has misappropriated. It was said, however, that even if Davies were not liable to pay or contribute to the payment of any debt or liability of the bank, he was at all events liable to pay or contribute to the payment of the costs, charges, and expenses of the winding-up. In my opinion this is not so; the liability to contribute to the costs of winding-up

must, like the liability to contribute to debts, be a legal or equitable liability in the character of a partner. If, without any default on the part of the trustees or managers, the assets had proved insufficient for the satisfaction of the liabilities of the bank, and it had become necessary to have recourse to the process of winding-up merely in order that the liabilities might be duly ascertained and the assets properly distributed, I cannot see how, in the face of section 11 of the Savings Bank Act, it would be possible to hold the trustees or managers liable for any part of the costs of such a winding-up. Any liability of Davies in respect of costs of winding-up must be attributable to the neglect or omission specified in that section. Whether by reason of that liability he could be compelled to pay any part of the costs of winding-up it is unnecessary now to determine, but, in my opinion, he cannot be placed on the list of contributories.

Is he, then, liable under section 165 of the Companies Act, 1862? That section provides that where in the course of the winding-up of any company it appears that any past or present director, manager, or any officer of the company has been guilty of any misfeasance or breach of trust in relation to the company, the Court may compel him to contribute such sums of money to the assets of the company, by way of compensation in respect of such misfeasance or breach of trust, as the Court thinks just. The Legislature has relieved the trustees and managers of savings banks from personal liability, except for neglect or omission to comply with certain rules and regulations. Those rules and regulations have, to the knowledge of Davies, not been complied with, and under these circumstances he has been guilty certainly of an omission, if not also of neglect, within the meaning of the statute. That omission or neglect appears to me to constitute a misfeasance or breach of trust within the meaning of section 165. I think, by reason of that misfeasance, there is sufficient evidence to satisfy me that the assets of the bank are less than they ought to be; and that claims which those assets are insuffi-

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cient to satisfy may be established in the winding-up. That being so, Davies may, in my opinion, be properly compelled to contribute an adequate sum to the assets of the company by way of compensation. It was said on his behalf that the actuary was a man of high respectability, who enjoyed the confidence, not only of the trustees and managers, but of all his fellow-townsmen in Cardiff. That appears to me to be no defence whatever. The Legislature has imposed on the trustees and managers this obligation, that not less than two persons shall be present on all occasions of public business for the purpose of watching and checking all transactions of deposit and repayment; that duty, to the knowledge of Davies, was omitted to be performed. What was the object of the double check, for the maintenance of which provision is so anxiously made by the statute? Surely to prevent the bank from being defrauded. How then can it be any excuse for the omission that the transaction of business was intrusted to a single person to all appearance worthy of trust. Such persons, as experience shews, not unfrequently yield to such temptations as were offered in the present case, and the possibility of such an event was an evil against which the Legislature desired to guard. Such frauds constitute the very mischief which it was the aim of the statute to prevent. These observations appear to me to answer another objection urged on behalf of the respondent—namely, that the damages occasioned by the acts of the actuary were too remote.

Again, it was said that other trustees and managers were not less responsible than Davies for the non-observance of the statutory requirements, and that an order ought to be made against them as well as against him. The evidence certainly appears to shew that other trustees and managers were, or ought to have been, aware of the disregard of the regulations, and it is quite possible that at some future period they may be held liable for the neglect or omission which I hold to be established against Davies. If so, it may be desirable that the amount to be contributed by each of them to the assets of the company by way of compensation should be ascertained by one and the same

proceeding; but this appears to me to afford no reason why I should abstain from now making a declaration of the liability of Mr. Davies. It was expressly laid down in *In re The British Guardian Life Assurance Company* (12) that there is nothing in section 165 which points to the necessity of having every one concerned before the Court upon an application under it.

On one matter which was much pressed upon me I must say a few words, although I do not regard it as at present ripe for decision. It was strenuously contended that the actuary had no authority on behalf of the bank to receive any sums of money out of the usual hours for public business, and that there could be no liability on the part of Mr. Davies for any such receipts which did not come to the actual possession of the bank. It is to be remembered, however, that the true receipts were entered in the pass-books of the depositors and in the ledgers of the bank, and that in many cases the depositors were compromised with on the footing of assets of the bank being liable to make good these receipts; and, without expressing a final opinion on the question, I am of opinion that there is a case for future investigation, in respect of which Mr. Davies may ultimately be found to be under some liability.

Subject to any observations which may be made on the form of the order (to which I shall be most willing to give attention), I think I am bound to declare that Mr. Davies is liable for neglect or omission in complying with the rules and regulations required by the statute 26 & 27 Vict. c. 87 to be adopted in the maintenance of checks and the examination of accounts, and to direct an enquiry what sums of money ought to be contributed by him to the assets of the company in respect of such neglect or omission.

With the remaining questions raised by the summons I propose to deal briefly, for they also appear to be at present not ripe for decision.

It appears that sections 38 and 39 of the Act of 1863 have been violated, and that deposits were received by the bank

(12) 49 Law J. Rep. Chanc. 446; Law Rep. 14 Ch. D. 335.

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which were wholly or partially improper to be received, either by reason of the deposits exceeding in amount the limits imposed by statute, or by reason of the depositors being entitled to some benefit from the funds of the bank or some other savings bank. In 1884 and 1885 the attention of the directors was called to this by the auditors' reports. The result of this is that the National Debt Commissioners have paid interest on deposits of larger amount than the statute authorises, and they have made a claim in the winding-up to be repaid the interest on such deposits so far as they exceeded the legal limit. Until that claim has been dealt with and its validity established, it would seem to me premature to express an opinion on the liability of Mr. Davies in respect of these excessive deposits.

Lastly, the trustees and managers are alleged to have misapplied the funds of the bank after the suspension of payment, in stamping the documents by which certain of the depositors purported to release the trustees and managers from liability, in providing for the costs and expenses of and connected with the preparation and execution of such documents and otherwise, and in payments to a Mr. Roberts for services in connection with what is termed the unauthorised winding-up of the bank and otherwise. Questions are likely, as I understand, to arise in the present winding-up with reference to these releases, and the proceedings of the trustees and managers after the suspension of the bank; and until these have been dealt with or disposed of, I do not see how the claims of the liquidator can be effectually dealt with.

It would seem to me best that these portions of the summons should simply stand over for the present.

Solicitors—Hare & Co., for liquidator; Bell, Brodrick & Gray, agents for Harry Cousins, Cardiff, for respondent.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
LINDLEY, L.J. } FINCK v. THE LONDON AND
LOPES, L.J. } SOUTH-WESTERN RAILWAY
1890. } COMPANY.
March 3, 4. }

Railway Company—Lands—Limits of Deviation—Land reasonably required for the Construction of the Line—Railways Clauses Act, 1845 (8 Vict. c. 20), s. 15—Lands Clauses Act, 1845 (8 Vict. c. 18), ss. 84 and 92.

A railway company, authorised by its special Act to take such of the lands shewn and described in the deposited plans and books of reference as might be required for the purposes mentioned in the special Act, has power to take lands outside the limits of deviation, if such lands are reasonably required for the construction of the line of railway within the limits of deviation, provided such lands have been properly shewn and described in the deposited plans and books of reference.

Wrigley v. The Lancashire and Yorkshire Railway Company (4 Giff. 352; 9 Jur. N.S. 710) explained; Dowling v. The Pontypool &c. Railway Company (43 Law J. Rep. Chanc. 761; Law Rep. 18 Eq. 714) approved.

The deposited plans and books of reference shewed two tenements of land (numbered thereon as Nos. 122 and 123), which consisted of two houses with their respective curtilages. One of the houses, and part of the other house, as well as parts of the curtilages of both, were within the limits of deviation, but the remaining parts of the two tenements were outside those limits. The tenant of the house partly within and partly without the limits required the company to take the whole of his tenement, but the plaintiff, the landlord, refused to sell the whole of the two tenements to the company:—Held, that, under such circumstances, it became reasonably necessary for the company to take the whole of the two tenements numbered 122 and 123, and that, as they were shewn and described in the deposited plans and books of reference, the company were entitled to take them.

Pulling v. The London, Chatham, and Dover Railway Company (3 De Gex, J. &

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S. 661; 33 Law J. Rep. Chanc. 505) distinguished.

Decision of KAY, J. (reported 58 Law J. Rep. Chanc. 350), affirmed.

This was an appeal from the decision of Kay, J. (reported 58 Law J. Rep. Chanc. 350).

The action was brought by a landowner against a railway company, and the plaintiff claimed the restoration of a piece of land alleged to have been wrongfully taken by the company; a declaration that two notices to treat given by the company were invalid; and damages in respect of an alleged obstruction of a right of way claimed by the plaintiff.

The land in question in the action which had been taken by the company, as they alleged in exercise of their statutory powers under the provisions of their special Act, had consisted of two houses with their respective curtilages (marked Nos. 122 and 123 on the deposited plan), which were held by tenants under leases from the plaintiff. One of the houses, and part of the other house, as well as parts of the curtilages of both houses, were within the limits of deviation delineated by dotted lines on the deposited plan; the rest of the two tenements or plots were outside the limits of deviation, but the whole of the two tenements were described and specified in the books of reference and in the deposited plan.

By the special Act in question—the South-Western Railway (Various Powers) Act, 1883 (46 & 47 Vict. c. clxxxix.), which incorporated the Lands Clauses Acts, 1845, 1860, and 1869, and also the Railways Clauses Act, 1845—the company were authorised to make a widening of the company's railway in certain streets in the neighbourhood of the company's station at Waterloo, in which neighbourhood the land in question was situate. Section 5 of the special Act enacted that "the company may make the railway deviations, improvements, and widening of railways, and other works described" in sections 6, 7, 8, and 9 of the Act, "with all proper bridges, viaducts, . . . and all other incidental works and conveniences connected with those railways and works, and all incidental works and conve-

niences, and may take and use such of the lands shewn on the deposited plans and described in the deposited books of reference as may be required for those purposes."

On the 31st of May, 1885, the company gave notice to take such part of the two tenements as were within the limits of deviation. The plaintiff thereupon gave notice to the company that he would not sell more than he was obliged to sell to the company under their compulsory powers; but the tenants, on the other hand, required the company to take the whole of the two tenements under section 92 of the Lands Clauses Act, 1845. On the 26th of January, 1886, the company issued a second notice to treat, which comprised the rest of the two tenements—that is, those parts of the two tenements which were outside the limits of deviation. Subsequently the company, under section 85 of the Lands Clauses Act, 1845, took possession of the whole of the two tenements, pulled down the two houses thereon, and built a viaduct carrying the new line of rails, which viaduct at one point (referred to as the small triangular bit of land) went beyond the limits of deviation, but only did so to the extent of two feet ten inches at the utmost.

At the trial before Kay, J., the plaintiff contended that under no circumstances was the company authorised or justified in taking those parts of the tenements which were outside the limits of deviation; and the company contended that if the *medium filum vice* of the widening were to be placed on the dotted line which shewed the limit of deviation, then that the lands taken would be in fact within such limits.

Kay, J., held that though the company were wrong in their contention that in the case of a widening of a railway the *medium filum vice* might be placed on the dotted line, yet that the plaintiff's action failed, as the taking of the lands outside the limits of deviation was rendered necessary for other reasons, and the plaintiff had, in fact, sustained no special damage thereby.

The plaintiff appealed.

Marten, Q.C., D. L. Alexander, and

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Montague Lush, for the appellant.—If the company exceeded their statutory powers in taking land which belonged to the plaintiff, it is not necessary for him to shew special damage. The company, in taking land outside the limits of deviation, exceeded their statutory powers.

[They referred to *Little v. The Newport, Abergavenny, and Hereford Railway Company* (1), *The Attorney-General v. The Tewkesbury and Malvern Railway Company* (2), and section 13 of the Railways Clauses Act, 1845.]

Phipson Beale, Q.C., and *Vaughan Hawkins*, for the respondent company.—It is well settled that a railway company may take lands lying outside the limits of deviation, if required for the purposes of their works—*Doe d. Payne v. The Bristol and Exeter Railway Company* (3)—provided such lands be marked on the plans and described in the books of reference—*Doe d. Armistead v. The North Staffordshire Railway Company* (4). Lands required for accommodation are lands required for the purposes of the railway—*Dowling v. The Pontypool &c. Railway Company* (5) and *Wilkinson v. The Hull &c. Railway and Docks Company* (6). It was reasonably necessary for the purposes of the company's works that the company should take the whole of the tenements numbered 122 and 123, as the tenant of one of the houses required the company to take the whole house. Section 13 of the Railways Clauses Act, 1845, is amended by section 4 of the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92).

Marten, Q.C., in reply.—The company in constructing the viaduct carrying their new line extended the viaduct beyond the limits of deviation at the point shewn on the plan by the triangular bit of land coloured blue. That was clearly in excess

of their statutory powers. *Watkins v. The Great Northern Railway Company* (7) is distinguishable, as there the company were acting within their powers. The plaintiff is entitled to compensation for the "injurious affecting" thereby of the plaintiff's adjoining land—*Cropper Essex v. The Acton Local Board* (8). As regards the pulling down of the whole of both houses, the buying out of the tenants does not affect the rights of the reversioner—*Pulling v. The London, Chatham, and Dover Railway Company* (9); and such pulling down is an "injurious affecting" of other lands. There is no evidence that it was reasonably necessary to pull down the whole of the two houses in order to construct the new line within the limits of deviation; and, even if it were so, that does not give the company the right to the soil on which the whole of the two houses stood.

COTTON, L.J.—This case is a complaint by a landowner against the railway company, that, in proceeding under the special Act which gave them power to widen their railway, they have exceeded their powers in various ways, and he claims to have restored to him some land which he says they took without any authority. What is the case? I think the first point to be considered is whether the two notices to treat were, as he contends, illegal and inoperative. That contention is very much based on this, that the railway company have no right to take any land beyond the limits of deviation, and that they could not therefore take what they have taken. That really was the main point; and he carried it so far as to say that they could not even take the land which was included in the first notice, which was a notice to take the parts of the houses nearest to the railway, and that *a fortiori* they could not take the land which was comprised in the second notice. Now, I think that the railway company did not proceed exactly as they ought to have

(1) 12 Com. B. Rep. 752; 22 Law J. Rep. C.P. 39.

(2) 1 De Gex & J. 423; 32 Law J. Rep. Chanc. 482.

(3) 16 Mee. & W. 320; 2 Rail. Cas. 75; 9 Law J. Rep. Exch. 232.

(4) 16 Q.B. Rep. 526; 20 Law J. Rep. Q.B. 249.

(5) 43 Law J. Rep. Chanc. 761; Law Rep. 18 Eq. 714.

(6) 51 Law J. Rep. Chanc. 788; Law Rep. 20 Ch. D. 32

(7) 16 Q.B. Rep. 961; 20 Law J. Rep. Q.B. 391.

(8) 58 Law J. Rep. Q.B. 594; Law Rep. 14 App. Cas. 153.

(9) 33 Beav. 664; 3 De Gex, J. & S. 661; 33 Law J. Rep. Chanc. 505.

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done, because, in my opinion, instead of giving the two notices, they ought to have given the notice once for all, including the whole of the property comprised in the two notices; but as they have now given notice, comprising the land contained in those two notices, I think we ought not to grant any relief in this action on that ground. Why do I say they ought not to have given, or were not entitled to give, the two notices, but a notice once for all for the land comprised in those two notices? For this reason—I do not enter into the question of what the limits of deviation may be as regards the extension—but even if the railway company had confined their works within the limits of deviation, in my opinion they were entitled to give notice to treat for the whole of the land comprised in those two notices, and I think they ought to have given it in one notice. I think there is a good deal of difficulty as to the powers of the company to extend their works beyond the limits of deviation in a case like this; but there is no question that they may take lands beyond the limits of deviation if the lands are required for the purpose of constructing the works which they are authorised to make by the Act of Parliament; and therefore, in my opinion, their power to take land is not limited to land within the limits of deviation, but it is limited to land which is described in the books of reference and in the Parliamentary plans.

Now, what was done here? Here were two houses, marked 122 and 123 in the plan affixed to the notices. They are entitled to take the whole of those plots, if described in the book of reference and in the Parliamentary plans, for the purposes of works which they are authorised to construct. Then, that being so, are 122 and 123 described in the book of reference and in the Parliamentary plans? [His Lordship then considered the book of reference and Parliamentary plans, and said that, in his opinion, they comprised the whole of the plots in question, and proceeded:] Then how have the railway company shewn that this property is reasonably necessary for the purpose of constructing the railway? It is not necessary in the sense that without it the railway could not have been constructed. That is not

the meaning of it; but whatever is required reasonably for the purpose of enabling a railway company to construct their railway, in my opinion, is, within the meaning of section 5 of the Special Act, land which they require for the purpose of constructing their railway. This first notice would have cut in halves part of one of these houses, and if the landlord and tenant had both been willing to enter into an arrangement to let the railway company pull down the whole, and then take back part of the land, I think the railway might have been reasonably made under those circumstances on the other part. But we find this—that the tenant said, “No, you shall not do that; you must pull down the house and take the whole. I will not have the house cut in halves, and have only half a house.” The landlord says, “I object to that; I will not sell an inch more ground than you can compulsorily take.” That being the case, I think the railway company ought to have given a notice at once that they required to take the whole, because then it became reasonably necessary for the purpose of constructing their railway to take the whole, when the tenant refused to enable them to take one part only, and because the landlord and tenant could not agree together as to what they would sell to the railway company. Not that the termor, as a rule, can bind by a notice, under the 92nd section of the Lands Clauses Act, the freeholder; but that in the present case, in consequence of the course which the parties took, it became reasonably necessary for the purpose of constructing the railway to take the whole of that which was comprised in both the notices. I do not doubt that what is said by Lord Justice Turner in the case of *Pulling v. The London, Chatham, and Dover Railway Company* (9) as a general rule is right; but here it is, not because the landlord is bound by the option of his tenant, but because at the option of the tenant it became reasonably necessary to take the whole, and it being reasonably necessary to take the whole, in my opinion the railway company were entitled to give notice to take, and to take, the whole. I think it is reasonably clear that, in consequence of the landlord's objection, they tried to see whether they could take only the

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actual portion which was comprised in the first notice. They were quite entitled to take the whole comprised in both notices. If they had given one notice, as they ought to have done, at first, they could have taken the whole. Then, in consequence of the claim made, which was established to be correct, as to the right of way to the stable, it became necessary, to enable the way to be made, which they have made, to take another portion of that land which was comprised in the second notice, and I do not doubt that where, in consequence of its being necessary to make a substituted road, the railway company must take land which they would not otherwise have taken, they are entitled to do so. That is land required for the purpose of constructing their works—that is, for doing something which the construction of their works renders necessary.

Then one comes to this point. Whether the railway company were entitled to take all the land which they covered by their viaduct, though part of it is beyond the limits of deviation; and I will assume that there was a departure from the power given them by the Act of Parliament in making their viaduct. But then, as Mr. Justice Kay said, how is the plaintiff injured by that? Unless he has suffered some special injury by their doing so, he individually cannot ask the Court to interfere. The Attorney-General might, on the ground of its affecting the public, apply to the Court; but that is not this case. It is not suggested here that there is any injury to the public, and the Attorney-General could not reasonably be put in motion. I therefore agree with Mr. Justice Kay in holding that, there being no special injury to the plaintiff in consequence of this departure from the authority given to the railway company by Parliament, the plaintiff cannot ask the Court to interfere. [His Lordship then dealt with the complaint made by the plaintiff as to a small triangular piece of land, beyond the limits of deviation, over which the defendant company had carried their viaduct. With respect to this, he said that he did not think the plaintiff had suffered any appreciable damage, and continued:]

Then there is only one other point, and that is the substituted road. Has the

plaintiff shewn there is any practical inconvenience by the substituted way? It is very true that till the action was brought, that substituted way was not given to him by the railway company; but it was given to him long before the trial of the action, and it was open still for the plaintiff to bring forward evidence to shew how inconvenient (if it was so) this substituted way was. He has not done that. Mr. Justice Kay seems to have considered the case very fully, and was satisfied that the substituted way was equally convenient with that which had been taken away from the plaintiff, and I cannot differ from that. In my opinion, therefore, the appeal altogether fails.

LINDLEY, L.J.—This is a case of some nicety, and presents various features which are very seldom met with. I think the key of the whole thing is to be found in the erroneous view adopted by the plaintiff; and that erroneous view is this, that under no circumstances could the railway company justify taking land which was beyond the limits of deviation. That is at the root of the whole of this litigation; and that appears to me to be a mistake. The limit of deviation has reference to the line of rails, and if there are pieces of land outside the limit of deviation, but properly referred to in the book of reference and deposited plans, and if those pieces of land are *bona fide* wanted for the purpose of making the line within the limits of deviation, there is no authority I know of to shew that such pieces of land cannot be properly taken by the railway company. There was a doubt thrown upon that by the case of *Wrigley v. The Lancashire and Yorkshire Railway Company* (10) before the Vice-Chancellor Stuart, and that case was referred to and examined with his usual care by Vice-Chancellor Hall in *Dowling v. The Pontypool Railway Company* (5). To understand the case of *Wrigley v. The Lancashire and Yorkshire Railway Company* (10) one must look at the report in the 9th *Jurist*. In the report of the case in 4 *Giffard*, the judgment of Vice-Chancellor Stuart runs in this way, at page 360: "It is evident that no

(10) 4 Giff. 352; 9 Jur. N.S. 710.

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part of the field which is now in dispute as described on the deposited plans of reference constituted one close. If so, the company had no power to take the land comprised in their notice." But, on turning to the *Jurist*, it is intelligible enough. "It is evident that no part of the field except that within the line of deviation was described in the deposited plans." That makes it plain and intelligible. With this explanation, which Vice-Chancellor Hall had before him in *Dowling's Case* (5), the doubt raised by the report in *Wrigley's Case* (10) appears to me to disappear. *Dowling's Case* (5) is a clear authority, if authority is wanted, that if there are lands properly described in the books of reference and deposited plans, which, though outside the limits of deviation, are *bona fide* wanted for the purpose of making the line within the limits of deviation, the company may take them; that is common sense, and in accordance with the Act.

Now I pass on to consider the rest of the case. It follows from that, that if the whole of the plots which are referred to as 122 and 123 were *bona fide* wanted for the purpose of making the line within the limits of deviation, they could be properly taken under those notices; and I am satisfied on the evidence that, under the very peculiar circumstances of this case—by which I mean that half the house was absolutely wanted, and that the other half must be pulled down or supported at an extravagant expense, which is utterly unreasonable—it is true, in point of fact, that in this case the whole of those plots were *bona fide* wanted for the purpose of making the line legitimately within the limits of deviation, and it appears to me to carry the point in substance as regards those plots; and, looking back, it appears to me it is to be regretted that the company did not give one notice to take the whole, and then this controversy would never have been dreamt of. Owing to reasons I am imperfectly acquainted with, they first gave notice to take half, and then to take the whole. I look upon that as nothing; the substance of the thing is, were they entitled to give notice to treat for this? I think they were; and whatever the plaintiff is entitled to under those notices under the

compensation clauses, he will get, if he has not got it already.

[His Lordship then referred to the complaint as to the small triangular piece of land, and said that, assuming that there was a cause of action against the company for throwing an arch of their viaduct over that piece of land, it was clearly only a case for nominal damages, and that the Court would not grant an enquiry for such a trivial matter. He then considered the question of the substituted right of way, and continued:]

It is competent to the railway company to take land for the purpose of making a substituted way. That has been decided in years gone by; and it appears to me, as a matter of convenience, all that can be said is that the present way is in some places narrower than it was before; but if it is sufficiently wide for the purpose for which it exists—that is to say, to let a horse go to and from the stable—that is sufficient to satisfy the plaintiff's right. There is no absolute right to seven feet all the way along; and when you look at the section of the Act of Parliament, it amounts to this: it is drawn in such a way that there is a certain latitude in giving the substituted way. It is to be "as convenient as the former, or as near as may be." The learned Judge has found as a fact that this is a sufficiently convenient way, and I see no reason to differ from him on that ground. It might have been straighter or more convenient, but still it is a reasonable way, and as good as the company can give under the circumstances.

It appears to me, therefore, that upon the whole case the appeal ought to be dismissed, and dismissed with costs.

LOPES, L.J.—If the company had given one notice for what is contained in both notices in the first instance—an entire notice, I mean, for the whole contained in the two notices—in my opinion we should never have heard anything of this case. It could not have been then said that any land was taken without Parliamentary authority. If some is outside the limits of deviation, it appears to me it is reasonably necessary for the purpose of the line, and of the line authorised by Parliament, and it is, moreover, properly described in

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the book of reference and in the Parliamentary plans.

Now, that being so, I do not feel inclined to assist the plaintiff because of a mistake on the part of the company in not giving a notice which comprised the whole of this land in the first instance, and I am the more unwilling to assist him because I feel that he is not substantially damaged. With regard to the bridge over the road, if any injury is thereby caused to the plaintiff, it is too insignificant to be entertained. With regard to the substituted way, I agree with what has been said by Mr. Justice Kay. I think that, having regard to the purposes for which that way is required, it is sufficiently convenient and commodious; and I am very much struck by this, that the occupier was not called at the trial, nor was anybody else called, to say that it was not sufficient for the purposes for which it was required. Mr. Marten said that the reason of that was, that the way was given after action brought, that photographs were produced, and that there was no necessity of giving any such evidence. I cannot help thinking myself that if this road had been in any way insufficient, or not sufficiently convenient, that the occupier, or some other person, to speak to the fact, would have been called.

This is a very peculiar case, and it is peculiar in this way: it appears to me that both the plaintiff and defendants have mistaken their rights. The plaintiff took a wrong view when he contended that no land, in any circumstances, could be taken beyond the limits of deviation; the defendants, on the other hand, took a wrong view when they contended that the *medium filum* of the widening was to be placed on the dotted line. I quite agree with what has been said by the other members of the Court, and I think that this appeal should be dismissed, and dismissed with costs.

Solicitors—W. H. Withall & Co., for appellant;
Bircham & Co., for respondent.

NORTH, J. }
1890. }
Jan. 15, 16. }
Feb. 4. }

BARRETT AND ELMERS
(LIMITED) v. DAY.
DAY v. FOSTER.

Patents &c. Act, 1883, s. 32 — Action for Threats—Pending Action for Infringement against Licensee—Staying vexatious Proceedings — Practice — Order XXV. rule 4.

An action to restrain threats in respect of an alleged infringement of a patent ought not, having regard to section 32 of the Patents &c. Act, 1883, to be commenced after an action to restrain the alleged infringement has been instituted and is being prosecuted with due diligence; and if it is so commenced, all proceedings in it may be stayed as being vexatious.

An action by a patentee against a licensee brought bona fide for royalties in respect of articles manufactured, as the patentee alleges, but the licensee denies, in accordance with the patent, and for an injunction to restrain the licensee from manufacturing the articles, except subject to the terms of the licence, is an action to restrain the infringement of the patent within section 32, notwithstanding that the validity of the patent cannot be contested by the licensee.

Any action may be stayed as being vexatious when it is clear that no relief can be obtained at the trial.

Adjourned summonses.

The facts of these cases are fully stated in his Lordship's judgment. This was the hearing of two adjourned summonses, one taken out on the 31st of October, 1889, by J. M. Day, the defendant in the first action, by which he asked that all further proceedings in that action might be stayed, on the ground that it was harassing and vexatious, and for payment of the taxed costs of the action and summons; the other taken out on the 2nd of November, 1889, by F. Foster, the defendant in the second action, by which he asked that all further proceedings in that action might be stayed until after the trial of the first action, and that the costs of the summons might be costs in the cause. Foster's counsel asked that this last application might be dealt with as an application that

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both actions might be tried at the same time.

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for J. M. Day, the defendant in the first action and plaintiff in the second.—There is no ground for the first action, for the threat of the 17th of December, 1888, is merged in the second action, begun in April, 1889; and the commencement of that action, by section 32 of the Patents &c. Act, 1883, puts an end to the plaintiff's cause of action for the threat—*Challender v. Royle* (1) and *The Combined Weighing and Advertising Company v. The Automatic Weighing Machine Company* (2).

Moulton, Q.C., and *T. Terrell*, for Barrett & Elers, Limited, the plaintiffs in the first action, and F. Foster, the defendant in the second.—The first action ought not to be stayed. A threat was made which has never been withdrawn, and the action which has been commenced against Foster is not such an action as is required by section 32 for putting an end to an action for threats. It was brought against a licensee, and the validity of the patent cannot be tested therein. The second action should be tried with the first, so that all the material facts and issues may be before the Court at the same time.

Cozens-Hardy, Q.C., in reply.

NORTH, J. (on Feb. 4).—Joseph Michael Day, the defendant in the first of these actions, is the owner of letters patent, granted on the 31st of December, 1885, for "an improved bottle for aerated liquids," and on the 13th of August, 1886, he granted to the defendant Foster sole and exclusive licence to make and vend that portion of the invention called the trigger opener, at a royalty of 1s. per gross, payable quarterly. The licence contained provisions that the licensee should not directly or indirectly use or exercise that part of the invention otherwise than in accordance with the licence, and should not at any time dispute the validity of Day's patent. For some time Foster manufactured the articles for which that

licence was given, and paid Day the royalties in respect thereof; but in the year 1888 Day found that Foster was making trigger openers for which he was not paying royalty, of a pattern for which he had himself applied for letters patent, but which Day alleges are made in accordance with his patent, and are therefore subject to royalty. Thereupon some correspondence ensued between their solicitors, in the course of which (on the 24th of November, 1888) Foster's solicitors wrote that Foster would protect himself under his own patent and a patent of Barrett and Varley which Foster had secured. This was the first time Day ever heard of Barrett and Varley's patent, which, upon investigation, turned out to be dated the 2nd of November, 1887, for "improvements relating to means for facilitating the opening of internally stoppered bottles for aerated and other liquids." It appears from the evidence that these letters patent were applied for on behalf of and at the expense of the plaintiffs Barrett & Elers (Limited), and that they early in November, 1888, granted to Foster an exclusive licence to use and exercise that patent, although the formal assignment by the patentees to Barrett & Elers, and the formal licence by them to Foster, were only executed on the 11th and 17th of January, 1889, respectively. On the 17th of December, 1888, Day's solicitor wrote to Foster's solicitor as follows:—

"It was only Saturday last that my client was enabled to procure a copy of Messrs. Barnett" (meaning Barrett) "and Varley's specification. It is clearly an infringement upon his patent. I thought it right to have this matter investigated before proceeding. I have now only to notify to you that in the action against your clients claims will be made in respect of this patent. I think it is only right to inform you of this before the writ is issued."

In pursuance of an arrangement between them, Foster's solicitors, on the 13th of February, 1889, furnished to Day's solicitors particulars of the sale by Foster on the previous day of one gross of openers made under Barrett and Varley's patent, and stated that Foster definitely declined to pay Day any royalty in respect of that

(1) 56 Law J. Rep. Chanc. 995; Law Rep. 36 Ch. D. 425.

(2) 58 Law J. Rep. Chanc. 709; Law Rep. 42 Ch. D. 665.

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sale, and intended to go on selling such openers, and not paying Day any royalty on them. Day apparently desired that the action he was about to bring against Foster should relate to articles sold by Foster, and purporting to be made under his own patent, as well as under that of Barrett and Varley, but Foster's solicitors refused to furnish an instance of any such sale.

Barrett & Elers were at this time assisting Foster in opposing Day, and were employing the same solicitors for that purpose, and in letters dated the 15th and 22nd of March, 1889, respectively, those solicitors, on behalf of Barrett & Elers, called Day's attention to his threats to proceed against Foster, requiring him to withdraw such threats, or properly commence an action to make them good, and referring him to section 32 of the Patents Act, 1883. Day did accordingly issue his writ against Foster on the 24th of April, 1889, and his statement of claim was delivered on the 29th of June, and after referring to Day's own patent and his licence to Foster, it alleged, "The defendant has manufactured and sold trigger openers differing only colourably from those made in accordance with the plaintiff's letters patent, and has refused to pay royalties thereon, alleging as his reason that the trigger openers so manufactured and sold were made according to an alleged invention comprised in certain letters patent granted to Henry Barrett and John James Varley (No. 14,941 of the year 1887), and are not within the privilege granted by the plaintiff's letters patent or affected by the said licence. The trigger openers made according to the alleged invention of the said Messrs. Barrett and Varley do not differ in any material respect from the trigger openers protected by the plaintiff's said letters patent." The plaintiff claimed, first, "a declaration that the said trigger openers, in respect of which the defendant refuses to pay royalties, are comprised within the plaintiff's said letters patent, and that the defendant is liable to pay royalties in respect thereof, in accordance with the said licence;" secondly, "an injunction to restrain the defendant, his servants, agents, and workmen, from making or vending

(except subject to the terms of the said licence) trigger openers made in accordance with the description contained in the specification filed under the said letters patent granted to Barrett and Varley, or only colourably differing from the trigger openers manufactured in accordance with the plaintiff's letters patent;" thirdly, "an account of the royalties due to the plaintiff from the defendant under the said licence." Foster's defence to that action was a very simple one; it was as follows:—

"(1) The defendant has duly accounted for and paid to the plaintiff all royalties due under and in pursuance of the indenture of licence referred to in paragraph 2 of the statement of claim, and dated the 13th of August, 1886; (2) the defendant admits that he has manufactured openers for internally stoppered aerated water-bottles made in pursuance of the specification of Henry Barrett and John James Varley (No. 14,941 of the year 1887), but he says that such openers are in no way an infringement of the plaintiff's said patent, nor are they included within the terms of the indenture of licence dated the 13th of August, 1886." That defence might have been put in very promptly, but Foster had his time to deliver it twice extended, and it was not, in fact, delivered until the 24th of October, and the action was shortly afterwards set down for trial.

In the meantime Barrett & Elers had, on the 16th of August, issued a writ against Day to obtain an injunction restraining the defendant from, by circulars, advertisements, or otherwise, threatening to take legal or other proceedings against persons manufacturing, using, or selling an alleged invention of the defendant—to wit, "an improved bottle for aerated liquids"—comprised in letters patent, dated the 31st of December, 1885, and numbered 16,057, and damages, and had applied on the 29th of August for an order in accordance therewith, but that application was refused. The affidavit of the solicitor, filed in support of that application, stated that the threats complained of were the letter of the 17th of December, 1888, which I have already read, and did not complain of or mention

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any other threats, and I may at once say that the suggestion in the writ to the effect that Day had issued any threatening advertisements or circulars was a mere fiction, and was not repeated. On the 24th of October Barrett & Elers delivered their statement of claim against Day, in which they alleged that Day had threatened Foster with legal proceedings in respect of an alleged infringement, repeating the statement that the threats were contained in the letter of the 17th of December, and that the plaintiffs had suffered damage by reason thereof, and they claimed an injunction restraining Day, his solicitors and agents, from threatening Barrett & Elers, or their licensees or assigns, with reference to alleged infringements of Day's patent, and damages and costs. Within a week after the delivery of that statement of claim—namely, on the 31st of October—Day took out a summons in the action of *Barrett & Elers v. Day*, that all proceedings therein might be stayed, and on the 2nd of November Foster took out a summons that all proceedings in *Day v. Foster* might be stayed until after the action of *Barrett & Elers v. Day* had been tried, and both these summonses were adjourned into Court to be heard by me together.

Before dealing with those applications on their merits one additional matter must be mentioned—namely, that Barrett & Elers alleged in their statement of claim that Day refused to join them as defendants in his action against Foster, or to allow Foster to contest the validity of Day's patent, and that Foster's manufacture was not an infringement of Day's legal rights, because, first, that manufacture is not an infringement of Day's patent, and, secondly, Day's patent is bad on the grounds of insufficiency of specification, want of novelty and utility, and Day's not being the first and true inventor. As regards the validity of Day's patent, it is now four years old, and no proceeding has been taken by Barrett & Elers, or by Barrett, Varley, or any one else, to have it repealed or revoked; and I must, therefore, for present purposes, treat it as valid. (See *Wren v. Weild* (3))

(3) 38 Law J. Rep. Q.B. 327; Law Rep. 4 Q.B. 730.

and *Halsey v. Brotherhood* (4).) Foster does not set up that it is invalid; the law estops him from doing so as a licensee; and, moreover, he has contracted that he will not at any time dispute the validity of Day's patent, and the complaint that Day will not allow Foster to do what he has not attempted to do, and has expressly contracted not to do, is absurd. Then as to the question whether what Foster has done is or is not within Day's patent, that is the very thing which has to be decided, and will be decided in the action of *Day v. Foster*. If it is not, Day's action will fail. But if it is, there is no reason why it should not be decided against Foster alone. In fact, Day could not join Barrett & Elers as defendants in that action, for he has no cause of action against them for what Foster has done. The fact that Barrett & Elers have a patent for a thing which, if made, would be an infringement of Day's prior patent, would not justify an action for infringement by Day against Barrett & Elers. See *Challender v. Royle* (1). It is true that Barrett & Elers allege for the first time in their statement of claim that they have themselves manufactured and sold articles substantially as claimed in Barrett and Varley's patent, but they give no details or admissions as to the nature of such articles, or the time or extent of the manufacture thereof, and Foster has, ever since November, 1888, had a licence from them. However this may be, there is no possible ground upon which I can hold that Day is bound to combine in one action his claim against Foster in respect of the manufacture and sale of certain articles, and any claim he may have against Barrett & Elers in respect of the manufacture or sale by them of other articles; nor can I hold it unreasonable that Day, who has commenced and is duly prosecuting an action against Foster for what he alleges to be, but which Barrett & Elers and Foster all deny to be, an infringement, should wait the result of that action before commencing proceedings against other alleged infringers in respect of any similar infringements.

(4) 49 Law J. Rep. Chanc. 786; 51 *ibid.* 283; Law Rep. 15 Ch. D. 514; 19 *ibid.* 386.

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The sole ground of complaint, therefore (if any), which Barrett & Elers have against Day is in respect of his solicitor's letter to Foster's solicitor of the 17th of December, and the question is whether that letter gives Barrett & Elers any ground for commencing or further prosecuting their action against Day. It is scarcely disputed that no such action could have been brought before the passing of the Patents Act of 1883. The letter in question was written to Foster's advisers as a fair and open warning that Day did not accept the excuse put forward by Foster as a justification of what he had done, and would assert his rights by action, and the concluding words of the letter, "I think it only right to inform you of this before the writ is issued," are exactly what it was right Day's adviser should say before entering into litigation. According to the well-known case of *Wren v. Weild* (3) (approved in *Halsey v. Brotherhood* (4)), Barrett & Elers could only have succeeded in an action founded upon that letter if they could prove affirmatively that Day's claim was not a *bona fide* claim in support of a right which, with or without cause, he believed he had, but was a *mala fide* and malicious attempt to injure them by asserting a claim of right, against his own knowledge that it was without any foundation, and no such case is suggested by the pleadings. The *bona fides* of Day's action is not challenged, and no attempt was made before me to shew that the articles made by Foster are so entirely outside Day's patent that there is no reasonable and probable cause for Day's allegation that such articles are an infringement. But does the 32nd section of the Patents Act, 1883, give Barrett & Elers any right of action against Day in respect of that letter? Judges have frequently expressed strong opinions as to the propriety and fairness of warning an opponent by letter of intended proceedings against him before rushing into litigation, and in *Wren v. Weild* (3) and in *Halsey v. Brotherhood* (4), before the Master of the Rolls, such remarks were applied to patentees about to sue alleged infringers. But it has been held by Vice-Chancellor Bacon in *The Driffield and East Riding Pure Linseed Cake Company v. The*

Waterloo Mills Cake and Warehousing Company (5), and by Mr. Justice Kekewich in *The Combined Weighing and Advertising Company v. The Automatic Weighing Machine Company* (2), that such a letter by a patentee's solicitor to an alleged infringer or his solicitor threatening an action for infringement does give a cause of action under this section, and I fear this will have the effect of preventing a patentee from adopting the course thus pointed out to be fair and reasonable, and that for the future the warning letter will only accompany instead of preceding the writ, and will consequently be useless. But finding such decisions existing, I am bound to follow them, and therefore to hold that the letter of the 17th of December gives a cause of action to any "persons aggrieved thereby."

Section 32, however, contains a proviso at the end which qualifies the whole section, and is as follows: "Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." If, therefore, Day has by his proceedings in *Day v. Foster* brought himself within that proviso, there is no ground of action against him under section 32. It is said that Day's action is not an action for infringement within the proviso. It is certainly the only action or proceeding with respect to which Day has used any threat, and unless it is an action for infringement I do not see how the threat to bring it gives a right of action under section 32, as that section only applies to cases in which a patentee of an invention has used threats with respect to an alleged manufacture, use, sale, or purchase of an invention which is proved not in fact to be an infringement. If the action is not one for infringement of a patent it is difficult to see how a threat to bring it can be a threat in respect of something done which is asserted to be an infringement of it, which, according to Lord Justice Bowen in *Challender v. Royle* (1), is requisite to make the section applicable. Again, Foster treats it as an action for infringement, for

(5) 55 Law J. Rep. Chanc. 391; Law Rep. 31 Ch. D. 638.

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he sets up by way of defence that the articles he has manufactured are not an infringement, and in his affidavit he says that the sole question in *Day v. Foster* is whether articles manufactured under Barrett and Varley's patent are or are not within Day's Patent. Barrett & Elers in their statement of claim say that the proceedings threatened were in respect of an alleged infringement, and plead, by way of reply thereto, that what Foster did was not, in fact, an infringement. And I have no hesitation whatever in holding that Day's action is an action for infringement within the section. Day is a patentee whose patent is clearly valid against Foster, and Day has under it the sole right to make and vend the particular article, and he sues Foster for making and selling that article. That certainly looks very like an action for infringement. But it is argued that it is not such, because Foster has a licence from Day to make and sell such articles, and therefore cannot be sued for infringement. I do not see how this would prevent the action being one for infringement, though it might give Foster, if that were all, a good ground of defence. It is argued that Day does not ask for relief on the footing that Foster is making and selling what he has no right to make and sell, but only for payment of royalty upon the footing of the licence. But it is necessary to look at the whole case. The defence that Foster sets up, and that Barrett & Elers also set up for him in their statement of claim, is not that Foster is protected by his licence, but that the licence has nothing to do with the matter, and no royalty is payable under it, because the articles are not made under the licence and are not within Day's patent at all; and that is the question to be decided. If Foster fails, it will be because he has infringed Day's rights. He might have had a good defence if he had relied upon the licence, paying the royalty. But he has refused to pay the royalty, and he cannot and does not attempt to say that, if the manufacture would have been an infringement but for that licence, the licence prevents its being so. The licence is merely a licence to make the articles, paying the royalty; and when Foster repudiates all obligation to pay the royalty,

he cannot rely upon the licence as a justification for the manufacture. Foster denies that the articles he makes are within the licence, and claims to manufacture them because they are not protected by Day's patent. Day alleges that they are, and claims specifically an injunction to restrain the manufacture thereof, except subject to the terms of the licence—that is, on payment of the royalty; and if that is not an action for infringement I do not know what is.

It is said further that Day's action is not within the proviso, even if it is an action for infringement, because what the section contemplates is an action for infringement commenced after an action for threats under section 32, whereas Day's action was commenced before it. If that were so, and Day desired to have the protection of that proviso, he would have had to dismiss the existing action of *Day v. Foster*, and, I suppose, pay the costs of it, and commence a fresh action against Foster on exactly the same lines, which new action Foster doubtless would have said was not commenced with due diligence after the threat. But I find nothing in the proviso warranting this contention, or pointing to the time when the action for infringement is to be brought, except that it is to be with due diligence. It must be borne in mind to what case the section is addressed—that of a patentee who causes damage by disseminating threats which he does not or will not justify by an action, who is "willing to wound but yet afraid to strike." It is not necessary for me now to express any opinion whether the bringing of an action for infringement with due diligence after the making of a threat renders an action for threats commenced in the meantime wrong from the beginning, because not founded on any good cause of action, though I do not feel much doubt as to the meaning of the Act. But I do express a decided opinion that if a threatened action for infringement is commenced and prosecuted with due diligence after such threat, there is no ground upon which an action under section 32 in respect of such threat can subsequently be commenced at all. To put it in another way, if a threat to bring an action for infringement is fol-

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lowed up by the *bona fide* commencement and prosecution with due diligence of the threatened action, there is no "person aggrieved" by the threat, and therefore no person who can bring an action under section 32; although I have no doubt that Barrett & Elers might have been "persons aggrieved" if no action for infringement had been commenced when they brought their action, or within a reasonable time afterwards. In the present case I am of opinion that the action of *Day v. Foster* certainly was commenced with due diligence having regard to the date of the threat, the letters of Foster's solicitor, and the reasonable desire of Day to combine all his complaints against Foster in one action, and especially having regard to the nature of the threat and to the fact that no action grounded thereon had been commenced when the writ was issued in *Day v. Foster*.

It was also argued by the very able counsel who appeared for Barrett & Elers, as well as for Foster, who left no stone unturned on behalf of their clients, that the action of *Day v. Foster* is not within the proviso, because it is not one in which the validity of the patent is in question. There is, however, in my opinion, nothing in this. If the action is for an infringement the proviso is satisfied, whatever defence the defendant may set up or omit to set up. It was admitted by counsel that the action would have been within the proviso if Foster could have pleaded that the patent is invalid, even though he had omitted to do so. But, in my opinion, it is equally within the proviso, though Foster does not plead invalidity, because he is incapacitated from doing so. If the action were in any sense a collusive one the case might be wholly different; but it is an honest action, brought hostilely against the only person threatened, being the only person whom Day knew to have infringed; for, whatever the truth may be as to any manufacture by Barrett & Elers, it was not referred to in any correspondence between the solicitors, nor at all until the statement of claim was delivered in *Barrett & Elers v. Day*; and it is not suggested that Day or his advisers had any materials before them which disclosed any ground of action against Barrett

& Elers. Lord Justice Cotton says in *Challender v. Royle* (1), "It is my opinion, and I ought to express it, that in order to bring the case within this proviso the action must be an honest action, an action honestly brought in order to test the validity of the patent or the fact of infringement, whichever may be in question." And again (at p. 439), "In my opinion the proviso is satisfied if an action to test the validity of the patent, or the fact of infringement, is honestly brought with reasonable diligence against the person or any of the persons to whom the threats have been made." And, in my opinion, Day's action stands the application of this test. I do not forget that Barrett & Elers allege in their statement of claim, after setting out the letter of the 17th of December, that since writing that letter the defendant has continued the "said" threats, and has brought his action against Foster. In that pleading the phrase "the said threats" means the threat in the letter of the 17th of December. In his affidavit, filed on the 1st of November, Day swears that, except by the letters of the 25th of November and the 17th of December, neither he nor any person on his behalf has at any time made any threat in respect of Barrett and Varley's patent; and although this affidavit was replied to on the 6th of November by affidavits of Foster and of the secretary of Barrett & Elers, Day's statement on this point is not contradicted. It may be that the non-withdrawal of that threat, coupled with the further correspondence between the solicitors, was in one sense a continuance of it down to the time of bringing the action; but it is obvious that the threat to bring an action came to an end when the threatened action was brought, and there is no suggestion by affidavit or pleading that any threat was ever made, except of bringing the action, or that subsequently to the date of commencement any threat was made at all. It follows, therefore, that the action must stand or fall by the letter of the 17th of December, which, in my opinion, for the reasons I have mentioned, gives no cause of action, unless it can be maintained upon the ground that Day may still fail to use due diligence in the prosecution of his action.

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But there has not been, in my opinion, any such failure down to the present time, and the action is set down and stands high in my list for trial; and, as nothing which Day can do can prevent its coming on in due course, no question as to its due prosecution can now arise.

But there is one other matter which I cannot leave out of sight in considering whether the action of *Barrett & Elers v. Day* should now be stayed or not, under rule 4 of Order XXV., as being "frivolous and vexatious." Independently of this order, the Court has undoubted jurisdiction to stay all proceedings, or dismiss an action, when on the facts proved to the satisfaction of the Court it appears that the action is frivolous and vexatious. (See *Willis v. Earl Beauchamp* (6), per Lord Justice Cotton, *The Metropolitan Bank (Limited) v. Pooley* (7), and *Reichel v. Magrath* (8).) In my opinion, the prosecution of an action is vexatious when it is clear that no relief can be granted at the trial. The only relief sought in this case by Barrett & Elers is an injunction to restrain Day from threatening them, or their licensees or assigns, with reference to alleged infringements of his patent by manufacturing under Barrett and Varley's patent, and damages and costs. As regards the threat to bring the action of *Day v. Foster*, no injunction to restrain such threat could be granted at the trial, nor could have been at any time since the writ in *Barrett & Elers v. Day*, as no such threat was any longer possible after the action had been brought, and no damages could be recovered in respect of a threat which did not give rise to any cause of action. And, as regards any other threats, none are proved or alleged, nor is there anything from which any intention on the part of Day to make such threats could be inferred, and no injunction can be granted to restrain a defendant from doing an act which it is not proved or even alleged that he ever intended or threatened to do (see *Stannard v. The Vestry of St. Giles*,

Camberwell (9) and *Proctor v. Bayley* (10)); nor could there, of course, be any damages for an act which was never committed. What Barrett & Elers avowedly desire to do is to try whether Day's patent is valid or not. But no such question can arise in their action, under the circumstances I have mentioned, as there is no issue to which it can be relevant, although, no doubt, according to *Challender v. Royle* (1) and *Kurtz v. Spence* (11), such question might have arisen if any threatening or intention to threaten on Day's part was alleged and proved, and there was an issue to be decided at the trial whether such threatening was justifiable or not. Under these circumstances I am of opinion that there is not, and never was, any cause of action in *Barrett & Elers v. Day* in respect of which relief can be granted at the trial, and that, this being so, the action is vexatious and the proceedings therein should be stayed; and I accordingly direct such stay, and that the defendant Day's costs should be paid by the plaintiffs. In deciding that it is vexatious, I do not mean to impute to the plaintiffs therein that it was commenced for the purpose of annoyance. I have no doubt it was considered a legitimate move in the war game of litigation between the parties. But this is no reason why the defendant should be harassed by the continuance of proceedings which, in my opinion, cannot result in a decision in the plaintiffs' favour.

Foster's summons in *Day v. Foster* seeks to have all proceedings in that action stayed until after the trial of the other action. I see no reason whatever for this. No question as to threats or as to the validity of Day's patent can be tried in the action against Foster, but that is the proper action in which to try whether the articles which Foster has made are or are not infringements of Day's patent. The questions in the two actions are entirely different. Foster's affidavit in support of his summons says that if what he asks is

(6) 55 Law J. Rep. P., D. & A. 17; Law Rep. 11 P. D. 60.

(7) 54 Law J. Rep. Q.B. 449; Law Rep. 10 App. Cas. 210.

(8) *Ante*, p. 66; Law Rep. 14 App. Cas. 665.

(9) 51 Law J. Rep. Chanc. 629; Law Rep. 20 Ch. D. 190.

(10) 59 Law J. Rep. Chanc. 12; Law Rep. 42 Ch. D. 390.

(11) Law Rep. 36 Ch. D. 770.

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granted he is willing to be bound by the decision in *Barrett & Elers's* action, so far as the issues as to validity and infringement are concerned. Inadvertently he lets out that what he is really seeking is to impugn the validity of Day's patent—a thing which he has expressly contracted for valuable consideration that he will not do. I consider such an attempt not creditable to him, and vexatious in every sense, and I dismiss his summons with costs.

Solicitors—A. E. Sydney, agent for M. Cavanagh,
Dublin; Gard, Hall & Rook.

KAY, J. }
1890. } BRISTOL AND SWANSEA AERATED
Feb. 19. } BREAD COMPANY (LIMITED)
March 5. } v. MAGGS.

Specific Performance—Agreement by Correspondence—Subsequent Negotiation.

The defendant by letter offered to sell his business on certain terms to the plaintiffs, which the plaintiffs by letter accepted. On a formal memorandum being submitted to the plaintiffs, they added a clause prohibiting the defendant from carrying on a similar business within a certain radius. Subsequent negotiations followed as to this clause, and the defendant declined to complete. The plaintiffs then offered to complete on the original terms in the letters, omitting the disputed clause. In an action by the plaintiffs for specific performance, —Held, that, looking to the subsequent negotiations, there was no concluded agreement constituted by the original letters, and the action was dismissed.

Hussey v. Horne Payne (48 Law J. Rep. Chanc. 846; Law Rep. 4 App. Cas. 311) followed, and the criticism on that case in *Bolton Partners v. Lambert* (58 Law J. Rep. Chanc. 425; Law Rep. 41 Ch. D. 295) dissented from.

This was an action for the specific performance of a contract alleged to be constituted by two letters. The first was written by the defendant, who was a con-

fectioner in Cardiff, to Colonel Guthrie, who was a director and the authorised agent of the plaintiff company, as follows:—

“Cardiff, May 29, 1889.

“Dear Sir,—I beg to submit to you the following conditions for disposal of my business carried on at 15 Duke Street, Cardiff. Lease and goodwill, 450*l*. (lease from the 29th of September, 1888, for fourteen years). All fixtures, fittings, utensils, &c., stock-in-trade connected with the premises, to be taken at valuation.

“Yours truly,

“R. MAGGS.

“This offer to hold good for ten days.”
To this Colonel Guthrie replied—

“Cardiff, June 1, 1889.

“Dear Sir,—On behalf of the Bristol, Cardiff, and Swansea Aerated Bread Company (Limited), I accept your offer for shop and lease, &c., 15 Duke Street, Cardiff.

Yours truly,

“JOHN GUTHRIE

(for B., C., & S. Aerated Bread Company).
Mr. R. Maggs, 15 Duke Street, Cardiff.”

On the 2nd of June, 1889, the defendant's solicitor sent to Colonel Guthrie a formal memorandum of agreement for approval, with an accompanying letter. This memorandum of agreement contained several terms not expressed in the letters; for example, it provided for the book debts and books of account being reserved to the vendor and for the payment of a deposit of 45*l*.; it fixed the 24th of June as the day for completion of the purchase and delivery of possession; it provided for delivery of abstract of title and the date from which it was to commence, and other formal matters.

This memorandum was altered by the plaintiffs' solicitors, mainly by the insertion of a clause preventing the vendor for five years from carrying on a like business within the borough of Cardiff or within a distance of five miles from the town hall. The memorandum so altered was returned on the 4th of June, with a letter of the plaintiffs' solicitors.

On the 5th of June the defendant's solicitor wrote sending the draft again to the plaintiffs' solicitors, with a modification of the proposed additional clause. On the 6th of June the plaintiffs' solicitors wrote that they could not themselves agree

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to the proposed modification, but that they had asked Colonel Guthrie to call about it. On the 7th the defendant's solicitor wrote that he regretted the plaintiffs' solicitors had not agreed to the terms of the draft contract, and continued:—"Colonel Guthrie has not been near me, and by my client's instructions I beg to inform you that he declines to proceed further in the matter." On the 8th Colonel Guthrie saw the defendant's solicitor, and said he had come to settle the agreement which had been returned to him. The answer was that he was too late; the defendant had made other arrangements. He replied he was prepared to sign the agreement leaving out the disputed clause. The solicitor declined, and Colonel Guthrie went immediately to the defendant, who, he said, told him that he wished to have the agreement cancelled, because his son was very much against his parting with the shop. The defendant, he said, did not suggest that there was no agreement, but asked him to use his influence with his co-directors to get the sale cancelled.

Levett, for the plaintiffs.—The two letters contain a clear and definite contract which the Court will enforce. The fact that we were prepared to make a fresh contract does not affect the old one—*Bonnewell v. Jenkins* (1).

[*KAY, J.*, referred to *Hussey v. Horne Payne* (2).]

That case is explained in *Bolton Partners v. Lambert* (3), where Cotton, L.J., says the decision went not on the subsequent letters, but on the fact that the two original letters of themselves contained terms which raised the doubt whether there was then a concluded agreement.

Warrington, for the defendants.—Looking to all the facts, there was no concluded agreement, but only negotiation, and the case is governed by *Hussey v. Horne Payne* (2), which shews that where the Court has to find a contract in a corre-

spondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be considered. Applying that rule to the present case, it is clear that the plaintiffs were not satisfied with the terms of the two letters, and, having themselves continued the negotiation, it was not open to them to go back to the original letters when they failed in the purpose of the continued negotiation—*May v. Thompson* (4) and *Preston v. Luck* (5).

Levett, in reply.

Cur. adv. vult.

KAY, J., stated the facts, observing that the other terms of the memorandum of agreement might possibly be treated as more or less formal, and continued:—"The contested stipulation as to restricting the vendor from carrying on a like business to that which he had sold was not by any means a matter of form. After some conflict of opinion it has been decided by the Court of Appeal in *Pearson v. Pearson* (6) that a man who sells the goodwill of a business may not only set up a similar business next door and say that he is the person who carried on the old business, but that he may also solicit the customers of the old business to continue to deal with him, although by these proceedings he might not only destroy all benefit to the purchaser of the thing which he had bought, but might recover to himself the actual possession of it. Such a fraudulent proceeding, according to the decision, cannot be prevented by any Court of law or equity. It follows that the stipulation which the company's solicitors introduced into the draft was one which they were not entitled to insert if the two letters which I have read were a complete contract. In other words, they were trying to obtain an additional and most important concession from the vendor. Now, put aside for a moment the Statute of Frauds and decided cases, and suppose this to pass in conversation: A. offers to B. his busi-

(1) 47 Law J. Rep. Chanc. 758; Law Rep. 8 Ch. D. 70.

(2) 48 Law J. Rep. Chanc. 846; Law Rep. 4 App. Cas. 311.

(3) 58 Law J. Rep. Chanc. 425, 430; Law Rep. 41 Ch. D. 295, 306.

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(4) 51 Law J. Rep. Chanc. 917; Law Rep. 20 Ch. D. 705.

(5) Law Rep. 27 Ch. D. 497.

(6) 54 Law J. Rep. Chanc. 32; Law Rep. 27 Ch. D. 145.

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ness, lease, and goodwill for 450*l.* B. says, "I accept." A day or two afterwards B. asks A. to engage not to carry on a similar business within a distance of five miles. A. answers, "I cannot agree to that, but I will if you say three miles." B. takes time to consider, saying he will send an agent next day to settle the terms. The agent does not go the next day, and A. accordingly say to B., "I put an end to the matter." No one could doubt that would be a continuous negotiation, and that B. could not say, "I will disregard all that followed the acceptance of the prior offer and insist on there being a complete contract by that acceptance." Well, then, still leaving out of sight the statute and authorities, suppose all this to take place by letters between A. and B. instead of conversation, it is obvious the result must be the same. Some of the letters being by the principals and some by the solicitors could not make any difference. Now, what effect has the Statute of Frauds upon such a transaction? Certainly it was not intended to turn a negotiation into an agreement. There was danger of fraud and perjury if parol agreements as to land could be enforced. To obviate this it was enacted, "No action shall be brought whereby to charge . . . any person . . . upon any contract or sale of lands . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." Lord Mansfield, in 1764, pointed out that it had often been said of this statute "that it should never be so turned, construed, or used as to protect or be a means of fraud"—*Carter v. Boehm* (7). This has been repeated again and again since his time, and, very recently, in *Jervis v. Berridge* (8); and in *Hussey v. Horne Payne* (2) Lord Selborne said, in effect, that the Statute of Frauds was a weapon of defence, not offence. The real truth is that the statute was not meant to affect contracts in any way, but only the evidence of them. It does not provide

that a memorandum duly signed shall be a contract, but only that no contract concerning land shall be proved by any lower evidence than such a written memorandum. The question whether the two letters relied on in this case were a complete contract, or were only steps in a negotiation, is altogether independent of the Statute of Frauds. Then I must consider the authorities on the subject. Is there anything in them which prevents my deciding this case according to what seems to me the common-sense view of the transaction?

In *Hussey v. Horne Payne* (2) Lord Cairns, dealing with a case in which it was proposed to satisfy the requirements of the Statute of Frauds through the medium of letters which had passed between the parties, said this, "It is one of the first principles applicable to a case of the kind that when you have to find your contract, or your note or memorandum of the terms of the contract, in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, 'We will look at the letters up to this point, and find in them a contract or not, but we will look at nothing beyond.' In order fairly to estimate what was arranged and agreed between the parties, you must look at the whole of that which took place and passed between them." Lord Cairns then considered the two letters which in that case it was contended constituted the agreement, putting aside the words, "subject to the title being approved by our solicitors," which occurred in the latter of them. He found that in the previous negotiation there had been a verbal suggestion by one of the parties, which was acquiesced in by the other, that the purchase-money should be paid by instalments. What those instalments were to be was to be thereafter settled. There was a subsequent negotiation about this, but before it was ended one of the parties died. The conclusion drawn by Lord Cairns from what the appellant himself told was "that the two original letters, which, if you took them alone, without any knowledge supplied to you of other facts of the case, might lead you to think that they represented and amounted to a coin-

(7) 3 Burr. 1805.

(8) 42 Law J. Rep. Chanc. 518; Law Rep. 8 Chanc. 360.

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plete and concluded agreement, yet really were not a complete and concluded agreement, that there were to be other terms which at that time had not been agreed upon, that efforts were made afterwards to settle those other terms, and that these efforts did not result in a settlement of these other terms," and he finds the result to be that there was, in point of fact, no completed agreement between the parties. Lord Cairns then considers the words which he had put aside, and treats them as meaning only that the title must be investigated and approved in the usual way. Lord Selborne concurs both in the reasons and the conclusion of Lord Cairns, and adds that he cannot agree that because two letters were written, by which the conditions required by the Statute of Frauds would have been satisfied if there were nothing outside those letters to the contrary, therefore there is here such a concluded agreement as a Court of equity ought specifically to perform, without regard to what preceded or what followed. "The observation," he says, "has often been made that a contract established by letters may sometimes bind parties who when they wrote these letters did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear upon the facts that there were other conditions of the intended contract beyond and beside those expressed in the letters which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement. I adhere" (Lord Selborne continued) "to what I said, when sitting in the Court of Chancery, in the case of *Jervis v. Berridge* (8), that the Statute of Frauds 'is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties,' and I think it especially important to keep that principle in view when, as in the present case, it is attempted to draw a line at one point of a negotiation, conducted partly by correspondence and

partly at meetings between the parties, without regard to the sequel of the negotiations, which, to my mind, plainly shews that terms of the intended agreement which were of great practical importance, and were so regarded on both sides, then remained unsettled and were still the subject of negotiation between them."

I have examined that case carefully, because it has been suggested that the judgment of Lord Cairns proceeds upon the circumstance that the two original letters contained terms which raised a doubt whether there was a concluded contract, and an observation to that effect of one of the Judges of the Court of Appeal in *Bolton Partners v. Lambert* (3) is relied on.

I have read Lord Cairns's judgment more than once, and, with deference, I do not think that to be a just criticism. Both he and Lord Selborne seemed to me to lay down broadly that where it is sought to make out a binding contract from correspondence, the whole of it, as well as the verbal communications at interviewing, should be regarded, and it is not right to stop at one letter of the correspondence, which with what preceded might constitute a sufficient agreement within the Statute of Frauds, whereas if the whole of the correspondence were considered, and particularly, as Lord Selborne says, "the sequel" of the communications, it may clearly appear that those letters were in truth only part of an uncompleted negotiation. As was said by Lord Justice Lindley in *May v. Thompson* (4), the case of *Hussey v. Horne Payne* (2), before the House of Lords, shews that we must look at the whole correspondence from beginning to end. Of course, if we find a few letters, which are perfectly plain in themselves, which shew an agreement, and the parties do not follow them up by further correspondence, we have a comparatively easy case; but where each letter is followed immediately by another which suggests something else as a topic of further discussion, it becomes most dangerous to draw a line after any particular letter.

With that view of the decision of *Hussey v. Horne Payne* (2) I entirely agree, and, so understood, it is a valuable and important authority, pointing out and obviating

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the great danger which arose from the course of modern decisions upon contracts by correspondence—namely, that the Statute of Frauds, which was passed merely to alter the law as to evidence of contract, might be used as a trap to catch an unwary vendor or purchaser, and bind him by a contract when the real intention was negotiation only. The only difference between that case and the present is that there had been before the letters in question were written an understanding, not expressed in them, that the purchase-money was to be paid by instalments, the amount of which remained to be settled. In this case there is no anterior understanding as to the restriction of the vendor's right to carry on a similar business to that sold. The negotiation as to that arose after the two letters relied on had passed. But it was begun by the solicitors of the plaintiffs, who are now seeking to rely on the two letters only. Their position, therefore, is, that they were not satisfied with the terms of the two letters, but themselves reopened the matter by negotiating for another most important advantage; and having thus treated the two letters as part of an incomplete bargain, it would be most inequitable to allow them to say, "Although we thus treated the matter as incomplete and a negotiation only, yet the defendant had no right to do so, but was bound by a complete contract." In my opinion the decision of *Hussey v. Horne Payne* (2) completely covers this case. I understand it to mean that if two letters standing alone would be evidence of a sufficient contract, yet a negotiation for an important term of the purchase and sale carried on afterwards is enough to shew that the contract was not complete; and, so far as my own judgment is concerned, I entirely agree in the justice and equity of such a rule. Cases have been referred to in which a subsequent discussion as to the preparation of a formal contract, even where the letters mentioned that such a contract is contemplated, has been held not to prevent the letters from being themselves a binding contract. There are many such decisions, and the distinctions between some of them are remarkably fine

—see *Crossley v. Maycock* (9). But they are all subject to the observation that the formal document contemplated is one which is to put into more correct form a complete agreement, not to alter that agreement by adding a substantial term to it. I have already pointed out that the subsequent negotiation in this case was in no sense concerning a matter of form, but was a negotiation for an additional term, to which the plaintiffs had no right, according to existing decisions, at law or in equity. It was suggested that the ten days during which the offer was to remain open had not expired when it was withdrawn. But this can make no difference. The offer was not a contract, and the term that it should remain open for ten days was therefore not binding. It has often been held that such an offer may, notwithstanding, be withdrawn within the ten days—*Roulledge v. Grant* (10), *Cooke v. Oxley* (11), and *Dickinson v. Dodds* (12). I decide this case against the plaintiffs upon the ground that although the two letters relied on would, if nothing else had taken place, have been sufficient evidence of a complete agreement, yet the plaintiffs have themselves shewn that the agreement was not complete by stipulating afterwards for an important additional term, which kept the whole matter of purchase and sale in a state of negotiation only, and that the defendant was therefore at liberty to put an end to the negotiations, as he did, by withdrawing his offer. The action must be dismissed with costs.

Solicitors—Prior, Church & Adams, agents for Meade, King & Bigg, Bristol, for plaintiffs; Field, Roscoe & Co., agents for G. F. Hill, Cardiff, for defendants.

(9) 48 Law J. Rep. Chanc. 379; Law Rep. 18 Eq. 180.

(10) 4 Bing. 653.

(11) 3 Term Rep. 653.

(12) 45 Law J. Rep. Chanc. 777; Law Rep. 2 Ch. D. 463.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
LINDLEY, L.J.
LOPES, L.J.

1890.

March 7, 8, 10.]

CLEGG v. HANDS.

Covenant—Breach—Public-house—Covenant to take Beer—Right to sue—Running with Land.

In a lease of a public-house by brewers, therein described as the lessors, including in such term "assigns," the lessee covenanted not to buy or sell on the premises any ale or stout other than such as should be bona fide purchased of the said lessors, or from them or either of them either alone or jointly with any other person or persons who might thereafter become a partner or partners with them or either of them, provided they or he should at such time deal in or vend such liquors, and should be willing to supply the same of good quality and at the fair market price. The lessors sold the goodwill of their business and the reversion of the public-house to a brewer carrying on business at a neighbouring brewery, and expressly assigned to him the benefit of this covenant. In an action by the lessors and their assignee to restrain a breach of the covenant,—Held, that the covenant was assignable, and was not confined to persons carrying on business at the lessors' brewery, and that the plaintiffs were entitled to an injunction.

Doe dem. Calvert v. Reid (10 B. & C. 849; 7 Law J. Rep. K.B. 328) distinguished.

Semble, the covenant ran with the land, and could be sued upon by an assignee of the reversion.

This was an appeal from a decision of the Vice-Chancellor of the County Palatine.

By an indenture of lease, dated the 19th of November, 1886, and made between "James Clegg and Peter Wright, both of Toxteth Park, in the county of Lancaster, brewers (hereinafter called the lessors, including in such term each of them, and their, each, and every of their heirs, executors, administrators, and assigns), of the one part, and Benjamin Hands, of Bootle, in the said county,

licensed victualler (hereinafter called the lessee, including in such term his executors, administrators, and permitted assigns), of the other part," the lessors demised to the lessee a leasehold public-house known as the Alexandra Hotel for a term of nine and a half years from the 21st of November, 1886, at the yearly rents and subject to the covenants, agreements, and conditions therein mentioned. The lease contained a series of covenants by the lessee introduced by the words, "And the said lessee doth hereby covenant with the said lessors in manner following." These covenants included a covenant to use the demised premises as a public-house and conduct the business in an orderly manner so as not to forfeit the licences attached to the house, and to keep open the premises for the sale of beer and spirits at all times during lawful hours; and after some further covenants relating to the renewal and transfer of the licences the lease proceeded as follows: "And, further, he, the said lessee, will not at any time during the continuance of this demise buy, receive, sell, or dispose of, either directly or indirectly, or permit to be bought, received, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the said demised premises or any part thereof any ales, stout (other than best stout) other than such as shall have been bona fide purchased of the said lessors, or from them or either of them, either alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them, provided they or he shall at such time deal in or vend such liquors as aforesaid, and shall be willing to supply the same to the said lessee of good quality, and at the fair market current price thereof."

At the date of the lease Clegg & Wright carried on business as brewers and dealers in ales and stout at the Alton Brewery, 74 and 76 Stanhope Street, Liverpool.

In the summer of 1889 Clegg & Wright agreed to sell the goodwill of their business, together with the reversion of the Alexandra Hotel, to Robert Cain, and the purchase was completed on the 2nd of October, 1889.

By an indenture of the 2nd of October,

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1889, Clegg & Wright assigned and conveyed to Cain the Alexandra Hotel, and the benefit of the rents and covenants reserved and contained in the lease of the 19th of November, 1886, together, especially, with the full benefit and advantage and the right during the continuance of the term of nine and a half years granted to the said B. Hands, that the said B. Hands would not at any time during the continuance of such demise, and should not buy, receive, sell, or dispose of, either directly or indirectly, or permit to be bought, received, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the said demised premises or any part thereof, any ales, stout (other than best stout) other than such as should have been *bona fide* purchased from the said R. Cain, who from thenceforth should be entitled to stand in the place of the lessor for all the purposes of the said indenture of the 19th of November, 1886.

Cain carried on business as a brewer and dealer in ales and stout at the Mersey Brewery, Stanhope Street. Clegg & Wright dissolved partnership on the 2nd of October, 1889, and the Alton Brewery had not since that date been used as a brewery.

After Clegg & Wright dissolved partnership Hands purchased his ales from other firms, and accordingly an action was brought against him by Cain, to which Clegg & Wright were made co-plaintiffs, for an injunction to restrain him from breaking his covenant.

The Vice-Chancellor, on the 20th of December, 1889, without deciding whether or not the covenant ran with the land, held that the plaintiffs were entitled to relief, and granted an injunction restraining the defendant from buying or selling ales or stout (other than best stout) other than such as should be *bona fide* purchased from Cain, his executors, administrators, and assigns, provided they or he should at the time deal in such liquors, and should be able and willing to supply the same of good quality and at the fair current market price.

The defendant appealed.

Henn Collins, Q.C., Mattinson, and McConkay, for the appellant.—The ques-

tion is whether the benefit of a covenant by a tenant of a tied house goes to the assignee of the lessor so that the assignee can sue for a breach of the covenant. Now, the true construction of the covenant is that it is a covenant by the defendant, not to take beer from his lessors or their assigns generally, but to take beer from the lessors and their successors in the brewery, or from persons who may be joined with them as partners in the brewery. If the covenant be separated from the brewery, it ceases to run with the land, and becomes a mere personal covenant, the benefit of which cannot be assigned. *Doe d. Calvert v. Reid* (1) was very like the present case. There the lessee of a public-house covenanted for himself, his executors and assigns, with his lessors (brewers), their executors, administrators, or assigns, or their successors, to take all his beer from them, or their successors in their said trade, and the lessors sold their trade and the public-house to third persons, who removed the plant and carried on the business of brewers at a distance; and it was held that the trade of the lessors was thereby determined, and that their assignees could not take advantage of the covenant by the lessee. Here the defendant covenanted with the lessors to take their beer. The word "lessors," according to the definition clause, would include their heirs, executors, administrators, and assigns; and if there were no words in the covenant restricting its operation, the covenant would be with the lessors and their assigns generally; but the last part of the covenant expressly refers to certain assigns, "partner or partners with them or either of them," and the use of these words limits the covenant to a covenant with the lessors and their successors in the business of brewers carried on at the brewery. If the covenant stood alone, without the introduction of the meaning given to lessors by the definition clause, it would clearly apply to Clegg & Wright, and their partners in the trade or business, and the only way in which effect can be given to the words respecting partners used in the covenant is by limiting

(1) 10 B. & C. 849; 8 Law J. Rep. K.B. (o.s.) 328

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the generality of the covenant. The benefit of such a covenant does not pass by an assignment of the mere reversion of the lease without the brewery—*Vyvyan v. Arthur* (2).

[CORROX, L.J.—Is not this covenant to be considered as part of the rent, as a “tied” house is always let at a lower rent?]

It is not to be considered part of the rent any more than any other obligation accepted by the lessee. It is a complete alteration of the contract to tie the defendant to another brewer, who may be carrying on his business anywhere, or to tie him to some person who is not a brewer at all. To enable this covenant to be enforced by the plaintiffs, it must be shewn, according to the old common law, that it runs with the land—that is, affects the land itself during the term, or *per se*, and not merely from collateral circumstances, affects the value of the land at the end of the term—*Spencer's Case* (3), *The Mayor of Congleton v. Pattison* (4), and *Keppel v. Bailey* (5). The covenant here is not one which can be said to touch or affect the land, and therefore it does not run with the land, and the benefit of it cannot be assigned.

[CORROX, L.J.—Does not the covenant affect the mode of occupation of the house?]

The particular acts covenanted to be performed by the lessee are personal acts collateral to the property demised, and do not touch or concern the thing demised, as required by the second resolution in *Spencer's Case* (3), and the benefit of the covenant is not assignable. Cain, we submit, is not alone capable of enforcing the covenant; neither are Clegg & Wright. If the brewery and the term had been assigned together, the assignee might possibly be entitled to sue on the covenant, because he would have had the brewery to which the benefit of the covenant was annexed. Here there has been a mere assignment of the term, the brewery has been divided from the term, and the assignee of the term cannot sue because he has not got

that with which the covenant might run. Examples of the collateral covenants mentioned in the second resolution in *Spencer's Case* (3) are furnished by the following cases:—*Purfrey's Case* (6), *Sampson v. Easterby* (7), *Thomas v. Hayward* (8), *Hartley v. Pehall* (9), and *Taylor v. Caldwell* (10). In *Lybbe v. Hart* (11) Baggallay, L.J., considered that a covenant in a lease to consume the hay and straw on a farm did not run with the land.

[The Court intimated that they could not agree with this *dictum*.]

Section 10 of the Conveyancing Act, 1881, has not done away with the doctrine as to covenants running with the land contained in *Spencer's Case* (3).

Cozens-Hardy, Q.C., and *Rutherford*, for the respondents.—The question really turns on the construction of the lease itself. The lessors are described as brewers, but there is nothing in the lease shewing that the covenant was to take from them beer brewed by themselves. The lease, besides the covenant in question, contains many covenants, in all of which the assigns of the lessors must be included. The words with regard to partners in the covenant to take beer from the lessors were put in to prevent any difficulty arising by reason of the lessors taking in a partner without making any assignment of the partnership property to him. It is said on behalf of the appellant that because Cain does not find it convenient to have two breweries in the same street, and make beer in the lessors' brewery, he is to lose the benefit of the covenant. We say that contention cannot prevail. It is to be observed that the covenant applies so long as the lessors—that is, the lessors or their assigns—deal in or vend beer of a good quality; the quality of the beer was the only limit contained in the covenant. *Doe d. Calvert v. Reid* (1) is distinguishable from the

(6) Godbold Rep. 120; Moora, 243.

(7) 9 B. & C. 503; 5 Law J. Rep. K.B. (o.s.) 291.

(8) 38 Law J. Rep. Exch. 175; Law Rep. 4 Exch. 311.

(9) Peake, 178.

(10) 3 B. & S. 826; 32 Law J. Rep. Q.B. 164.

(11) 54 Law J. Rep. Chanc. 860, 862; Law Rep. 29 Ch. D. 8, 19.

(2) 1 B. & C. 410; 1 Law J. Rep. K.B. (o.s.) 138.

(3) Sm. L. C. (9th ed.), vol. 1, pp. 65 and 72.

(4) 10 East, 130.

(5) 2 Myl. & K. 517.

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present case. There the lessors were described as of the particular brewery, and the covenant refers to their successors in their present or late business or trade, and was limited to beer brewed for sale in their late or present trade or business. This covenant runs with the land, and can be sued upon by the assignee of the reversion, as it affects the mode of occupation of the thing demised—*Tatem v. Chaplin* (12) and *Hooper v. Clark* (13).

[COTTON, L.J., referred to *Thomas v. Hayward* (8).]

That case is distinguishable on the ground stated in *Fleetwood v. Hull* (14), that the covenant was not either to do or refrain from doing anything on the demised premises. In *The Mayor of Congleton v. Pattison* (4) the test is said to be whether the covenant affects the land itself, or the mode of cultivating or occupying it. It may be that the words in section 10 of the Conveyancing Act, "having regard to the subject-matter" of the lease, are wider than "touching or concerning the thing demised;" but, apart from the Act, we submit that this is a covenant running with the land within the doctrine of *Spencer's Case* (3). We submit, further, that it is not necessary in this case to consider whether the covenant runs at law or not, because both the covenantor and the covenantees are before the Court, and it has never been doubted that a covenant not running with the land may be sued upon by the covenantee as trustee for, and for the benefit of, the assignee. That brings the case within the observations of Lord Blackburn in *Hooper v. Clark* (13).

Here the benefit of the covenant is expressly assigned, and Cain is entitled on that ground also—*Renals v. Cowlishaw* (15). The covenant, even though not running with the land, can be enforced in equity against the defendant, from the fact of his having acquired the lease on the faith of the covenant being observed,

(12) 2 H. Black. 133.

(13) 35 Law J. Rep. Q.B. 79; Law Rep. 2 Q.B. 200.

(14) 58 Law J. Rep. Q.B. 341; Law Rep. 23 Q.B. D. 35.

(15) 48 Law J. Rep. Chanc. 33, 35, 830; Law Rep. 9 Ch. D. 125, 128; 11 Ch. D. 867.

according to the principle of *Tulk v. Moxhay* (16) and *Luker v. Dennis* (17), where Fry, L.J., deals with *Keppel v. Bailey* (5).

[LOPES, L.J., referred to *Hall v. Ewin* (18).]

Collins, Q.C., in reply.—This is a collateral covenant according to the test in *Thomas v. Hayward* (8), because it touches only the beneficial occupation of the thing, and not the thing itself. No case has been produced in which a Court of equity has granted the benefit of a covenant where the covenant would not have run at law.

[COTTON, L.J.—In *Renals v. Cowlishaw* (15) James, L.J., considered it immaterial whether the covenant ran with the land or not.]

But relief was refused in that case. So in *Austerberry v. The Corporation of Oldham* (19) relief was refused because the covenant did not run at law.

[COTTON, L.J., referred to *Haywood v. The Brunswick &c. Building Society* (20) and *Keates v. Lyon* (21).]

Here the covenant is an affirmative covenant to buy beer from the lessors. It is a personal contract incapable of assignment—*Robson v. Drummond* (22).

COTTON, L.J.—This is a question involving several points; but it has been very fully and ably argued, and we think we had better give the judgment at which we have arrived at once.

An injunction has been granted to restrain the defendant from buying beer contrary to the covenant in his lease; and the first question raised is, what is the true construction of the covenant? There was a lease entered into between Clegg & Wright and the defendant, in which Clegg & Wright are described as "the

(16) 2 Ph. 774; 28 Law J. Rep. Chanc. 83.

(17) 47 Law J. Rep. Chanc. 174; Law Rep. 7 Ch. D. 227, 235.

(18) 57 Law J. Rep. Chanc. 95; Law Rep. 37 Ch. D. 74.

(19) 55 Law J. Rep. Chanc. 633; Law Rep. 29 Ch. D. 750.

(20) 51 Law J. Rep. Q.B. 73; Law Rep. 8 Q.B. D. 403.

(21) 38 Law J. Rep. Chanc. 357; Law Rep. 4 Chanc. 218.

(22) 2 B. & Ad. 303; 9 Law J. Rep. K.B. (o.s.) 187.

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lessors (including in such term each of them, and their, each, and every of their heirs, executors, administrators, and assigns)." I read that because a good deal of the argument in support of the appeal was founded on it. The defendant is described as the lessee. The lease contains several covenants entered into by the lessee in terms with the lessors—that is, each of them, and their, each, and every of their heirs, executors, administrators, and assigns. There is no doubt about that. Then we come to the particular covenant in question. That is this—that "he, the said lessee, will not, at any time during the continuance of this demise, buy, receive, sell, or dispose of, either directly or indirectly, or permit to be bought, received, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the said demised premises, or any part thereof, any ales, stout (other than best stout) other than such"—this is what the argument turns upon—"as shall have been *bona fide* purchased of the said lessors, or from them, or either of them, either alone or jointly with any other person or persons who may hereafter become a partner or partners with them, or either of them." It is said that that is not a covenant which includes the assigns, because part of the definition of the lessors is repeated in the covenant in terms which exclude the full application of that definition. But I cannot think that that is so. The covenant is entered into with the lessors—that is, the persons named, or any of them, or the heirs, executors, administrators, or assigns of each or any of them. Very probably it was not necessary to add what is here put in; but I cannot think that that prevents the covenant being a covenant with the assigns of the persons who were the grantors of this lease to the defendant.

But then it is said, as I understand the argument, that it was only intended to include such assigns as should carry on the business of brewers at the particular brewery where Messrs. Clegg & Wright carried on business, and where the business of brewing is no longer carried on. The case of *Doe d. Calvert v. Reid* (1) was much relied upon for the purpose of that construction; but that was a case where the language was different, and, in my opinion,

it is clear that that was not the intention in the present case.

Then follows this proviso: "Provided they or he shall at such time deal in or vend such liquors as aforesaid, and shall be willing to supply the same to the said lessee, of good quality, and at the fair current market price thereof." That affords some protection to the publican that the beer shall be of good quality and that it shall be supplied at a fair price.

It appears to me to be clearly shewn that it was not intended to restrict this covenant to the benefit of the persons who carried on this brewery at this particular place, by the fact that the covenant does not in any way refer to the beer which has to be provided being made by the landlords or their assigns. The words are, "provided they or he shall at such time deal in or vend such liquors." That shews that it was not made, or intended to be made, a stipulation that the persons entitled to the benefit of the covenant were to be persons who made beer at all. It was not provided that they should still make the beer they were selling, but it was provided that it should be of good quality and be supplied at the fair current market price.

Considerable light is thrown upon the true intention of the parties by the fact that these landlords not only made beer, but bought beer, and supplied those who were not bound by any restrictive covenants to take beer from them alone. That, I think, shews what they were intending to provide for—that they should have the right to supply beer to the lessee whether they made it themselves or not, so long as they dealt in beer and were willing and able to supply it of good quality and at the fair market price.

The appellant referred to the case of *Doe d. Calvert v. Reid* (1), which I have already mentioned. Cases, so far as they give us a rule of construction, are very useful; but it is very seldom, to my mind, that a case upon the construction of a particular document tells us much when we come to another, unless it lays down some principle to guide us. That was an action of ejectment by brewers against the lessee of a public-house for breach of a covenant relating to the sale of beer. The brewers

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had purchased the business of the original lessors, but they did not carry it on at the place where the lessors had carried on their business at the time the lease was granted.

The terms of the covenant were that the lessee should take from the lessors, "their executors, administrators, or assigns, or their successors in their late or present trade as brewers, all the porter, ale," &c. The words "their successors in their late or present trade as brewers," though not in terms limiting the assigns to those in that position, nevertheless afforded a clue to the construction. The defendant said that the plaintiffs were no longer carrying on that trade, because, though they were carrying on the trade of brewers, they were not carrying on the trade of the lessors, who were parties to the suit, and the Court said that what was meant by the covenant was carrying on the same trade—not merely carrying on the trade of brewers, but carrying on the trade which was carried on at that particular brewery.

The language in this case is different from the language in *Doe d. Calvert v. Reid* (1), and gives a different effect to the covenant. It cannot be said here that this was a personal covenant with the particular landlords who granted the lease, or that it was impossible for the benefit of it to be conveyed to anybody else. It is not like the case of a man employing a particular painter to paint his picture, which would imply that the painter could not hand over the contract to anybody else. In my opinion this is not a contract which is incapable of being assigned.

Then it is said that this covenant does not run with the land. I think it does run with the land. That is my opinion; but there are other points on which this case may be decided independently of that. It is a contract relating to the way in which the business of the house is to be carried on. Therefore, it is a contract relating to the public-house, just as much, in my opinion, as a contract as to the mode in which the cultivation of a particular bit of land is to be carried on relates to the land. It affects the value of the reversion; it affects the house; and, in my opinion, it is a contract running with the land. I think, therefore, that the judgment can be supported on that

ground. But there is another ground on which I think the judgment may also be supported. Here there has been a sale by the landlords of the goodwill to the plaintiff Cain. He is, therefore, entitled to sue independently of the question of its running with the land, so far as the landlords who entered into this covenant could give him the right. That being so, the difficulty that existed in the case of *Renals v. Cowlishaw* (15) is got rid of. Here there is an assignment of the benefit of the covenant to Cain, even if it did not pass by the mere assignment to him of the reversion of this public-house. Then, in my opinion, as he is entitled to sue in respect of that, the doctrine of *Tulk v. Moxhay* (16), properly applied, will enable him to enforce that covenant as against the defendant. The defendant having, by reason of this restrictive covenant, obtained the public-house at a less rent, as we may assume he did (because it was put before us in the course of the argument that the restrictive covenant might affect the rental value of the house), we ought not to allow him to deal with that public-house, as against the person entitled to the benefit of that covenant, in a way inconsistent with the covenant by reason of which he got the house at a lower rent. Therefore, in my opinion, on that ground, even if this covenant did not run with the land, the judgment of the Vice-Chancellor is right.

But then it is said—and that we ought to consider—that this Court has decided that the doctrine of *Tulk v. Moxhay* (16) will not be extended beyond the case of restrictive covenants. In *Tulk v. Moxhay* (16) the covenant was not in its terms restrictive; but it implied a restriction, because there was a covenant that the premises were to be used only as an ornamental garden. That implied that the defendant was not to build on it, which was what he was about to do. What was meant was this: "We will not enforce this doctrine where the covenants are covenants which, if enforced, will compel the defendant to put his hand into his pocket and spend money." Here the defendant, from the nature of his tenancy, is compelled to buy beer. This covenant will compel him to buy from the plaintiff Cain. Even if this was a

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contract in terms to buy all beer from the plaintiffs, that would involve a negative—that he should not buy his beer from anybody else; and therefore, in my opinion, that would not come within the rule which we laid down in the case of *Haywood v. The Brunswick Building Society* (20), where there was a contract, which would have involved the spending of money by the defendants if it had been enforced against them. In that case the land was granted in consideration of a covenant to build and repair buildings, and that was a covenant which the Court refused to enforce, considering the doctrine of *Tulk v. Moxhay* (16) not applicable in such a case.

In my opinion, both on the ground that the covenant runs with the land, and also on the ground that the doctrine of *Tulk v. Moxhay* (16) applies, the order of the Vice-Chancellor is right.

LINDLEY, L.J.—I agree with Mr. Collins in thinking that this case is one of very great importance, both to brewers, and also to tenants of “tied” houses, because certainly it is rather a startling thing to anybody to be told that when you have agreed to buy beer from a particular brewer, you may find yourself bound to take bad beer from somebody else. Whether you are or not depends upon the agreement into which you have entered. The whole question, to my mind, turns upon the true construction of this agreement, and the only difficulty that I think serious is to find out whether this agreement is or is not assignable—that is to say, whether the tenant here entered into an agreement with certain persons to buy beer of them, and them alone, relying upon their skill and personal reputation; or whether he did not enter into a very much wider contract, to buy beer from them or persons to whom they might assign their business or the public-house. The question whether the contract is a personal unassignable contract or not, must be gathered from the instrument itself, having regard, of course, to the position of both parties.

The lease has been fully discussed, and I will refer to it very shortly. The lessors are described as brewers—there is no reference to any particular place of business, or anything of that kind—and the lessee

is described as a licensed victualler. Then there is an ordinary lease of a public-house, and then there come covenants by the tenant that he will use and occupy the premises demised as and for a tavern or public-house only, and will conduct the same so as not to forfeit his licence—I am reading it shortly—and will keep open the premises for the sale of ale and beer. Then there is a covenant about not getting ale or beer from other people. Does this lease contain any indication either one way or the other as to whether the benefit of this was capable of being assigned? The very first thing that one comes across is the interpretation clause which follows the names of the brewers, and describes them as “hereinafter called the lessors, including in such term each of them, and their, each, and every of their heirs, executors, administrators, and assigns.” Those words are never found in what are called personal contracts. If I were to enter into an engagement with an artist to paint my picture, I should not put those words in. If he died, I should not leave it to his executors to finish what he had begun. Such words are out of place altogether in a contract which is personal in that sense.

Now when we come to the covenant which more particularly relates to this matter, we find that the lessee has agreed with his lessors that he will not during the lease—I am again reading it shortly—sell or dispose of on the premises, any ale or stout other than such as shall have been *bona fide* purchased of the said lessors, or from them or either of them, alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them. That clause lets in partners. Well, does it go further? That turns upon the construction of a very few words. Mr. Collins says that by reason of the introduction into this clause of the words “from them or either of them” which occur in the definition clause, it is tolerably clear that the definition was departed from. I thought at first sight that there was a great deal in favour of that construction; but when you come to see what the whole clause is, it appears to me that you cannot put that limited construction upon it, and that the true construc-

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tion is that which interprets "lessors" in the sense in which it occurs everywhere. That being the case, I think there can be no reasonable doubt that this contract is not a personal and unassignable contract. Accordingly the question then arises whether it has become assigned to Mr. Cain. Well, the answer to that is easy enough. Unquestionably it has. If it is capable of being assigned, it has been assigned. It has been assigned unquestionably and without any controversy in equity by the agreement by the brewers with regard to the sale of the business, which of course includes the benefit of the goodwill; and inasmuch as the purchaser and his assignors are both suing, I see no answer whatever to this action upon that ground.

It has also been said that it is assigned to Mr. Cain by means of his being an assignee of the reversion in the lease. That raises a technical question, which, stated in legal language, amounts to this: whether the benefit of this covenant runs with the land. We have heard the authorities discussed by Mr. Collins, who has studied this branch of the law probably more carefully than anybody living, and he has not persuaded me, I confess, that this is a covenant which does not run with the land. I rather think it does. If you look at the authorities which he has cited, and look at them carefully, this does, in lawyer's language, so "touch and concern" the thing demised as to run with it at common law. But whether that is so or not, it appears to me that it is absolutely no answer with regard to that covenant, the benefit of which has been expressly assigned to Mr. Cain, and Mr. Cain is therefore entitled to it.

Then comes a question as to whether this covenant is one which can be enforced in equity, having regard to the doctrine relating to specific performance and injunctions. Mr. Collins has suggested that although this covenant is negative in point of form, it is affirmative in substance, and that an injunction, therefore, ought not to be granted. But when you look at the whole of this lease, you find that the covenant which he suggests as affirmative really involves a negative element in it. If you take into consideration the covenant to keep open this place as a public-

house, and to sell beer there, you cannot treat the covenant that follows as an affirmative covenant to buy beer of the lessors, but you must put in "and of the lessors exclusively." If you get that, you get a negative portion of the covenant which can be properly enforced consistently with the doctrine applicable to cases of this kind; and therefore, whether you regard it as an affirmative with a negative element in it, or whether you regard it as split up, as it is here, into these two parts, partly affirmative and partly negative, that negative part can be properly enforced.

For these reasons it seems to me that the decision is right, and the appeal must be dismissed, with costs.

LOPES, L.J.—The question in this case is on the construction of the covenant. In the definition clause the word "lessors" includes assigns. It is contended, with regard to this particular covenant, that by the words following "lessors" in the covenant—I mean those words, "from them or either of them alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them"—being used, it was intended that the operation of the definition clause was to be excluded, and that the covenant must be dealt with entirely apart from the definition clause. I cannot adopt that view. I am bound to say that at first I was somewhat taken with it, but on consideration I think it cannot be maintained. It appears to me that the words to which I have alluded following "lessors" were introduced merely to cover the case of any partnership between the lessors and third parties, or their assigns and third parties—not only the assigns of the brewery with which the covenantees were then concerned, but any assigns, provided only that they or he should at such time deal in or vend such liquors as aforesaid, and should be willing to supply the same to the said lessee of good quality and at a fair average price. The covenant, therefore, in my opinion cannot be said to be a personal covenant.

But then a question is raised as to whether the benefit of this covenant runs with the reversion. It was contended by

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Mr. Collins that it did not run with the reversion, and that it was purely collateral. The benefit, to run with the reversion, must "touch or concern" the demised premises. Now, does this covenant touch or concern the demised premises? It relates to the mode of enjoyment of a public-house. The thing demised is a public-house, and the covenant compels the covenantor to buy beer of the covenantees and their assigns. In my opinion it touches and concerns the demised premises; it affects the mode of enjoyment of the premises, and therefore it runs with the reversion.

I entirely agree with what has been said with regard to the application of the case of *Tulk v. Moxhay* (16), and I think this appeal should be dismissed.

Solicitors—J. Hands, agent for Bartlett & Berry, Liverpool, for appellant; Field, Roscoe & Co., agents for Miller, Peel, Hughes & Co., Liverpool, for respondents.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
LINDLEY, L.J.
LOPES, L.J. } WHITBY v. MITCHELL.
1890.
Feb. 14, 15.

Limitation to use of Unborn Children of Unborn Person—Restriction within the Limits of Rule against Perpetuity—Void Limitation—Possibility on a Possibility.

The old real property rule, prohibiting a legal limitation of an estate to the issue of an unborn person to take as purchasers, has not been abrogated or superseded by, or merged in the more modern rule against perpetuities, but the two rules are independent and co-existing rules. Consequently, a limitation offending against the old rule is not invalidated by the fact that it is so framed as necessarily to take effect within the period of a life in being and twenty-one years after.

Appeal by the children of Mrs. Burlton from the decision of Kay, J. The case is reported *ante*, p. 8.

Marten, Q.C., and *W. Baker*, for the appellants.—Kay, J., decided this case on the authority of *dicta* of Mr. Joshua Williams; but the old rule as to a possibility on a possibility is obsolete, except as a branch of the more modern and comprehensive rule against perpetuities. The existence of the rule as laid down by that author—*Williams on Real Property* (9th ed. pp. 263–264; 15th ed. pp. 321–23; 16th ed. pp. 314–315, 624)—is denied by other writers: *Lewis on Perpetuities* (1843, pp. 419, 420, and Supplement (1849), pp. 97, 112, 136, *et seq.*). See *Tudor's Leading Cases on Conveyancing*, notes to *Cadell v. Palmer* (2nd ed. p. 410), and *Cole v. Sewell* (1). The rule, if still in existence at all, is only against general limitations to unborn sons of unborn sons. In *Hay v. The Earl of Coventry* (2) there was nothing to limit the time of birth; but if the limitations be so worded as necessarily to fall within the requirements of the rule against perpetuities they are not affected by it. The statement by Mr. Preston, in his argument in *Mogg v. Mogg* (3), that "a gift to an unborn child for life is good if it stops there, but if a remainder is added to his children or issue as purchasers it is not good unless there be a limitation of the time within which it is to take effect," is quoted with approval and adopted by Wood, V.C., in *Catlin v. Brown* (4). That statement is also supported by *Brudenell v. Elwes* (5), *Hockley v. Maubey* (6), and *Routledge v. Dorril* (7)—see *Cases and Opinions* (Mr. Booth's and Mr. Yorke's opinions on the will of Charles Baker), vol. 2, pp. 432–434, *et seq.*; *Sugden on Powers* (8th ed. p. 393, and p. 397, par. 8); 1 *Jarman on Wills* (4th ed. pp. 279, 281); 2 *Jarm.* (Appendix, p. 845). In all the cases where these limitations have been held to be bad, they were so under the rule against perpetuities; and the old rule not being one on which titles have been accepted, but merely restrictive, a formal recognition of its

(1) 4 Dr. & W. 1, at p. 32.

(2) 3 Term Rep. 83.

(3) 1 Mer. 654, at p. 664.

(4) 11 Hare, 372, at p. 375.

(5) 1 East, 442.

(6) 1 Ves. jun. 150.

(7) 2 Ves. jun. 357.

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disappearance can do no injury. Then the appointment, although it must for general purposes be read into the settlement which creates the power, takes effect as a springing use, and Mr. J. Williams himself states the law as to springing uses, which take effect by virtue of the Statute of Uses, as being independent of this artificial rule.

They also referred to *Frost v. Frost* (8).

Farwell.—The law as to perpetuities is a comparatively modern rule, "borrowed by analogy from legal formal limitations"—per Kenyon, C.J., *Porter v. Bradley* (9)—to meet the invention of executory trusts and limitations of personal estate, to which the old common law rule that an estate cannot be given to an unborn person for life, followed by any estate to a child of such unborn person, did not apply. The origin of the rule is explained by Sir G. Jessel in *In re Ridley*; *Buckton v. Hay* (10). That old rule was in existence at a time when the only possible limitations were limitations of common law estates—that is, particular estates with remainders. Then there being no law as to perpetuity in the olden times, the possibility of piling remainder upon remainder, and keeping land indefinitely inalienable, was prevented by the introduction of the old rule that you cannot have a possibility on a possibility. That rule, applying only to legal estates and limitations, cannot be merged in or qualified by a new rule introduced to meet different circumstances—e.g. the great increase in the value of personal estate, and invention of executory trusts. The doctrine as to perpetuities has no reference to legal remainders—*Cole v. Sewell* (1)—and so all cases cited by the appellant in which there were legal limitations or limitations of personal estate, there being properly no limitations of personal estate by way of remainder, have no application.

Lord St. Leonards never intended in *Cole v. Sewell* (1) to treat the old rule as overridden by the more modern, as appears from his judgment in *Monypenny v. Dering* (1852) (11), where he disclaimed any such

(8) *Ante*, p. 118; Law Rep. 43 Ch. D. 246.

(9) 3 Term Rep. 142, 146.

(10) 48 Law J. Rep. Chanc. 563; Law Rep. 11 Ch. D. 645.

(11) 2 De Gex, M. & G. 145, 170; 22 Law J. Rep. Chanc. 313.

intention, saying that the rule was too well settled to be broken in upon. So in *Buckton v. Hay* (1879) (10) Sir G. Jessel treats the rules as co-existing; see also *Fearne's Contingent Remainders* (ed. 1844, p. 565, ch. 4: "Of other matters relating to Executory Devises," note to par. 24); *Burton's Compendium* (7th ed. p. 255); *Williams on Real Property* (11th ed. appendix F, p. 521), *Sugden on the Law of Property* (1849, pp. 120, 318, 319).

In *Catlin v. Brown* (4) the estates were equitable, and so were the estates in *Mogg v. Mogg* (3); and the statement of the rule by Mr. Preston in the argument in the latter case (p. 664) must be taken with reference to a limitation of equitable estates, and not as applicable or intended to apply to legal estates. So must the adoption of that rule by Wood, V.C., in the former. *Routledge v. Dorril* (7) was a case of personal estate, to which the rule for which I now contend does not apply.

He referred also to *Preston on Abstracts* (vol. 2, p. 114, 166).

Renshaw, Q.C. (*Swinfen Eady* with him), for Mitchell.—The power given to Mrs. Burlton to appoint by will was bad; and when a power to appoint is void for remoteness, the gift over in default of appointment fails also—*Wollaston v. King* (12).

Alexander Young, for the plaintiff.

Baker, in reply.

COTTON, L.J.—This is an appeal from a decision of Mr. Justice Kay, who has held that certain limitations of legal estates introduced into a settlement of 1865 are void, not on the ground of remoteness, but because the limitation attempted is one not allowed by law. The limitation is a limitation of a legal estate to an unborn child, with remainder to her unborn children. It is said that the limitations in this case do not come within the rule against perpetuity, and that there is no other rule which invalidates these limitations.

Mr. Justice Kay has, however, decided, and in my opinion rightly, that there is a rule in existence which does prevent these limitations being good.

(12) 38 Law J. Rep. Chanc. 392; Law Rep. 8 Eq. 165.

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That rule is said to be one providing against "a possibility on a possibility," or, to state the rule in a more convenient form, it is that you cannot have a limitation for the life of an unborn person, with a limitation after his death to his unborn children to take as purchasers. But it has been urged that, although that was the old rule, it has been long ago done away with and superseded by the more modern rule against perpetuities. But, in my opinion, we cannot come to that conclusion.

It has been conceded that the old rule existed long before the rule prohibiting the limitations of estates tending to a perpetuity existed. Can we say that it is put an end to or replaced? Mr. Joshua Williams lays it down that it is still existing; other text-writers say that it ought not to be so considered. In this difference of opinion we must see what aid we can obtain from Judges and others in high position. We have Mr. Butler's note to *Fearne's Contingent Remainders*, and although there is a good deal of argument and expression of doubt in certain text-writers, yet we take the view that the rule must still be considered as existing, and as preventing the limitation of estates in such a way as, although it may not offend against the rule as to perpetuities, to be objectionable to the old rule. Lord Kenyon refers to it in the case of *Hay v. The Earl of Coventry* (2); he says: "It is not necessary for me to say what effect that would have had in the present case if that point"—that is, whether an estate for life could be given to unborn issue—"had remained undecided, because the law is now clearly settled that an estate for life may be limited to unborn issue, provided the deviser does not go further and give an estate in succession to the children of such unborn issue." It is said that such a limitation, being, as it was, to unborn issue generally, would be necessarily bad, because it would offend against the rule against perpetuities. But we find the rule on which Mr. Justice Kay has decided this case to be a rule which Judges treated as still subsisting, long after the rule against perpetuities had been crystallised and laid down in definite and distinct terms.

We find Lord St. Leonards saying in

Monypenny v. Dering (11): "Then the rule of law forbids the raising of successive estates by purchase to unborn children—that is, to an unborn child of an unborn child. With this rule I have never meant to interfere, for it is too well settled to be broken in upon." We have Lord St. Leonards referring to that old rule as a still existing rule in 1852, at a time when according to the argument of the appellants in this case it had been superseded.

Besides that, we have Mr. Butler's note to *Fearne*. He lays down what he considers to be the law, and does not consider that there had been any supersession of the old law. He says (9th ed. p. 563): "The cases of a possibility upon a possibility may be considered as exceptions from the rule. They proceeded on a different ground, and gave rise to this important rule, that, if land is limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person's issue." He then recognises the old rule to be still subsisting.

Then a passage was cited by Mr. Farwell from *Burton's Compendium* (5th ed. 303; 7th ed. 255): "Life estates may by law be given in succession to any number of persons in existence, and ulterior estates in succession to their children yet unborn.

... But no remainder can be given to the child of a person who is not in existence." So then he recognises the old rule as still in force.

Therefore, although very ingenious and learned arguments have been addressed to us to shew that the old rule has been superseded and put an end to, it is in my opinion well established that it is still in existence.

A passage from the judgment of Sir E. Sugden in *Cole v. Sewell* (1) was referred to, where he speaks of the old rule as being obsolete; but by that he only meant that it is no longer so necessary to refer to it, because the modern rule against perpetuities is generally sufficient to meet the necessities of the case, and he nowhere lays down that the old rule is no longer in existence. But then, when Mr. Marten refers to that passage as being in his favour, I prefer what he said when on the bench at a later period in *Monypenny v.*

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Dering (11), which shews that he did not consider the old rule to have been abrogated.

In my opinion the decision of Mr. Justice Kay was right.

LINDLEY, L.J.—I entertain no doubt myself that the observations of Mr. Justice Williams on this subject are correct from beginning to end, and I do not think that I could express my own view better than by reading what he says. I admit that I am in a difficulty—as it is obvious he was—in understanding the exact meaning of the old rule or doctrine as to a “possibility upon a possibility,” and if any one refers to the passage in *Coke on Littleton* where the doctrine is discussed, I hope he will be able to understand it better than I do. I do not understand it now, and I never did. But, notwithstanding this difficulty, the doctrine gave rise to an intelligible rule which any one can understand, and which is expressed by Butler in his note to *Fearne*, where he says that “the cases of a possibility upon a possibility . . . gave rise to this important rule, that if land is limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person’s issue.”

That is intelligible, and there are other passages to the same effect on pages 502 and 503 of that author. I have always understood it to be a settled rule of law, and I am not aware of any authority or *dictum* which in any way impugns it.

But it has been urged that the old rule had become obsolete, or merged in or superseded by the more modern doctrine as to perpetuities. I think that Butler’s note which I have cited is an answer to that. It points out that the old rule has nothing to do with perpetuities.

The rule against perpetuities is of much later origin, and was due to the invention of shifting uses and executory devises. When shifting uses and executory devises were invented, it became necessary to impose some limits upon the estates which could then be created.

I hold that the old rule has not been abrogated, and the principle of it seems to me to be grounded on very good sense. After all, the practical question is whether upon

the grounds put forward we ought to allow land to be tied up for any longer period than generally allowed. So far from supporting ingenious devices for tying up the disposition of land, our inclination ought to be to discountenance such a proceeding as a retrograde step. The time has long gone by for supporting devices leading to the indefinite tying up of land. The appeal must be dismissed.

LOPES, L.J.—That there was an old rule prohibiting the limitation of an estate to the unborn child of an unborn person has been admitted, and could not in fact be denied. It was an old rule, originating, no doubt, out of the feudal system.

But it has been urged that although this old rule did once exist, it has been superseded by the rule against perpetuities. No direct authority for any such contention has been cited to us, nor could any be found. Certain *dicta*, no doubt, of text-writers of more or less doubtful import and authority have been brought to the notice of the Court. But it is clear that in 1789 the old rule was recognised as existing by Lord Kenyon in *Hay v. The Earl of Coventry* (2), and in 1852 it was again recognised as still existing in the case of *Monypenny v. Dering* (11) by so great an authority as Lord St. Leonards; and it is to be observed that on both these occasions the rule was recognised at a time when the rule against perpetuities was in existence. I have no doubt, therefore, that the two rules are independent and coexisting rules.

The rule against perpetuity originated, and was rendered necessary, by the introduction of executory devises and springing uses, against which the old rule would have been an insufficient protection.

I am clearly of opinion that the decision of Mr. Justice Kay was right, and that the appeal must be dismissed.

Solicitors—Sanderson, Holland & Adkin; Cowdell & Sons; W. Montgomery White.

[IN THE CHANCERY DIVISION AND IN
THE COURT OF APPEAL.]

STIRLING, J.	} <i>In re PYLE WORKS</i> (LIMITED).
1889.	
Nov. 16, 26.	
1890.	
Jan. 13.	
COTTON, L.J.	
LINDLEY, L.J.	
LOPES, L.J.	
March 18, 20, 21, 22.	
April 1.	

*Company—Winding-up—Mortgagees of
uncalled Capital—Calls made in Winding-
up—Priority over general Creditors.*

*Where, by the memorandum and articles
of association of a limited company, there
is power to mortgage unpaid capital, a
mortgage of future calls is effectual on calls
made by the liquidator in the winding-
up of the company.*

*In re The Phoenix Bessemer Steel
Company (44 Law J. Rep. Chanc. 683)
and Howard v. The Patent Ivory Manu-
facturing Company (57 Law J. Rep.
Chanc. 878; Law Rep. 38 Ch. D. 151)
approved.*

*In re Whitehouse & Co. (47 Law J.
Rep. Chanc. 801; Law Rep. 9 Ch. D.
595) discussed.*

Decision of STIRLING, J., affirmed.

In the winding-up of this company three summonses were taken out by certain mortgagees, claiming under mortgages created by the company on its uncalled capital, for the determination of the question whether the mortgagees were entitled to be paid what was due on their mortgages out of calls to be made in the winding-up, in priority to the unsecured creditors of the company.

The company was registered in 1880 with a memorandum of association, which defined the objects of the company to be (amongst others) "to borrow money by mortgage or otherwise, receive money on deposit, and issue transferable and other bonds and mortgage debenture and other securities, founded or based upon all or any of the real and personal assets or on the credit of the company." By the articles of association, which bore even date with the memorandum of association,

it was provided (article 106) that the directors might mortgage any of the property of the company; and article 111 provided "that the board of directors might, from time to time, borrow on bonds or debentures of the company, or on mortgage of all or any part of the property of the company, and either with or without including in any such mortgage all or any definite proportion of the capital of the company then uncalled, such sums of money as they from time to time think expedient." The mortgages in question were four in number. 1. A mortgage dated the 3rd of January, 1882, in favour of Frederick Greenwood and John Brooke Greenwood, by which, first, all the then uncalled-up amounts of 6*l.* per share on 3,500 preferred shares of the company; and, secondly, all the personal property, assets, and effects which then, or at any time during the continuance of the security, should belong to the company, but not including any uncalled capital of the company, except that thereinbefore expressly mentioned, were assigned to secure repayment of an advance of 2,500*l.* 2. A mortgage dated the 3rd of May, 1886, in favour of Robert M'Ilwraith and Edward Gotto, whereby the uncalled amounts of 4*l.* per share on 5,000 shares of the company were assigned by way of security against any loss or damage which M'Ilwraith and Gotto might sustain by reason of their having guaranteed to the British Linen Company's bank the repayment of a sum of 3,500*l.* advanced by the bank to the company, and also guaranteed to the London and North Western Railway Company and to the Great Western Railway Company the payment of such sum as might be due to those railway companies by the company for carriage of goods upon their ledger account with the railway companies. 3. A mortgage, dated the 10th of August, 1887, in favour of Ferdinand Gautier, whereby the uncalled amounts of 4*l.* per share on 5,000 shares of the company were (subject to the prior mortgages) assigned to secure an advance of 4,000*l.* 4. A mortgage, dated the 28th of October, 1887, in favour of Robert M'Ilwraith, whereby the uncalled amounts of 4*l.* per share on 5,000 shares of the company were assigned, subject to the

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prior mortgages, to secure an advance of 3,000*l*. The first summons was taken out by Gautier, the second by Gotto, and the third by F. and J. B. Greenwood and M'Ilwraith. Messrs. M'Ilwraith and Gotto were directors of and held shares in the company.

Graham Hastings, Q.C., and *Whinney*, for the first and third summonses.—The memorandum and articles must be read together, and, so reading them, the company has power to mortgage its uncalled capital—*The Phoenix Bessemer Steel Company* (1). There is inherent power in a trading company to raise money for the purpose of carrying on its business. The memorandum of association in this case is very wide, and it alone is sufficient to authorise the mortgages. But clause 111 of the articles is express. In *Howard v. The Patent Ivory &c. Company* (2), Kay, J., held that there was a power to borrow on uncalled capital—see also *The Bank of South Australia v. Abrahams* (3).

Buckle, Q.C., and *Ashworth James*, for the second summons (Gotto).—The mortgages were given for valuable consideration, and the mortgagees are entitled to priority. There is no case of set-off—*Grissell's Case* (4) and *Black & Co.'s Case* (5). The company cannot contract that a creditor shall have such a right of set-off. The calls subject to the charge belong to the mortgagee and not to the company.

Giffard, Q.C., and *Haldane*, for the liquidator.

Phipson Beale, Q.C., and *Carson*, for unsecured creditors of the company.—The directors had no power to mortgage future calls. They may have had power to bind the payments which the shareholders were liable to make under their contracts with the company, or calls made by the directors themselves, but they could not bind payments to be enforced under the

statute or calls to be made by the liquidator. In a liquidation the liability of the shareholders to contribute is to be ascertained under section 38 of the Act of 1862 only. By section 75 that liability creates a specialty debt. By section 98 the Court is to cause the assets to be collected and applied in discharge of the liabilities, and by section 133 the property of the company is to be applied in satisfaction of its liabilities *pari passu*—*Lindley on Company Law* (5th ed.), 193, *Ex parte Robinson's Executors* (6), *Muir v. The City of Glasgow Bank* (7), *Stanley's Case* (8), *Grissell's Case* (4), *Black & Co.'s Case* (5), *In re Whitehouse* (9), *In re The China Steamship Company; ex parte Mackenzie* (10), and *The Bank of South Australia v. Abrahams* (3). Section 38 must be read strictly and as imposing new liabilities on the shareholders—*Webb v. Whiffin* (11) and *Burgess's Case* (12). The company as a going concern cannot mortgage any such liability as this. If such a power is contrary to the Act of 1862, it cannot be conferred by the memorandum and articles—*Trevor v. Whitworth* (13). But assuming the power, the mortgages are not in the form authorised by article 111. In the Greenwood mortgage no part of the uncalled capital is included, and the other three mortgages purport to charge the uncalled capital only, and not any part of the property of the company. Again, the second mortgage was given as an indemnity for a guarantee; such a mortgage is not within the power. In *In re The Phoenix Bessemer Steel Company* (1) and *Howard v. The Patent Ivory Company* (2) the mortgagees do not appear to have been declared entitled to a charge on calls

(6) 6 De Gex, M. & G. 572; 26 Law J. Rep. Chanc. 95.

(7) 4 Ct. of Sess. Cas. vol. 6, 392, 401.

(8) 4 De Gex, J. & S. 407; 33 Law J. Rep. Chanc. 535.

(9) 47 Law J. Rep. Chanc. 1801; Law Rep. 9 Ch. D. 595.

(10) 38 Law J. Rep. Chanc. 199; Law Rep. 7 Eq. 240.

(11) 42 Law J. Rep. Chanc. 161; Law Rep. 5 E. & I. App. 711.

(12) 49 Law J. Rep. Chanc. 541; Law Rep. 15 Ch. D. 507, 511.

(13) 57 Law J. Rep. Chanc. 28; Law Rep. 12 App. Cas. 409.

(1) 44 Law J. Rep. Chanc. 883.

(2) 57 Law J. Rep. Chanc. 878; Law Rep. 38 Ch. D. 156.

(3) 44 Law J. Rep. P.C. 76; Law Rep. 6 P.C. 265 (271).

(4) 35 Law J. Rep. Chanc. 752; Law Rep. 1 Chanc. 528.

(5) 42 Law J. Rep. Chanc. 404; Law Rep. 8 Chanc. 254.

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made in the winding-up. If such charges are allowed, there will be no security for persons dealing in the ordinary way with a company, who would have no means of knowing how far the credit of the company was pledged, the validity of a mortgage by the company not being necessarily dependent upon registration under section 43 of the Act of 1862—*Wright v. Horton* (14) and *Holroyd v. Marshall* (15).

Graham Hastings, Q.C., in reply, referred to *In re The South Durham Iron Company*; *Smith's Case* (16) and *In re The Sankey Brook Coal Company* (17).

Buckley, Q.C., in reply, referred to *Stone v. The City and County Bank* (18).

Cur. adv. vult.

STIRLING, J. (after stating the facts).—It was laid down in *The Bank of South Australia v. Abrahams* (3) that the right of a company to unpaid capital "is, strictly speaking, more in the nature of power than of property; and, although that which a man has power to make his own may be charged as well as that which is actually his, it requires apt and proper words, or a sufficient context, to have this effect." It was held by the Master of the Rolls (Sir George Jessel), in the case of *The Phoenix Bessemer Steel Company* (1), that the apt and proper words, or sufficient context, need not be found in the memorandum of association, but it is sufficient if they are contained in contemporaneous articles of association. What he said on that subject is contained in two sentences (at p. 685) which I shall read: "The memorandum and articles are contemporaneous documents, and the rule of construction is that if contemporaneous documents can be read in two ways, in one of which they appear consistent and in the other inconsistent, the construction is to be preferred which will render them

consistent. Another principle is that if one of two contemporaneous documents is ambiguous in its terms, but the other is clear, then force is to be given to the one whose terms are clear, so as to interpret the one containing ambiguous terms." Similar principles were acted upon by the same learned Judge in the case of *Harrison v. The Mexican Railway Company* (19), and, so far as they related to the matter now under consideration, do not appear to be affected by the qualifications suggested by the Court of Appeal in *Guinness v. The Land Corporation of Ireland* (20). I propose, therefore, to act upon that. The memorandum of association in the present case empowers the company "to borrow on mortgage or otherwise." Mortgage of what? The contemporaneous articles of association say, "On mortgage of all or any part of the property of the company, either with or without including in any such mortgage all or any definite proportion of the capital then uncalled." Those words, read with those in the memorandum of association, authorise a mortgage of uncalled capital, certainly, along with other property of the company, to secure an advance. Further, the memorandum authorises the issue of "mortgage debenture and other securities, . . . founded on all or any of the real or personal assets or on the credit of the company."

If it is conceded (as was contended in argument) that the strict or primary meaning of the word "assets" is property, and that it would not include uncalled capital in the absence of a context, still the articles of association shew that uncalled capital was intended to be available as the subject-matter of a security, and I should therefore hold, if necessary, that there is here found a context sufficient to shew that that word "assets," as it was used in the memorandum, is used in a sense which includes uncalled capital. I am of opinion, therefore, that the mortgage of the 3rd of January, 1882, which includes both uncalled capital and other property of the company, is authorised by the express terms of article 111. In the other mort-

(14) 56 Law J. Rep. Chanc. 873; Law Rep. 12 App. Cas. 371, 376.

(15) 33 Law J. Rep. Chanc. 193; 10 H.L. Cas. 191.

(16) 48 Law J. Rep. Chanc. 480; Law Rep. 11 Ch. D. 579.

(17) 39 Law J. Rep. Chanc. 223; Law Rep. 9 Eq. 721; *ibid.* 10 Eq. 381.

(18) 47 Law J. Rep. C.P. 681; Law Rep. 3 C.P. D. 282.

(19) 44 Law J. Rep. Chanc. 403; Law Rep. 19 Eq. 358.

(20) 52 Law J. Rep. Chanc. 177; Law Rep. 22 Ch. D. 349.

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gages the subject-matter of the security is uncalled capital only; and it is suggested that as they include no part of the property of the company strictly so called, they do not fall within article 111 as to their validity. The terms of article 111 are these: "They may borrow from time to time on bonds or debentures of the company, or on mortgage of all or any part of the property of the company, and either with or without including in any such mortgage all or any definite proportion of the capital of the company then uncalled, such sums of money as they may from time to time think expedient." It is said that the words "such mortgage" mean a mortgage of all or any part of the property of the company, which would not include the uncalled capital as then read. The result of that would be that a mortgage of uncalled capital alone would be invalid, whereas if it included any part, however small, of the other property of the company it would be valid. I do not think that such a narrow construction ought to prevail, and I prefer to read the words "such mortgage" as meaning a mortgage given to secure money borrowed by the company generally. In my opinion, therefore, the mortgages of the 10th of August and 28th of October, 1887, are within the power. There remains the question whether such a mortgage may be given by way of indemnity, as in the case of the deed of the 3rd of May, 1886. The consideration of this I postpone for the present, and I proceed to consider whether these charges which I have held to be valid are effectual against unsecured creditors as regards calls made in the winding-up, it being contended that a company formed under the Companies Act, 1862, has no power to bind such calls, whatever may be its powers as regards calls made by the directors. Now, the order made in *In re The Phoenix Bessemer Steel Company* (1), already referred to, appears from the report to be precisely in point. The Registrar has furnished me with a copy of the precise terms of the order, which is as follows: "His Honour being of opinion that the Sheffield and South Yorkshire Permanent Benefit Building Society have, under a mortgage by the trustees of the Yorkshire Benefit

Building Society, a first charge on the unpaid capital of the company and on the proceeds of all future calls made and to be made on the shares of the said company, doth order that the liquidators do get in all the said unpaid capital under the direction of the Judge, and do place the same and the proceeds of all future calls to be made on the shares of the said company to a separate fund, to be entitled 'calls in respect of unpaid capital;' and the said unpaid capital and the proceeds of any future capital are not to be dealt with by the said liquidators without notice to the applicants." It therefore appears that the mortgagees were recognised and dealt with by the Court as having a charge not only on calls made by the directors, but on those to be made in the winding-up; and no notice of any suggestion of a difference between them is to be found either in the arguments of counsel or the judgment of Sir G. Jessel as reported. A similar decision appears to have been given by Mr. Justice Kay in *Howard v. The Patent Ivory Company* (2), out here also there is a like silence as to any distinction between calls made before and those made after the commencement of the winding-up. It is now contended that these decisions ought not to be followed, on the ground that they are inconsistent, if not with other cases binding on me, at all events with the grounds on which the decisions in those cases are based. Before proceeding to consider those cases, I may remark that in the earliest, or one of the earliest, cases in which the validity of a mortgage of unpaid calls was considered—namely, *Stanley's Case* (8)—Lord Justice Turner appears to have based his decision against the validity of the charge on the ground that it would be inconsistent with the discretion vested in the directors as to the making of calls. This, however, was set aside by Sir G. Jessel, who relied mainly on the analogy furnished by section 38 of the Companies Clauses Act, 1845, which expressly confers power "to mortgage the future calls on the shareholders." In *In re The Sankey Brook Coal Company* (17) a charge was given on the proceeds of a call proposed to be, but not actually made. The call was afterwards made, but before the proceeds were

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got in, a winding-up commenced. It was held by Lord Justice (then Vice-Chancellor) James that the charge was valid, and the liquidators were ordered to apply the proceeds of the call towards payment of the debt secured by the charge. I do not, however, treat that as an authority directly in favour of the mortgagees in the present case; for the order made in *In re The Sankey Brook Coal Company* (17) related to the proceeds, not of a call made by the liquidators, but of one made by the directors, which (as is shewn by *Stone v. The City and County Bank* (18)) the liquidators had power to enforce. It may be thought (and it is suggested in argument) that a directors' call so enforced is subject to charges from which a call made by the liquidator would be free. The cases on which reliance is placed in opposition to the summons are mainly *Grissell's Case* (4), *Black & Co.'s Case* (5), and *In re Whitehouse* (9), all of which were decided on the terms of the Companies Act, 1862, and particularly on sections 38, 75, 98, 101, and 133.

In section 16 of the Companies Act it is provided that "the articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber in the presence of and be attested by one witness at the least, and such attestation shall be a sufficient attestation in Scotland as well as in England and Ireland. When registered they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act, and all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt." That relates to moneys payable in pursuance of the conditions and regulations of the company.

In section 38 it is provided that "in

the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company." That applies to the event of a company being wound up. Then there is a limitation, which ought to be read: "In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." That word "unpaid" is dealt with by the Master of the Rolls in *Whitehouse's Case* (9), which I shall presently read. In section 75 we have this: "The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland) of the nature of a specialty accruing due from such person at the time when his liability commenced; but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability." It is quite plain, therefore, in sections 38 and 75 that the liability under section 38 is treated in the Act as a different liability from that which is created by section 16.

By section 98 it is provided: "As soon as may be after making an order for winding up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities."

Section 101 provides: "The Court may, at any time after making an order for winding up the company, make an order on any contributory for the time being settled on the list of contributories directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents to the company, exclusive of any moneys which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the Court in pursuance of this part of this Act."

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That excludes from the operation of section 101 contribution under section 38. "And it may in making such order when the company is not limited allow to such contributory by way of set-off any moneys due to him or the estate which he represents from the company on any independent dealing or contract with the company, but not any moneys due to him as a member of the company in respect of any dividend or profit. Provided that when all the creditors of any company, whether limited or unlimited, are paid in full, any moneys due on any account whatever to any contributory from the company may be set off against any subsequent call or calls."

By section 133, which deals with a voluntary winding-up, "The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members, according to their rights and interests in the company."

In *Grissell's Case* (4) the company was being wound up under supervision; calls were made in the winding-up, and the question was, what were the rights of a contributory who was also a creditor of the company? It was held that the debt could not be set off against the calls, but that the contributory must first pay his calls, and then he would be entitled to receive a dividend *pari passu* with the other creditors. Lord Chelmsford, in giving the judgment of the Court, says, "First of all, the question depends entirely on the construction of the Companies Act, 1862." Then he says: "In considering the questions involved in these applications, the primary intention of the Legislature in the provisions relating to the winding-up of companies must be regarded. That intention is expressed in the 133rd section of the Act, being that the property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members, according to their rights and interests in the company." Then later on, at p. 535, he says: "It appears to me to be quite clear

that the amount of the call not paid cannot be set off against the debt. The Act creates a scheme for the payment of the debts of a company in lieu of the old course of issuing execution against individual members. It removes the rights and liabilities of parties out of the sphere of the ordinary relation of debtor and creditor to which the law of set-off applies. Taking the Act as a whole, the call is to come into the assets of the company, to be applied with the other assets in payment of debts. To allow a set-off against the call would be contrary to the whole scope of the Act. In support of this view it will be sufficient to refer again to section 133 as to the satisfaction of the liabilities of the company *pari passu*." Then he goes on to deal with section 101, which he relies upon, but into which I think I need not enter.

In *Black's Case* (5) the company was being wound up by the Court. The contributories had entered into an agreement with the company for the supply of locomotive engines, one term of which was that during the continuance of the agreement the contributories might set off against the calls upon all or any of their shares the amount due to them from the company, or for which they held the company's acceptances. It was held that this special contract as to set-off was not available as regards calls made in the winding-up.

What the Lord Chancellor (Lord Selborne) said was this, "The point, therefore, which His Honour has decided is simply this, that a company may contract with one of its shareholders so as to take him, in case of a winding-up, out of the law laid down in *Grissell's Case* (4), and give him in substance a right to be paid out of his own calls in preference to other creditors; which right, but for such special contract, he would not have had. It is probably enough to say that the law generally has been settled by *Grissell's Case* (4), upon the interpretation of the Act of Parliament and of the rules laid down in that Act of Parliament as to the mode in which, under a winding-up, the money arising from calls is to be applied in payment of the debts of the creditors *pari passu* and without preference. That case

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(being decided by an authority which we ought to treat as binding on ourselves, even if we doubted that it was right) has determined that in general such a set-off is not to be allowed. That decision being founded upon the interpretation of the Act of Parliament, it is very difficult to understand how it can be seriously argued that a company and one of its shareholders can by any agreement they choose to enter into between themselves override, and relieve themselves from, the operation of the Act of Parliament. The principle of the winding-up enactments is like that of the Bankruptcy Acts." Then, after some further remarks, he says: "That being so, it is impossible to entertain the idea that if the law is as laid down in that case" (that is, *Grissell's Case* (4)), "any company can by any private contract take a particular creditor, who is also a shareholder, out of the operation of that law unless the contract comes within the permissive portion of the 25th section of the Act of 1867. But in this case the course prescribed by that section has not been followed, and I do not propose to say more on the subject, except that I greatly doubt whether that Act does not supply additional reason against holding that the set-off in this case can be allowed." Then he goes on to deal with the case decided by the Court of Common Pleas—namely, *The Brighton Arcade Company v. Dowling* (21)—in which it was held that the decision in *Grissell's Case* (4) did not apply to a company which was being voluntarily wound up; and then he goes on to deal with the ordinary law of set-off, and afterwards says: "But here the rights are substantially different. The moment that the winding-up takes place, the whole administration is carried on with a view to the payment of the debts of the creditors, and in the first instance to payment *pari passu*. The different sections of the Act—those which define the liability of limited companies, the 7th, 8th, 23rd, and 38th; those which deal with the administration of assets, the 98th, 101st, and 133rd; those which give the power to make calls, not in the ordinary way, but specially for

the purposes of this Act, the 102nd and 133rd—all have in view the payment *pari passu* and equally of the debts due to the creditors; and the hand which receives the calls necessarily receives them as statutory trustee for the equal and rateable payment of all the creditors. The result of this contention, that one particular creditor may pay himself in full by retaining his own calls and not paying them, would in effect be to give him a preference, and to exonerate him from his obligation as a shareholder to contribute towards the payment of the debts of the other creditors." Lord Justice James simply concurred, but there are a few words in Lord Justice Mellish's judgment which I desire to read: "Then the 98th section says that the assets, which clearly include the unpaid portions of all shares, are to be applied in discharge of the liabilities. If the case stood upon that section alone, it might be a very considerable question whether the meaning was not that the money was to be called up and applied among all the creditors, so that the shareholder should only receive his share of the debt; but that is, in my judgment, made quite clear by the 101st section. Although that section does not in terms say that there is to be no set-off, yet it shews that the Legislature in framing that section thought it had already been enacted that there should be no set-off, because in the 101st section they proceed to say that where there is unlimited liability, then, in the case of any independent contract, there may be set-off." In *Whitehouse's Case* (9) the late Master of the Rolls applied the same principle to the case of a purely voluntary winding-up, notwithstanding the case in the Common Pleas which had been already dealt with and doubted in *Black's Case* (5). The late Master of the Rolls there begins by dealing with the common law right of set-off, the ordinary right of set-off, and after dealing with that he says, "Before going into the details of that Act, I may state the scheme of the Act as regards winding up, which was this—that the assets of the company were to be collected by the liquidator and distributed among the creditors, and in the case of an insolvent company it was very like bankruptcy; but if the assets were to be so

(21) 37 Law J. Rep. C.P. 125; Law Rep. 2 C.P. 175.

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distributed, of course, if the liquidator sued in his own name, he would not be indebted at all to the man to whom the company was indebted, and there would be no strict right of set-off. Whether that was affected or not by the provisions of the Act that enabled him to sue in the name of the company, I will consider further on. If he comes under those sections—notably the 138th section—in a voluntary winding-up he comes in his own name as liquidator to enforce a call, and, strictly speaking, there is no actual set-off, because he is not indebted. If, therefore, you want a set-off at all, you must shew some provision in the Act itself giving the right of set-off, because in principle there is no such right. The debt due to the liquidator is distributable among the creditors, and the debt due to the individual from the company would only rank with the view of obtaining a dividend for the creditor for the amount due." Then on page 600 he deals with sub-section 4 of the 38th section, which I have read, and he says this: "Now first of all as regards the calls made in the winding-up, they being calls for something unpaid on the shares, that is a contribution due by the member under the Act, and is not a debt due to the company. The contribution also under this section applies to the unpaid calls made before the winding-up, because though that is a debt due to the company, it is not the less an amount unpaid on the shares in respect of which he is liable, and therefore he must be liable to contribute all that is unpaid on his shares. As I said before, it is as much unpaid if he had not paid the calls made before the winding-up, as it is in respect of the amount unpaid on the shares in respect of which no call has been made before the winding-up." So that the Master of the Rolls thought that the principle of *Grissell's Case* (4) extended not merely to calls made in the winding-up, but to calls made prior to the winding-up. He deals afterwards with the question which he had referred to in the early part of his judgment, whether there was any difference where the action was brought in the name of the company at common law, and comes to the conclusion that there was not. It is not necessary to go through that part of his judgment.

It thus appears that in *Grissell's Case* (4) and *Whitehouse's Case* (9) the question related to the ordinary right of set-off, and that *Black's Case* (5) related to a right of set-off conferred by contract. None of them dealt in any way with the effect of a charge given for valuable consideration. That subject is alluded to in the argument in *Black's Case* (5), but not (so far as I have observed) in the judgment; and the terms of the agreement which was relied on by the contributories in that case were not apparently such as could be treated as creating an equitable assignment of the unpaid calls. In all these cases it was held that the right of set-off could not prevail—that is to say, that the liquidator was entitled to receive the calls in full, and undiminished and unaffected by any indebtedness on the part of the company to the person by whom the calls were payable. Here it is admitted that the calls are to be paid in full; the question is, how is the liquidator to apply them when received—whether *pari passu* among all the creditors, or in satisfaction of the debts of the mortgagees in whose favour charges have been created on the unpaid capital? The decisions in the three cases to which I have referred are, therefore, not in point; but reliance is placed on the language made use of in the judgments, and certainly some of the language, if taken literally, appears to be strongly in favour of the contention on the part of the general creditors. It is, however, to be borne in mind that those judgments were given with reference to cases none of which involved the consideration of the effect of a charge upon unpaid capital. Apart from decision, the argument in favour of the mortgagees is thus put:—By section 38 there is imposed a liability to contribute to the "assets of the company" in the event of its being wound up. By section 98 the Court is to cause the "assets of the company to be collected and applied in discharge of its liabilities"; and by section 133 "the property of the company" (a term which has been held to have the same meaning as "assets of the company" in section 98) "shall be applied in satisfaction of its liabilities *pari passu*."

The proceeds of the calls made in the

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winding-up, therefore, become (as was held in *Webb v. Whiffin* (11)) part of the "assets" or "property" of the company. Now, in dealing with other portions of those "assets" or that "property," the liquidator would be bound to have regard to any equitable charges duly created thereon (including, of course, such charges as were held by the House of Lords to be valid in the cases of *Holroyd v. Marshall* (15) and *Tailby v. The Official Receiver* (22)), and to apply the proceeds of the realisation of such specific parts of the assets, first, in payment of the sum due on the charge, and secondly (and only secondly), in payment of the general creditors *pari passu*. It is said on behalf of the mortgagees that the like course ought to be followed with respect to the proceeds of calls made in the winding-up. On the other hand, it is said on behalf of the unsecured creditors that the language of the Act of 1862 is such as to prohibit any application of the proceeds of calls made in the winding-up in favour of specific mortgagees, and that all such proceeds must be divided *pari passu* among the creditors of the company. This contention appears to be now for the first time explicitly raised for judicial decision. If it had to be decided on the language of the Act alone, there might be some difficulty; but, in dealing with it, a Court of first instance is bound, I apprehend, to have regard to the current of decisions on the Act of 1862.

Now, in the cases relating to set-off, the Courts which decided them did not place exclusive reliance on sections 38 and 133; but each of them attached weight to section 101, which was treated (as it is put by Lord Justice Mellish in *Black's Case* (5)) as shewing that "the Legislature thought that it had already been enacted that there should be no set-off."

No section of the Companies Act, 1862, so conclusively negatives the validity of a charge of calls in the winding-up, as section 101 negatives the right of set-off. Reference was made in argument to sections 25, 26, and 32, which impose on the company the duty of giving information to the public on certain matters, and, amongst others, as to the amount

(22) Law Rep. 13 App. Cas. 533.

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of calls made on each share, the total amount of calls received, and the total amount of calls unpaid; and it was said that a member of the public proposing to deal with the company would be misled if a charge on unpaid capital, of which he had no notice or means of obtaining information, were held to be valid. The same argument would shew that a charge on a call made, but remaining unpaid, ought not to be held valid; yet effect was given to such a charge—*In re The Sankey Brook Coal Company* (17). I may also add that if the observations of Sir George Jessel in *In re Whitehouse* (9) are to be understood as applying to a charge as well as to a right of set-off, I have difficulty in seeing how those of them which relate to calls made by directors while the company is a going concern, but remaining unpaid at the commencement of the winding-up, are to be reconciled with the decision in the case of *The Sankey Brook Coal Company* (17). Again, as has been already pointed out, the validity of mortgages of future calls, when apt and proper words are used or a sufficient context is found, is recognised in the judgment delivered by Lord Justice James in *The Bank of South Australia v. Abrahams* (3). In that case the calls sought to be affected by the mortgage had been made in the winding-up, and the distinction now sought to be drawn between calls made by directors and calls made in a winding-up cannot, I think, have commended itself to the Lord Justice, or the other eminent Judges who took part in the decision. It is difficult to suppose that the Judicial Committee meant to recognise the existence of a power to create a mortgage which would fail at the moment when it was most wanted—namely, when the company had become insolvent and was being wound up—any more than that the Legislature meant to confer such power only on companies governed by the Companies Clauses Act, 1845, some of which, it is to be remembered, may be wound up under the Companies Act, 1862. Looking at these circumstances, and finding two decisions in favour of the mortgagees, and having some reason to believe that the earlier of these cases—namely, *In re The Phoenix*

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Bessemer Steel Company] (1)—has been followed in chambers, and been to a considerable extent relied on by persons dealing with joint-stock companies during the fifteen years which have elapsed since it was decided, it is enough for me to say that the weight of authority appears to me to be in favour of the contention of the mortgagees; and I, therefore, propose to follow the decision in *In re The Phoenix Bessemer Steel Company* (1). One point more under this head remains to be considered. It appears that some of the mortgagees are themselves shareholders of the company, and it was contended that, even if the mortgages were good as regards calls on the shares of third parties, they were invalid as regards calls on the mortgagees' own shares. If, however, there exists a valid power of mortgaging future calls, it seems to me that it must extend to calls on the shares of mortgagees as well as of other persons; and that the calls on the shares of the mortgagees are as applicable in payment of the mortgagees' debt as are calls on the shares of third parties. I hold, therefore, that the claims of the mortgagees under the mortgages of the 3rd of January, 1882, the 10th of August, 1887, and the 28th of October, 1887, are well founded. As regards the mortgage of the 3rd of May, 1886, it differs from those other three in this respect—that it is given by way of indemnity and not to secure an advance. It does not, as it appears to me, fall precisely within any of the decisions to which I have referred. I do not say at present that it is invalid; but I think it would be desirable to know something more of the circumstances under which that mortgage was given than is contained in the affidavits now before the Court; and I therefore propose to postpone my decision on this part of the case until some further evidence on this point has been brought before me.

The unsecured creditors appealed from the decision. The arguments on appeal, so far as they differed from or extended the arguments before Stirling, J., appear sufficiently from the judgments.

Rigby, Q.C., Beale, Q.C., and Carson, for the appellants.

Sir Horace Davey, Q.C., and Whinney; Buckley, Q.C., and Ashworth James; Graham Hastings, Q.C., and Whinney, for various mortgagees.

Giffard, Q.C., and Haldane, Q.C., for the liquidator.

Rigby, Q.C., replied.

The following cases and Acts of Parliament were cited and referred to: *Black's Case* (5), *Grissell's Case* (4), *Webb v. Whiffin* (11), *In re Whitehouse* (9), *Ex parte Bradshaw* (23), *Burgess's Case* (12), *Birch v. Cropper* (24), *Trevor v. Whitworth* (13), *Stanley's Case* (8), *The Bank of South Australia v. Abrahams* (3), *In re The Phoenix Bessemer Steel Company* (1), *Howard v. The Patent Ivory Manufacturing Company* (2), the Companies Act, 1862, ss. 3, 4, 5, 7, 8, 9, 10, 22–38, 74, 75, 98, 135; Companies Act, 1867, and Companies Act, 1879, s. 5; the Companies' Clauses Consolidation Act, 1845, *Poole's Case* (25), *Stone v. The City and County Bank* (18), *In re The West of England Bank; ex parte Hatcher* (26), *Williams v. Harding* (27), *Smith's Case* (16), *In re The Birmingham Banking Company* (28), *Lishman's Case* (29), *The Panama Mail Company* (30), *In re The Sankey Brook Coal Company* (17), *In re The Inns of Court Hotel* (31), *Ex parte Kintrea* (32), *The Brighton Arcade Company v. Dowling* (21).

Cur. adv. vult.

COTTON, L.J. (on April 1).—This is an appeal from a decision of Mr. Justice Stirling, and the question raised is whether a mortgage of calls made during the wind-

(23) Law Rep. 15 Ch. D. 465.

(24) Law Rep. 14 App. Cas. 525.

(25) 48 Law J. Rep. Chanc. 48; Law Rep. 9 Ch. D. 322.

(26) 48 Law J. Rep. Chanc. 723; Law Rep. 12 Ch. D. 284.

(27) 35 Law J. Rep. Bankr. 25; Law Rep. 1 E. & I. App. 9.

(28) 40 Law J. Rep. Chanc. 90; Law Rep. 6 Chanc. 83.

(29) 19 W.R. 344.

(30) 39 Law J. Rep. Chanc. 482; Law Rep. 5 Chanc. 318.

(31) 37 Law J. Rep. Chanc. 692; Law Rep. 6 Eq. 82.

(32) 39 Law J. Rep. Chanc. 193; Law Rep. 5 Chanc. 95.

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ing-up is good. The first point raised here was whether there was any power given by the articles of association and by the memorandum to make a charge on the uncalled capital. In my opinion there was. Let us take the memorandum. In it one of the objects of the society is stated to be to borrow money by mortgage or otherwise, to receive money on deposit, and to issue transferable and other bonds and mortgage debentures, and other securities founded or based upon all or any of the real or personal assets, or on the credit of the company. In article 111, power is given to the directors from time to time to borrow on bonds or debentures of the company, or on mortgage of all or any part of the property of the company, and either with or without including in any such mortgage all or any definite portion of the capital of the company then uncalled, such sums of money as they from time to time think expedient. There is one of the mortgages in question which stands in a particular position, but I do not propose to deal with that, because Mr. Justice Stirling has directed enquiries as to that particular mortgage, which was not granted for money advanced, but was given as security for a guarantee. In my opinion there is power given there to mortgage the uncalled capital. But then it is said that calls made in the winding-up are not part of the property of the company or the capital of the company. It has not been pressed upon us here that the mortgages would have been bad as to calls made before the winding-up, as was contended in *Stanley's Case* (8), but only that they are bad as to calls made after the winding-up. In *Stanley's Case* (8) it was held that a mortgage of the proceeds of future calls was invalid, and Lord Justice Turner said that such a charge would prevent the directors from exercising the discretion which they were bound to exercise in calling up the capital. But in that case there was no express power given by the memorandum and articles to mortgage the uncalled capital, as there is in the present case, and therefore the decision in that case does not apply to the present case.

In support of the argument that calls made in the winding-up are not to be

considered as part of the capital of the company, section 38 of the Companies Act, 1862, was very much relied on. It was said that this section creates entirely new rights, and makes the shareholders contributories in a totally different position in some respects, as regards debts and liabilities of the company, from what they were before the winding-up, and that therefore a call made in the winding-up is entirely different from a call made by the directors before the winding-up, and is not to be considered as part of the capital of the company. In my opinion that is wrong in a case like this. We are considering a call made in the winding-up of a limited company—a company limited by shares, not a company limited by guarantee, or an unlimited company. What can be called for in the winding-up is the amount unpaid, if any, on the shares; and although there is special provision in the Act how this is to be done when the company is being wound up, yet that is merely giving a power to call for that part of the capital of the company which has not been already called up. It is true there is a difference in the means of providing for calls when the company is being wound up, to the means adopted when the company is a going concern. When the company is not in liquidation the directors make the calls in accordance with the powers conferred upon them by the Act, and the calls are paid to them as representing the company. When the company is being wound up, the calls are made by the liquidator and are paid to him, he is freed from the restrictions which exist when the company is a going concern, and is able to call for the amount which still remains unpaid on the shares. The observations in the judgment of the late Master of the Rolls in *Whitehouse & Co.'s Case* (9) are strongly in support of the appellants' contention; but although I think his decision in that case was right, it was on an entirely different question to the present, namely, whether in the voluntary liquidation of a company, a contributory could set off a debt due to him from the company against calls, and I think he spoke erroneously with regard to the nature of a call in a winding-up, and that the true ground on which set-off

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cannot be allowed is that given by Lord Selborne in *Black's Case* (5).

The case of *Webb v. Whiffin* (11) has been referred to, and the judgment of Lord Cairns has been much relied on by the appellants. The question in that case was whether in the winding-up of a company the funds contributed by the B list of shareholders became part of the general assets of the company and could not be applied preferentially or exclusively to the payment of those debts which were incurred before the B shareholders retired from the company; and it was with reference to that question that Lord Cairns referred to calls made in the winding-up as forming a fund set apart in order to be specially appropriated to the payment of debts due in the winding-up. He speaks of the money from the calls going into the common fund as that which, when it is got from the B list of shareholders, is not to be set apart and appropriated to a particular part of the creditors, but is to be thrown into one common fund and to be dealt with as one fund for the creditors. There are expressions used by him in his judgment which are against the contention that calls made in the winding-up are not to be considered as part of the capital of the company. Thus, in speaking of the common fund, he speaks of it as part of the capital of the company, and referring to the scheme of the Act of 1862 says: "As I understand that Act, the relation of creditor and debtor, which is established by the Act, is established only with regard to that which is the common fund or capital of the company." He there distinctly treats the calls made in the winding-up as part of the capital of the company, and again a little further on he says: "But by the Act of 1862 that state of things is entirely swept away. A capital is created, sometimes limited, sometimes without limit; but that capital is to be made good in the shape of a common fund, and that common fund it is which is to be the source of the payment of every creditor of the company." There again he treats that which is called up in the winding-up as part of the capital, and being a common fund for the payment of creditors. In my opinion the Companies Act, 1879, which was referred to by the

respondents is not to be disregarded. It enables a limited company to declare that portion of its capital which has not been called up shall not be capable of being called up except in the event of the company being wound up. That distinctly recognises that which is called up, and can only be called up when the company is being wound up, as part of the capital of the company, and that is what the calls are here. Whether or not there is anything in the Act to prevent these calls being mortgaged is another question which we have to consider; but, in my opinion, there is no good ground for saying that a call made by a liquidator in a winding-up of a limited company is not part of the capital of the company. There may be certain companies, there are certain companies, in which calls cannot in any way be considered as part of the capital of the company, but that is not the case we have now to deal with.

Then we come to the more serious question—namely, whether there is anything in the Companies Acts which prevents a mortgage being effectually made of capital which is to be called up in the winding-up; and it was contended that such a mortgage is prohibited by the Act. Now there is nothing in the Act which expressly in terms negatives the right of the directors to mortgage these calls which are part of the assets and capital of the company—namely, that capital which, when the winding-up commenced, has not been already called up. I have expressed my opinion that these calls are to be considered part of the capital of the company which has not been already called up. Then is there something like a necessary implication from the Act to prevent the directors from effectually mortgaging that part of the property of the company? It is said that that part of the capital of the company—that is to say, calls made by the liquidator—ought to be collected and ought to be applied in payment of all the unpaid creditors equally, and sections 98 and 133 of the Companies Act of 1862 are relied on in support of that contention. But then the question arises, what are to be considered assets of the company? The assets of the company, in my opinion, which are in those sections ex-

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pressed to be dealt with, must mean that portion of the capital which the directors have not actually dealt with before the winding-up, and the unpaid capital of the company which has been mortgaged is not assets—that is, free assets—which can be dealt with for the payment of debts.

Well, it has not been said that there is anything in the Act of 1862 which expressly prevents the mortgage of calls made after the winding-up being effectual, but it is said that the general object of the Act will be defeated if the mortgage is effectual. I think myself that it might perhaps have been better if there had been some prohibition in the Act against the mortgaging of calls which have not been paid; but that has not been done; and, in my opinion, as there is nothing in the Act to prevent the directors from mortgaging future calls, it would be wrong, simply because we think that the Act would have been better if there had been such a restriction, to introduce a restriction merely from our view that the object of the Act was that all creditors should be paid equally, and would thereby be better carried into effect. If Parliament had intended that there should be this restriction, they would probably have inserted it in the Act. Whether they have omitted it intentionally or unintentionally, we ought not to introduce into the Act what would interfere in so serious a way with the disposal by the company of its property by way of mortgage.

Then section 43 of the Act of 1862, in my opinion, is not to be disregarded. It requires the directors to keep a register of all mortgages of the company's property, including mortgages of capital uncalled at the commencement of the winding-up. Neither is the Companies' Clauses Consolidation Act, 1845, to be disregarded. It gives express power to mortgage or dispose of uncalled capital. It is true that the companies to which that Act applied could not be wound up, but still unpaid calls could be reached by creditors by means of *scire facias*. There was no provision in that Act which provided for information being given to creditors of mortgages of uncalled capital, and although that Act is no authority in the present case, yet it tends to shew that the Legis-

lature did not think it necessary in the Act of 1862 to prohibit mortgages of unpaid capital which had been expressly authorised by the Act of 1845.

Then have the decisions which we are bound to follow laid down that there can be no such mortgages as the present? There is said to be no authority which we ought to follow, but, as far as I can see, the cases are against the appeal. In *In re The Phoenix Bessemer Steel Company* (1), the late Master of the Rolls treated it as undoubted that there could be a good mortgage of future calls. He said: "The first question is whether a company can mortgage future calls; there can be no doubt that the power can be given by the articles of association." It does not appear that the point was particularly argued in that case, but the Master of the Rolls treated it as undoubted that if power was given by the articles and the memorandum there could be an effectual mortgage of future calls. The same view was taken by Mr. Justice Kay in *Howard v. The Patent Ivory Manufacturing Company* (2), where all the cases on the subject were considered by him. Those cases, no doubt, are not binding upon us if we thought them clearly wrong. The decision of the Master of the Rolls was in 1875, and since then the point has frequently arisen as to whether in particular cases there had been an effectual mortgage of unpaid calls, and in none of the cases has it been said that the decision of the Master of the Rolls was wrong. Where it has been decided that mortgages of unpaid calls have been ineffectual, it has been on the ground that power was not given by the articles of association and memorandum to mortgage future calls. That was the ground of the decisions in *The Bank of South Australia v. Abrahams* (3) and *In re The Sankey Brook Coal Company* (17). In my opinion there is nothing in the Act either expressly or by necessary implication preventing a mortgage of calls unpaid at the date of the mortgage being effectual upon calls afterwards made by the liquidator in the winding-up.

I have already said that as regards one of the mortgages there was a special question upon which Mr. Justice Stirling has

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given no decision, and therefore it would not be right for us to give a decision upon that point; but I think I ought to mention with regard to what has been said about the mortgagees here being shareholders in the company, that if these mortgages were valid, then there would be a set-off of the debt due to them against the calls payable by them, and that this would be contrary to the Act. But the charge created by the mortgages was a general charge on all the unpaid calls, and not merely on the calls made upon the particular shareholder who was mortgagee, as was the case in *Black's Case* (5). And therefore, in my opinion, the principle of the decisions that there cannot be a set-off of calls against a debt due does not apply to the present case. In my opinion the appeal fails.

LINDLEY, L.J.—In order to decide the question raised by this appeal, it is necessary to study the Companies Act, 1862, and the Acts amending it, and in particular those portions of them which relate to capital, to calls, to the liability of members, and to the collection and distribution of assets in the event of a winding-up. The sections which relate to capital are section 8, clause 5, and sections 14 and 26. I do not stop to read them. It is plain from those sections that what is meant by the capital of a company having its capital divided into shares is the nominal capital mentioned in the company's memorandum or articles of association, as the case may be. This is the sum which the directors are empowered to raise by issuing shares, and which those who take shares agree to pay to the extent of the nominal amount of the shares which they respectively hold.

The power conferred by the articles of a company to call up or to mortgage or otherwise deal with its capital, extends to its nominal capital, and, unless restricted in terms, as is sometimes the case, to the whole of such capital; but such power does not extend to other moneys which, although raisable, in the event of winding up form no part of the capital of the company.

The sections which relate to calls and to the liability of members in respect of their shares are sections 7, 9, clause 4, and

sections 16, 38, 75, 101, and 102, and the Companies Act, 1867, section 25. The general effect of these sections is to render each member liable to pay the full amount of his shares, and in the case of unlimited companies, and companies limited by guarantee, a further sum in the event of the winding-up, but only in that event. This liability is in the nature of a specialty debt due to the company, accruing in respect of each share held from the time of its acquisition; and it is a liability which in the case of limited companies can only be discharged by payment in cash, unless an agreement to the contrary is duly registered.

The sections which relate to the collection and distribution of assets in the event of a winding-up are sections 94, 95, 98, 101, 102, and 133. All actions which are to be brought in order to get in the disposable assets are brought by the liquidator in the name of the company—that is, section 95, clause 1; and although he is empowered to take proceedings in his own name, when it is not convenient to use the name of the company (section 95, clause 7), he ought not to adopt this form when there is no necessity for doing so. The form of procedure is, however, immaterial as regards the rights and liabilities sought to be enforced. That will be found to be stated by the late Lord Justice Giffard in *Ex parte Kintrea* (32). The assets when got in are distributable *pari passu* amongst the unsecured creditors of the company, and members of a limited company cannot set off moneys due from them to a company against moneys which the liquidator is empowered to collect for payment of the debts of the company.

A careful study of the foregoing enactments will be found to warrant the following inferences:—

1. That the uncalled capital on any share is money which its holder is bound to pay to the company when required by the proper authority. The right to require payment of this money is vested in the company, and, when payment is required, the amount payable is a debt due to the company in all cases, whether the payment is required before or after the liquidation.

2. That the Companies Act, 1862, does not say when, or by whom, the uncalled

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capital is to be called up before the company is in liquidation. The Act leaves this matter to be regulated by the company's articles of association; but after a liquidator is appointed, he is the person to exercise the power of calling up.

3. That directors can only make calls at such times, after such notice, and of such amounts as are prescribed by the articles of association; but liquidators are not bound to observe the articles as regards these matters. Liquidators both can and must collect the assets, which it is their duty to distribute as speedily as circumstances will permit.

4. That the Acts contain no clause forbidding mortgages of assets, although every mortgage withdraws from the unsecured creditors that which, but for the mortgage, would be distributed among them in a winding-up. So far from forbidding mortgages, the Act of 1862, by section 43, requires limited companies to keep a register of mortgages and charges on their property; from which it is obvious that such mortgages were contemplated. The members are left to decide by themselves what powers of mortgaging, if any, they will confer on the directors; but all mortgages and charges by limited companies under powers conferred by their articles ought, I apprehend, to be registered under section 43, whether what is mortgaged or charged is, at the date of the mortgage or charge, existing property of the company, or property which the company has only a power of acquiring.

There being no prohibition in terms against mortgaging uncalled capital, is such a transaction forbidden by necessary implication—that is, are there any provisions in the Act to which full effect cannot be given if such a transaction is valid? I can find none. Those moneys which are payable only on a winding-up, and which by the Act are excluded from the capital of the company, and are never under the control of the directors, cannot, I apprehend, be dealt with in any way by them. Those moneys form a statutory fund which only comes into existence when the company is in liquidation—that is to say, when the powers of the directors have ceased; but uncalled capital is in a totally different position. The power to call it up can

be exercised by the directors, and all money raisable in respect of it is an asset of the company. When calls are made by the directors, it is the capital which they call up; and when calls are made by the liquidators, it is capital which they call up, so long as there is capital to call. In ordinary limited companies they can require payment of nothing else. In other companies they can, and it is unnecessary to distinguish calls in respect of capital from calls in respect of further liability. But the proposition that calls made by liquidators in an ordinary limited company are not calls of capital, but of other moneys payable by statute, seems to me very paradoxical, and to be a proposition which leads to the strange conclusion that members of such companies are under two liabilities, and not one—namely, a liability to pay up the capital, and another to pay up a sum equal to it, with, I suppose, a substitution of the latter liability for the former in the event of a winding-up. This view is, I think, erroneous, and the language of the Companies Act, 1879, to which I will refer presently, is inconsistent with it.

Webb v. Whiffin (11) appears to me to be rather in favour of, than opposed to, the view which I take of this matter. On a winding-up it is a liquidator's duty to get in and distribute the assets of the company, including all uncalled capital if it is required. But what are the assets of the company which the liquidator is to get in and distribute depends on what alienation charges and incumbrances have been validly made and created before the date of the winding-up. If the company has mortgaged or charged its property, or any debt due to it, or any money which, although not a debt, the directors had power to require payment of, there is nothing in the statute which entitles the liquidator to disregard such mortgage or charge. Those who contend that the liquidator, although bound to regard any mortgages of specific property and floating charges, is at liberty to disregard a charge on uncalled capital, are bound to shew why those last charges are less valid than the first.

Reliance is placed on the statutory provision prohibiting set-off, and on the cases

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relating to that subject; and, unquestionably, there are passages in some of the judgments in those cases which, if taken as a starting-point and made the basis of further reasoning, might lead to a conclusion different from that at which I have arrived—I allude more particularly to *Black's Case* (5) and *Whitehouse's Case* (9). But the proper starting-point is the statute itself. The exposition of the Act in those cases is valuable; but it must never be overlooked that there is a section in the Act—101—expressly forbidding set-off in the winding-up of limited companies, and that this express prohibition is the basis of the reasoning in the cases in question. In *Whitehouse's Case* (9) the late Master of the Rolls criticised the reasoning of the Court of Common Pleas in *The Brighton Arcade Company v. Dowling* (21), on the ground that the Court there was wrong in treating a call made by a liquidator in a voluntary winding-up as a debt due to the company; but, with deference to Sir George Jessel, it appears to me that on this point he was himself mistaken. The decision in *The Brighton Arcade Company v. Dowling* (21) was, in my opinion, clearly erroneous, because, although the call was a debt due to the company, the statute, properly construed, prohibited the allowance of set-off in cases of voluntary winding-up, as well as in cases of winding-up by the Court, or subject to its supervision. I have thought it desirable to call attention to the matter; and although the decision in *Whitehouse's Case* (9) is, in my opinion, quite correct, some of the observations in it are, I think, themselves open to comment, and are opposed to the conclusion at which I have myself arrived.

Having now dealt with the Act and the decisions most opposed to the validity of mortgages of uncalled capital, it is necessary to refer to the authorities on which such mortgages have been held valid. *The Phoenix Bessemer Steel Company's Case* (1) and *Howard v. The Patent Ivory Company* (2) are distinct authorities in their favour; but there are many others in which the Courts have taken for granted that such mortgages would be valid if the regulations of the company had authorised them in sufficiently plain language. I may refer here to *The Sankey Brook Coal Company's*

Case (17), *Bradshaw's Case* (23), and *The Bank of South Australia v. Abrahams* (3). *Stanley's Case* (8) paved the way for these by treating the question as one of construction only. Further, article 7 of Table A, relating to the prepayment of uncalled capital, shews that uncalled capital may be anticipated, and the fund for distribution in the event of winding-up be thereby reduced. Members who prepay amounts which may be called up on their shares are not liable to pay them up again in the event of a winding-up. This was decided in *Pool's Case* (25), and this case goes far to shew that the calls made by the liquidator in the winding-up of a limited company are in respect of uncalled capital, and not in respect of the liability to contribute to some other fund.

The Companies Act, 1879, section 5, enables a limited company to divide its capital into two parts, one of which shall only be called up in the event of winding up. When the capital of the company has been so divided, that part which can only be called up in the event of winding up ceases to be subject to the control of the directors, and cannot, I apprehend, be charged or disposed of by them. Whether such part can be prepaid need not be discussed. The language of this enactment, however, again supports the view that calls made by the liquidator in an ordinary limited company in the course of a winding-up are made in respect of capital, and not in respect of some statutory fund more or less distinguishable from it.

The Companies' Clauses Consolidation Act, 1845, expressly enables companies governed by that Act to mortgage unpaid capital. Such a mortgage would, I apprehend, prevail against a judgment creditor of the company who was proceeding by *scire facias* against a shareholder whose shares are not fully paid up, and such a mortgage would equally prevail against the liquidator making calls in a winding-up, being governed by the same Acts and capable of being wound up under the Companies Act, 1862. This shews that there is nothing contrary to public policy in allowing companies with limited liability to mortgage their unpaid capital. It is true that there is no such

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express power given in the Companies Act, 1862; but this is accounted for by the fact that the Act unquestionably leaves the power of mortgaging, and other powers of the directors, to be regulated by the company's articles of association. The omission of express powers to mortgage unpaid-up capital affords no sufficient ground for negating such powers.

In conclusion, I can find nothing in the Companies Act, 1862, or the subsequent Acts amending it, expressly, or by necessary implication, prohibiting limited companies from mortgaging their unpaid-up capital; nothing to shew error in the view hitherto taken, and duly acted upon, and according to which such mortgages are valid even as against creditors in a winding-up; nothing which would justify the Court in holding the mortgages in this particular case invalid. Finding nothing to prohibit them, and an article expressly authorising them, I am of opinion that they are valid, and that the appeal ought to be dismissed with costs.

LOPES, L.J.—With regard to the main point raised in this case, whether future calls can be mortgaged where such mortgage is authorised by the memorandum and articles of association, it is, to my mind, difficult to distinguish in principle this case from *Black's Case* (5) and *Whitehouse's Case* (9).

It is said those decisions are based on a question of set-off, and are not applicable to the case of a mortgage on future calls. Lord Justice Mellish, no doubt, in *Black's Case* (5) does base his judgment on section 101 of the Act of 1862, a section which prohibits in limited companies a set-off; but Lord Selborne does not, in my opinion, rest his judgment on that section, but rests it rather on the ground that when a winding-up comes all the creditors are to be paid, and in the first instance *pari passu*. I will not refer again to the many passages in that judgment which to my mind are of importance. I will satisfy myself by merely referring to the very clear and comprehensive summing-up of his opinion which is to be found at the end of his judgment, at page 264, Law Rep. 8 Ch. App., in these words: "I am clearly of opinion that it is not competent for any

person whatever, by an antecedent contract, to alter the administration of the assets of the company under such a winding-up. I am not at all sure that on the construction of this particular contract it is necessary to hold that there has been any attempt to do so; but even if there were an attempt, my judgment would be that that attempt is necessarily ineffectual, because it would be an attempt by private agreement to get out of and override an Act of Parliament." Now I cannot help thinking that Lord Selborne, when he used those words, intended to express an opinion that there could be no anticipation of future calls in any case so as to alter the administration of the assets in a winding-up.

But it is said that the Act of 1862 does not prohibit these mortgages. That is true, and I do not think it has been suggested that there is anything in the Act which authorises such mortgages; but it is observed that in the Companies Act, 1845, where it was intended that a mortgage of future calls should be authorised, there is an express power given to mortgage future calls. Now it has been argued that the anticipation of the fund out of which creditors are to be paid before that fund is created is contrary to the policy of the Act and inexpedient. I cannot help saying that I feel there is weight in that argument. But it is said with truth that the *Phoenix Bessemer Case* (1) and *Howard v. The Patent Ivory Company* (2) are correctly decided, and govern the case now before the Court. With regard to the *Phoenix Bessemer Case* (1), and I think I may say with regard to *Howard v. The Patent Ivory Company* (2), the points we have to consider were scarcely, if at all, argued. The late Master of the Rolls, in the *Phoenix Bessemer Case* (1), seems to have assumed the power to mortgage. *Black's Case* (5) was decided in 1872, the *Phoenix Bessemer Case* (2) being decided in 1875, and it is to be remarked that in the *Phoenix Bessemer Case* (1), *Black's Case* (5), which was decided three years before, was not cited. Neither, again, in *Howard v. The Patent Ivory Company* (2), which was decided in 1888, I think was *Black's Case* (5) noticed. The Master of the Rolls, as I have said, seems to have as-

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sumed the power, and given no reason for the conclusion at which he arrived. Now the *Phoenix Bessemer Case* (1) has no doubt been acted upon for fifteen years, and, so far as I have seen, it has not been impeached by any other decision. I feel the weight of this, and I need not say that I feel the weight of the judgments which have just been delivered, and the reasons given in those judgments. The judgments have been delivered by very learned Judges, who are much more conversant with company law than I am. I assent, therefore, to the judgments which have been delivered, but, I add with great hesitation, for the reasons which I have given.

Appeal dismissed.

Solicitors—Maples, Teesdale & Co., for official liquidator; Drake, Son & Parton, for appellants; Lane, Munro, Soutter & Slack, and Clements, for respondents.

KEKEWICH, J. }
1890. }
March 14. }

FARRAR v. COOPER.

Practice—Arbitration—Terms of Reference to Arbitration—Injunction to restrain Arbitration—Particulars of Differences.

Where, in pursuance of articles of partnership, some of the partners proceed to the appointment of arbitrators for the settlement of differences arising between the partners, but without specifying what the differences are, and refuse to supply the other partners, whom they call upon to appoint their arbitrators, with particulars of the matter to be referred, the Court has jurisdiction to grant an injunction in restraint of further proceedings in the arbitration, but will not do so, inasmuch as the proceedings of such an arbitration, carried on against the will of the dissenting partners, would have no binding effect upon the latter.

Motion.

By articles of partnership dated the 30th of June, 1880, between William Cooper of the first part, Benjamin Farrar of the

second part, and Henry Cooper of the third part, it was agreed, clause 26: "That in all cases of dispute on the method of business adopted by the said partners or one of them, or as to any questions in relation to the said partnership, the decision and instructions of the majority or two members of the said partnership shall be final and effective, and be binding on the partner not assenting to or concurring in the said decision and instructions." The 27th clause provided: "That in case any dispute shall arise between the said partners, their executors or administrators, either during the continuance of the said partnership or after the determination thereof, either on the construction of these presents or the settlement of the books and accounts thereof, or the settling, dividing, or applying the profits and losses of the said partnership, or any other matter, cause, or thing relating to the same, then and in such case the said partners, their executors or administrators, shall forthwith nominate three disinterested persons, one of whom to be chosen by each of the said partners, which said three shall determine all such matters aforesaid by their award in writing under their hands, and in case such referees cannot agree upon an award within thirty days next after such reference, then the same shall be referred to and be determined by such one other disinterested person as the said referees shall for that purpose appoint as umpire between them, who shall determine the same by writing under his hand within ten days after he shall be so appointed umpire, and the said partners, their executors, administrators, or assigns, shall and will abide by and perform the award which shall be made by the said referees or their said umpire without further suit or trouble whatsoever." Clause 28: "That the submission to reference shall be made a rule of the Chancery Division of Her Majesty's High Court of Justice upon the application of either of the said parties hereto, and every award thereunder shall also be made such rule, and be prosecuted as a judgment of the said Court." It was also provided that no action should be brought by one partner against another until he should have neglected or refused to appoint a referee,

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or the time limited for making an award should have expired.

Differences arose between the partners, which the Coopers desired to refer to arbitration, whilst Farrar insisted that the provision in clause 26 was sufficient for the purpose. On the 20th of February, 1890, the two Coopers, by separate instruments in similar form, appointed two arbitrators. In both cases in the notice of appointment it was stated that the appointment was "for the purpose of awarding, ordering, and determining all disputes, differences, doubts, or questions which have arisen between me and you, . . . or either of you, concerning the construction of the said indenture of the 30th of June, 1887, or the settlement of the books and accounts of the said partnership, or the settling, dividing, or applying the profits and losses of the partnership, or any other matter, cause, or thing relating to the same, and for all other purposes, if any, for which I am entitled to nominate an arbitrator in connection with the said partnership." The notice then called upon the other partners to appoint their arbitrators. Farrar's solicitors, on receiving the notice, enquired what were the points for arbitration. They were informed that when the proper time arrived they would be supplied with particulars. The plaintiff then issued his writ, and now moved "that the defendants might be restrained from proceeding with the arbitration . . . finally, or until they have specified to the plaintiff what disputes and differences have arisen which they desire to have settled by arbitration, or that the plaintiff may be at liberty to revoke the submission to arbitration contained in the deed of partnership."

Marten, Q.C., and Jason Smith.—The Court has jurisdiction, which it will exercise in a proper case, to restrain proceedings in an arbitration.

Renshaw, Q.C., and Bray, for the defendants.—The Court will not restrain proceedings in the arbitration, even if the matter is beyond the agreement to refer—*The North London Railway Company v. The Great Northern Railway Company* (1)

(1) 52 Law J. Rep. Q.B. 380; Law Rep. 11 Q.B. D. 30.

—and in this case there is no pretence that we are going beyond the terms of reference.

Marten, Q.C., in reply, referred to *The London and Blackwall Railway Company v. Cross* (2), *Maunsell v. The Midland Great Western of Ireland Railway Company* (3), *Piercy v. Young* (4), *Mylne v. Dickenson* (5), *Beddow v. Beddow* (6), *Hedley v. Bates* (7), and the Arbitration Act, 1889, s. 12.

KEKEWICH, J.—There is certainly no desire on my part to interfere with the domestic tribunal in partnership cases—far from it. Many Judges have expressed their entire approval of this view, and business men often prefer to refer such matters to arbitration, especially when they are of a character which cannot be conveniently decided in open Court according to our procedure. Therefore, anything that I may say must not be considered as a wish to interfere with arbitration—the right of partners to resort to a domestic forum of their own selection. But it seems to me that the first principle of arbitration is that, having secured competent men, men capable of doing their duty, and intending to do their duty, you must lay before them those points which they have to decide; and, unless this is done, it is impossible for them to decide any questions between the parties. In the present state of affairs I am extremely reluctant not only to express, but even to indicate any opinion as to the meaning of these clauses of the partnership deed; but this is to be observed, that clauses 26 and 27 are wholly different in language, and I understand them to be wholly different in intent. Whether there is any dispute arising within section 26 is not now under consideration, though I gather from the affidavits that there is. As re-

(2) 55 Law J. Rep. Chanc. 313; Law Rep. 31 Ch. D. 354.

(3) 1 Hem. & M. 130; 32 Law J. Rep. Chanc. 513.

(4) Law Rep. 14 Ch. D. 200.

(5) G. Cooper, 195.

(6) 47 Law J. Rep. Chanc. 588; Law Rep. 9 Ch. D. 89.

(7) 49 Law J. Rep. Chanc. 170; Law Rep. 18 Ch. D. 498.

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gards clause 27, the words are not quite in the common form, according to my experience, and they may require close consideration as to whether anything has yet occurred which comes within the clause. That may need determination hereafter. The defendants have not condescended to tell the plaintiffs what they require to be referred to arbitration. They say, in a rather curt manner, on the 25th of February, 1890: "You appoint your arbitrator, and then we will tell you at the proper time what your arbitrator is to consider." The legal answer to that is: "I want to know, before appointing my arbitrator, what he is to consider. My selection of an arbitrator may depend much upon this. For instance, if it is a question of the construction of these presents, I should prefer to select a member of the legal profession. If it were a settlement of books of account, I should probably select an accountant," and so forth. The course which has been followed appears to my mind to put the plaintiff in an extremely unfair position. If that be so, the only result of an arbitration without the previous settlement of the terms of reference would be to produce an award which could not be enforced, and might cause a good deal of litigation, but could not have any practical effect. The result would be first to raise questions as to the enforcement of that award. Therefore, so far as I can foresee, there would be no arbitration—unless, of course, the plaintiff comes in and assents—which can be binding upon him or be really of any practical advantage. But does it follow that I ought to restrain the proceedings which the defendants threaten? I entirely adopt what Lord Justice Lindley says in the case of *The London and Blackwall Railway Company v. Cross* (2)—namely, that there are cases in which the Court will restrain parties from proceeding to arbitration, and Mr. Marten has cited other authorities to that effect; but Lord Justice Lindley does not say, and I do not pretend to say, in what cases it is right to do so. I do not think that *The North London Railway Company v. The Great Northern Railway Company* (1) would prevent my doing so in a proper case—that is, in a case in which I saw that in-

justice or injury which ought not to be borne would result by the arbitration proceedings. But where I see there is merely a futile proceeding, and that there is nothing to injure the plaintiffs, in my opinion I ought not to grant an injunction.

There was a case before the late Master of the Rolls, the name of which has escaped me, in which I was counsel for the plaintiff, in which it was sought to restrain directors from holding a meeting and submitting resolutions which would interfere with the issue of some preference shares in a company, resolutions which afterwards gave rise to further litigation described in a reported case in which there was a different plaintiff. The Master of the Rolls said, "Why should I interfere? These directors and such shareholders as support them can pass such resolutions as they think fit. If you are right, they have no authority to pass any resolutions binding upon you. Therefore the resolutions are waste paper, and I have no right to interfere"; and an injunction was refused on that ground. I ought, in this case, to refuse an injunction on the same ground. I do not think that this arbitration, if it proceeded in the absence of the plaintiff or without the proper forms being observed, would have the slightest effect. That being my opinion, I do not think I ought to grant any injunction. That being so, I make no order on this motion. The plaintiff having been provoked to come here, I shall make the costs of the motion costs in the action.

Solicitors—Wolferstan & Avery, for plaintiff;
H. Nield, for defendants.

STIRLING, J. }
1890. }
May 22. }

THYNNE v. SHOVE.

Trade Name—Sale of Goodwill of Business carried on in Vendor's Name—Right of Purchaser to use Vendor's Name.

The plaintiff sold to the defendant his business premises, and the goodwill of the business carried on by him there. The deed by which the sale was carried out contained no express assignment of the right to use the plaintiff's name:—Held, that the defendant had, by virtue of the assignment of the goodwill, the right to use the plaintiff's name in the business, so as to shew that the business was the one formerly carried on by him, but not so as to expose him to any liability by holding him out as the owner of the business, or as one of the persons with whom contracts were to be made.

Levy v. Walker (48 Law J. Rep. Chanc. 273; Law Rep. 10 Ch. D. 436) distinguished.

This was a motion by the plaintiff, from whom the defendant had purchased the business of a baker and pastrycook, asking for an order that the defendant should forthwith deliver up to the plaintiff all cards, bill-heads, and bags printed by or for the defendant, with the name of "A. Thynne" (the plaintiff's name) thereon; and also for an injunction to restrain the defendant from printing or publishing cards, bill-heads, bags, or other documents in the name of the plaintiff, or otherwise using or trading in the name of the plaintiff.

On the 27th of March, 1890, the defendant entered into a contract to purchase the plaintiff's shop and dwelling-house, 44 Tranquil Vale, Blackheath, with the goodwill of the old-established business of a baker and pastrycook there carried on by him, the landlord's fixtures being included in the sale, but the purchaser was to take by valuation the stock-in-trade, trade fixtures, fittings, and utensils, and the tenant's fixtures and fittings on the premises.

By indenture dated the 26th of April, 1890, the plaintiff assigned to the defendant the residue of the lease of the

premises, and all the beneficial interest and goodwill of the plaintiff in the trade or business carried on by him upon the premises. There was no express authority given by the assignment for the defendant to use the plaintiff's name in the business.

Amongst the stock-in-trade taken over by the defendant were some trade-cards, with this inscription upon them: "A. Thynne, Baker and Confectioner, The Village Bakery, Blackheath (established 1850)." After the stock taken over was exhausted, the defendant had other similar cards printed, and issued them, as he alleged, in the ordinary course of business. The defendant's name did not appear in any way upon these cards. The plaintiff in his affidavit stated that, on the 13th of May, he discovered that the defendant was issuing these cards, by which, as he alleged, the defendant wished the public to understand that the plaintiff was still carrying on business on the premises. He contended that the defendant had no right to use his name, and he strongly objected to his so doing, as it would materially injure him if he started in business again at Blackheath.

The defendant, in his affidavit, denied that the plaintiff could be materially or at all injured, as he denied the plaintiff's right to solicit any of the customers of the business purchased by him, and he contended that he had a right to use the name of "Arthur Thynne" as a trade name.

Hastings, Q.C., and *Bradford*, for the motion.—The assignment gave no authority to use the name of the plaintiff in the business, and, without that, the defendant had no right to use it. No one is entitled to use the name of another person in a business, if the world at large is likely, by reason of it, to understand that the business is the business of that other person—*Levy v. Walker* (1) and *Gray v. Smith* (2).

Buckley, Q.C., and *Levett*, for the defendant.—It was the opinion of Lord Justice James, as stated in *Levy v. Walker*

(1) 48 Law J. Rep. Chanc. 273; Law Rep. 10 Ch. D. 436.

(2) 58 Law J. Rep. Chanc. 868; 59 *ibid.* 145; Law Rep. 43 Ch. D. 208.

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(1), that the sale of a business and goodwill conveyed the right to the use of the business name.

Hastings, Q.C., in reply.—The plaintiff will be exposed to liability if the defendant uses his name as a trade name. *Levy v. Walker* (1) is only an authority that the name may be used where there is no possibility of any liability being incurred thereby.

STIRLING, J.—I understand that the parties are willing that I should treat this motion as the hearing of the action. The question which arises is an important one, and one which is not altogether covered by authority.

The plaintiff's statement of his case, in his affidavit, if taken literally, is certainly in excess of his rights. He has assigned the goodwill of the business, and, by virtue of that assignment, the defendant has the right of using the plaintiff's name in carrying on the business, for the purpose of shewing that the business is the one formerly carried on by the plaintiff, but he must not use it in such a way as to hold out the plaintiff as the real owner of the business, or expose him to any liability. That appears to me to be the only limit to his right of using the plaintiff's name. The defendant, on the other hand, claims an absolute right to use the name of "Arthur Thynne" as a trade name, without any limit or qualification whatever. The question is, whether he is so entitled to use that name. I think that, upon principle, he ought not to be allowed to use it so as to expose the plaintiff to any liability, and I am not aware of any case that has been decided contrary to that. In the case of *Levy v. Walker* (1) Miss Charbonnel, who was carrying on business in London in partnership with Miss Walker, under the firm of Charbonnel & Walker, married Mr. Levy. The partnership was then dissolved, Miss Walker buying the partnership business and premises, trade fixtures, stock-in-trade, goodwill, and business as a going concern. She continued to carry on the business under the style of Charbonnel and Walker, and Mr. and Mrs. Levy, who carried on business at Paris, under the firm of "Charbonnel et Cie.," commenced an action to

restrain her from carrying on the business under that name. The Court of Appeal refused to grant an injunction, on the ground that the plaintiffs were under no liability, by reason of Miss Walker so carrying on the business, either to persons dealing with Miss Walker for the first time after the dissolution, or to persons who dealt with the firm at the dissolution. Lord Justice James, in his judgment, gave it as his opinion that the assignment of the goodwill and business carried with it the exclusive right to use the name of the firm. The Master of the Rolls, it is true, declined to express any opinion on the question, but he said that he must not therefore be supposed to intimate any contrary opinion. Lord Justice James says: "I think it right to say that the sale of the goodwill and business conveyed the right to the use of the partnership name as a description of the articles sold in that trade, and that that right is an exclusive right as against the person who sold it, and an exclusive right as against all the world, so that no other person could represent himself as carrying on the same business."

It is to be observed that the names of Charbonnel & Walker were not the names of any two persons actually carrying on business, but were really used as a fancy name.

That is very different from a case where a man may be exposed to some liability by the use of his name, and Lord Justice James did not, of course, mean to say that a person had any right to use another's name in such a way as to expose him to liability. That distinction was pointed out by Lord Justice Cotton in *Gray v. Smith* (2), where he says, in referring to *Levy v. Walker* (1), that Mr. and Mrs. Levy could not be subjected to any liability by the use of the name of Charbonnel & Walker, by Miss Walker, as the use of that name could not suggest to any one person that either Mr. or Mrs. Levy was a partner.

In the present case both parties have put their rights too high. The defendant is, in my opinion, entitled to use the plaintiff's name in the business, so long as he does not thereby expose the plaintiff to any liability, and he is not entitled to use

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it in such a way as to do that. I think the proper mode of dealing with the case is to restrain the defendant, his servants and agents, from using the plaintiff's name in such a way as to expose him to liability by holding him out as one of the persons with whom contracts are to be made, which would impose liability upon him. As to the costs, there is no evidence that the plaintiff has really been subjected to any such liability, and I think it right that there should be no costs on either side.

Solicitors—Ingoldby & Adkin, for plaintiff;
Keene, Marsland & Bryden, for defendant.

KAY, J. }
1890. }
June 3. }

In re NEVILL.
ROBINSON v. NEVILL.

Mortgage—Will—Locke King's Act—
Contrary Intention—17 & 18 Vict. c. 113 ;
30 & 31 Vict. c. 69 ; 40 & 41 Vict. c. 34.

Testator, who was a baker, by his will made in 1885, gave his trade property, which included real and leasehold estate, and business to his son, subject nevertheless, and charged, in exoneration of the rest of his estate, with payment of all debts and liabilities owing at the time of his death in connection with the said business. The testator included in this gift his freehold premises situated at Acton, which he had purchased and meant for his said business, subject, as to such estate, to any purchase or other moneys payable in respect thereof at the testator's death. The testator then gave the residue of his real and personal estate to trustees, upon trust to convert, and out of the proceeds to pay his funeral and testamentary expenses and debts other than those thereinbefore provided for. At his death the testator owed trade debts not secured by mortgage, and private debts which were secured by mortgage of real and leasehold estate used in his business, and also of real and leasehold estate not used in his business. On the question whether the real and leasehold estate used in the business

was primarily liable together with the other real and leasehold estate to the payment of the mortgage debts under Locke King's Act and the Amendment Acts,—Held, that the testator having divided his debts into two classes, trade debts and private debts, and as to the first class having clearly indicated a contrary intention so as to exclude the operation of the Acts, the necessary implication was that he had the same intention in dealing with the second class, and that the mortgage debts were therefore primarily payable out of the proceeds of sale of the residuary real and personal estate.

H. W. Nevill, who was a baker in a large way of business, by his will, dated the 23rd of February, 1885, appointed three executors and trustees, and devised and bequeathed all his freehold estate at Wanstead, in the county of Essex, together with the business premises, and all his leasehold or other estates in Bingfield Street and Storey Street respectively, including the business premises, and all other his leasehold or other estates situate in or adjacent to Bingfield Street and Storey Street, or held by him in connection with his business premises there, and all his leasehold estates in Milkwood Road, including the business premises, and certain houses and lands in Heron Road, which said freehold and leasehold estates respectively, or parts thereof, were used or occupied by him in connection with his business as a baker; and also all his freehold hereditaments situate at Acton which he had lately purchased, and which he intended to adopt for the purposes of his business, with all erections and buildings thereon, and all other the freehold, leasehold, or other estate near or adjacent to his said freehold hereditaments at Acton, which he might acquire or contract to purchase before his death, for the purposes of or in connection with his business premises at Acton (subject as to such estate to any purchase or other moneys at his death, payable in respect thereof; and subject as to all the said leasehold estates to the rents and covenants under which he held the same, including the burthen of any unperformed covenants for building contained in any of the said leases), and

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all the fixtures, machinery, horses, plant, stock in trade, patent rights, credits, book debts, cash in hand at any of his business premises, as also the cash balances standing to his credit at the several bankers where his business accounts were kept, furniture, wine and effects, belonging or owing to him in connection with his said business, to his son Robert Nevill, "subject nevertheless to, and charged, in exoneration of the rest of my estate, with the debts and liabilities owing by me at my death in connection with the said business," and subject to certain annuities, upon trust that his son should continue the business as a going concern, and should, out of the rents and profits, keep down the annuities, and, subject thereto, should stand possessed of the business and profits and other the subject-matter of the said devise and bequest, in trust for his said son absolutely. And the testator devised and bequeathed the residue of his real and personal estate to his trustees, upon trust to sell and convert the same, and out of the proceeds to pay his funeral and testamentary expenses, and debts "other than those hereinbefore provided for," and the legacies bequeathed by his will or any codicil, and to divide the ultimate residue into three equal shares upon certain trusts for his three daughters.

The testator died on the 18th of August, 1889.

The testator was in the habit of depositing the deeds relating to his business property, and to other property belonging to him, with the London and South Western Bank, in two tin boxes for safe custody, and at the time of his death two tin boxes were at the bank, one containing deeds and documents relating exclusively to his private property, and the other containing the deeds relating to his business property, and some other deeds relating to his private property. The testator, at the time of his death, was indebted to the bank in 35,500*l.* on his private account, which was secured by three indentures of mortgage made by the testator to the bank, dated the 22nd of July, 1884, the 1st of January, 1885, and the 20th of July, 1886, and the deposit of the deeds and documents in the

custody of the bank relating as well to his trade property as his private property.

The value of the trade property comprised in the documents relating to the testator's business was stated to be about 60,000*l.*, and the value of the residuary estate comprised in the documents relating to the testator's private property was stated to be about 85,000*l.* It was also stated that none of the testator's trade debts were secured by mortgage.

This was a summons taken out by the trustees of the will, raising the question whether Locke King's Act and the Amendment Acts applied to the case, in which case the real and leasehold property specifically devised and bequeathed to Robert Nevill, comprised in the documents relating to the testator's business, would be liable to bear a proportionate part of the mortgage debt of 35,500*l.*

Marten, Q.C., and *Vernon Smith*, for the plaintiffs.—The son, as devisee of a portion of the mortgaged property—namely, the part used in the testator's trade—is liable for a rateable proportion of the mortgage debt, under Locke King's Act (17 & 18 Vict. c. 113). The direction to pay debts "other than those hereinbefore provided for"—which, it is admitted, means "private debts," as distinguished from "trade debts"—out of the residuary real and personal estate, does not indicate a contrary intention, having regard to the provisions of the Amendment Acts, 1867 and 1877 (30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34).

Rigby, Q.C., *Renshaw, Q.C.*, and *Swinfen Eady*, for the testator's son.—The first Amendment Act (30 & 31 Vict. c. 69), which only contemplates a direction for payment out of "personal estate," does not apply to this case at all, but the intention of that Act was only that a mere formal direction for payment of debts should not indicate a contrary intention so as to exclude the operation of the principal Act (17 & 18 Vict. c. 113). Nor is the case within the second Amendment Act (40 & 41 Vict. c. 34), which provides that a "mere charge of or direction for payment of debts upon or out of residuary real and personal estate shall not indicate

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a contrary intention," for we have here a specific trust for sale and conversion of real and personal estate, and payment of debts out of the blended fund, and a trust of this kind alters the whole order of administration, and is not a mere "charge or direction" within the Act. Secondly, even if the Acts, or either of them, do apply to such a trust, each Act admits of a contrary intention being shewn without the specific mention of mortgage debts. In this case the testator has divided his debts into two classes—trade debts, which he directs his son to pay, including any purchase-money or vendor's lien on the Acton estate; and debts other than trade debts—that is, his private debts. It will not be disputed that the first class of debts would include mortgage debts, and the necessary implication is that the second class—namely, the private debts—also includes mortgage debts. The provisions of the two Amendment Acts only apply to a formal direction for payment of debts, and not to a direction for payment of particular debts, or debts owing in a particular place or to a particular person—*In re Fleck*; *Colton v. Roberts* (1), *In re Trevelyan*; *Perceval v. Trevelyan* (2), and *Eno v. Tatham* (3).

Marten, Q.C., in reply.—The Acts of Parliament give the residuary estate to the persons entitled, free from the mortgage debt so far as it is charged on the trade property. There is no sufficient indication of a contrary intention. There is a general description of debts, with an exception of trade debts. The exception does not by necessary implication shew that the general description includes mortgage debts, even if the class of excepted debts includes mortgage debts. The testator has omitted the words "in exoneration of the rest of my estate," in dealing with the private debts; but in *Rossiter v. Rossiter* (4) even these words were held insufficient to indicate a contrary intention.

The Amendment Acts apply to a

specific trust as well as to a mere charge or direction—*Leonino v. Leonino* (5). The cases of *In re Flecke* (1) and *In re Trevelyan* (2) were not decided under the Amendment Act of 1877 (40 & 41 Vict. c. 34).

KAY, J.—In this case I understand the facts to be that the testator, the owner of considerable property, had in his lifetime carried on a large business as a baker. He had incurred debts, some of which related to his business, and also he had some private debts, of which a portion—and a very large portion—was secured by mortgages on property used for his trade, and also on property not used for his trade. In that state of things he made his will, and the general scheme of the will is to give his trade-property and the business itself to his son Robert, "subject, nevertheless, to and charged, in exoneration of the rest of my estate, with the debts and liabilities owing by me at my death in connection with the said business," and also subject to other charges which he made by his will. Then he deals with the residue of his estate, real and personal, by giving it to trustees, upon trust to sell and convert, and, out of the moneys produced by such sale and such part of his personal estate as should consist of money, to pay his funeral and testamentary expenses and "debts other than those hereinbefore provided for," and the legacies, and so on, and then he gives the ultimate residue on certain trusts in favour of his daughters.

Now, "other than those hereinbefore provided for," of course relates to the provision that he had made for payment of the trade debts, in exoneration of the rest of his estate, out of the property which he had given to his son Robert Nevill. In neither part of the will has he mentioned mortgage-debts, but in dealing with the property he had given to Robert Nevill he does include in that property all the freehold property and hereditaments situated at Acton, which he had lately purchased and which he intended to adopt for the purposes of his business, and all other

(1) 57 Law J. Rep. Chanc. 943; Law Rep. 37 Ch. D. 677.

(2) 26 Sol. Journ. 43.

(3) 3 De Gex, J. & S. 443; 32 Law J. Rep. Chanc. 311.

(4) 49 Law J. Rep. Chanc. 86; Law Rep. 13 Ch. D. 354.

(5) 48 Law J. Rep. Chanc. 217; Law Rep. 10 Ch. D. 460.

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property which he may acquire or contract to purchase before his death for the purposes of his business, subject as to such estate—that is, the estate he had contracted for and such other estate as he might have contracted to buy—to any purchase or other moneys at his death payable in respect thereof. So that he subjects the estate which he had given to Robert Nevill to any moneys that were charged on it by way of debt or lien, and also subjects all the property given to Robert Nevill to his trade debts, without saying whether they were mortgage or other debts, and then he charges the residue of his real and personal estate with all other debts except his trade debts, and then he gives it to different people. The scheme of the will, therefore, is that the whole of the trade property is given to Robert, he paying, in exoneration of the rest of the estate, the trade debts; while provision is made for the other persons out of what might be left of the residue of the real and personal estate after paying the debts other than trade debts.

Now to that state of things I have to apply the law which is enacted by the series of statutes called Locke King's Acts. The first of them, the 17 & 18 Vict. c. 113, provided, shortly, that any person dying after the 31st of December, 1854, entitled to any estate or interest in any land or other hereditaments which at the time of his death should be charged by way of mortgage, if he should not by his will, or deed, or other document, have signified any contrary or other intention, then the heir or devisee to whom the estate went was to be primarily liable to pay the debts in exoneration of the rest of the testator's property. Then questions arose as to what was a sufficient expression of a contrary or other intention; and in order to assist the Court—an assistance which was not very complete—another Act was passed, the 30 & 31 Vict. c. 69, which provided that “a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to, or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words ex-

pressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.” That is to say, paraphrasing it, a mere direction that the debts or all the debts of the testator are to be payable out of the personal estate, shall not be read to include his mortgage-debts, but you must find some other indication in the will, either expressed or by necessary implication, which shews that mortgage-debts are included, and that the mortgage-debts are to be paid out of the personal estate.

Then, again, came a later statute, the 40 & 41 Vict. c. 34, which provided that such contrary intention should not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate. That is to say, a mere charge on residuary real estate or a mixed fund of residuary real and personal estate is not to be sufficient indication of the contrary intention.

Now, first of all, have I got here the necessary implication or expression that these debts which are to be paid out of the residuary real and personal estate include mortgage debts? If I understand rightly the scheme of the will, it is this: he divides his debts into two classes—his business debts, and his debts other than his business debts. He says nothing at all about mortgage debts, except that he indicates in one part of his will that the business debts are to include all moneys charged by way of vendor's lien on the property he was buying or might thereafter buy for the purpose of his business; but it could not be possibly denied, I think, that if there had been business debts secured by mortgage, those debts would have been included in the debts which the devisee, Robert Nevill, had to pay. That seems to me almost too clear for argument. They are none the less business debts because secured by mortgages, and the classification of his debts as business debts and debts other than business debts, if it includes in the business debts any debts that are secured by mortgage being within the definition of business, *ex necessitate* there must be included in the other class—the other debts—debts also incurred

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by mortgage which are not business debts. In short, he divides his debts into two classes, business debts and other debts, which is the same thing as saying business debts and private debts; and if one class include mortgage debts, clearly the other class must include mortgage debts too. I cannot see how it is possible to leave out from a classification of that kind mortgage debts. Therefore I do find, not in express words, but at any rate by an implication which to my mind is absolutely necessary, that in the debts which are to be paid out of the residue are included mortgage debts which are not business debts. That seems clear. Then comes the other Act and the last Act, and that Act says that where there is a fund of residuary real and personal estate, a mere charge of debts on the residuary real and personal estate or residuary real estate shall not of itself be enough to indicate the contrary intention. This clearly is not the case of an ordinary charge of debts or all the debts—it does not matter, but the word “all” is not here—on the real and personal estate. The difficulty there meant to be dealt with was this. Where there has been a charge upon the personal estate alone, that shall not indicate the contrary intention; but if there be a charge upon residuary real and personal estate, that may be enough to indicate a contrary intention. Says the Act of Parliament, No; the addition of real estate in the charge, or the residuary real estate when alone included in the charge, shall not be enough to indicate the contrary intention.

But now does this case come within the mischief intended to be provided against by that Act? Here I have not got a general charge of debts on the residuary real and personal estate. It is a mixed fund. The residue does consist of real and personal estate. The mere charge of debts generally according to the last Act I have referred to would not be enough to indicate a contrary intention; but I have not a mere charge of debts. If I am right in my view of the scheme of this will, the charge made by this provision as to the residuary estate includes all the private mortgage debts—I use the word “private” there in contradistinction to business debts—includes

mortgage debts which are private debts; that satisfies the second Act; and also it is not a general charge of debts, but it is a direction that his residuary legatees and devisees shall only take what is left after payment of his private debts, whether they were mortgage debts or not. If that be what he has said in plain words in his will, the Act of Parliament does not prevent the Court from carrying out the terms of the will. On the contrary, each one of those Acts carefully excludes an intention sufficiently expressed on the face of the will to the contrary.

I therefore come to this conclusion, that here the intention of the testator expressed on the face of the will was to make Robert Nevill and the property devised to Robert Nevill subject to the business debts, whether mortgage debts or not, including the vendor's lien which he has expressly mentioned, and that he gives to his residuary legatees nothing whatever except what might be left of the residuary real and personal estate after paying all the other debts—that is, the private debts, whether mortgage debts or simple contract debts. Now I have arrived at that conclusion from the meaning of the testator expressed in his will, and, as I have said, there is nothing in the Act of Parliament which at all interferes with the right of the Court to carry out the expressed intention of the testator when it finds that sufficiently clearly expressed. I confess I am largely assisted in the conclusion at which I have arrived by the two cases that have been cited—one, the case before Mr. Justice Chitty, *In re Trevelyan* (2), and the other, the case of *In re Fleck* (1), before Mr. Justice North. It is said that neither of those cases appears to have been decided under the last Act—that is, that the last of the three Acts of Parliament to which I have referred does not seem to have been applicable to either of the two cases. But that seems to me to have very little to do with it, because the purpose of that last Act was merely to say, where there is a charge on the residue of the real and personal estate or the real estate alone, that by itself shall not be sufficient to indicate a contrary intention. The contrary intention, as indicated from the whole scheme of the will, seems to me, for the

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reasons I have given, to shew that the residuary estate was to bear, and bear in exoneration of the rest of the estate, the debts other than the business debts.

Now I confess I felt some difficulty during the argument arising from this, that in the case of the gift to Robert Nevill of the business and the business premises, the testator does say in so many words that that property is to bear the business debts "in exoneration" of the rest of the estate; and when he comes to deal with the residue he does not repeat those words "in exoneration," but he devotes the residue to the payment of all the private debts, but does not say in exoneration of the estate given to Robert. But to my mind the absence of those words does not create so much difficulty as at first I thought it must. It is impossible to suppose that the intention of the testator was to burden Robert with all the business debts, and, besides that, with the private debts, or such of the private debts as were charged upon the mortgage of the business property, because he distinctly says the business debts are to be paid out of Robert's estate, and paid exclusively thereof in exoneration of the rest of the estate, and the other debts are to come out of the residue of the real and personal estate. It seems to me that the repetition of the words "in exoneration" would have been unnecessary, and that the absence of those words does not create any doubt or difficulty as to what the real intention of the testator as expressed by his will was—namely, to divide his debts into two classes, and make the property devised to Robert Nevill pay one class, and make what he calls the residue of his real and personal estate pay the other class of debts. That, I conceive, was his intention. That seems to me sufficiently expressed, and, in my opinion, the Acts which have been referred to do not in the least degree interfere with that construction of the will.

There will be a declaration that the debt due by the testator to his bankers, secured by the indentures and deposit in the summons mentioned, ought to be borne by the assets of the testator other than those bequeathed to his son Robert, in exoneration thereof. The costs of all

parties of this application will be paid out of residue, the costs of the plaintiffs as between solicitor and client.

Solicitors—A. Lawrence Houlder, for plaintiffs;
Snow, Snow & Fox, for the son.

[IN THE COURT OF APPEAL.]

LINDLEY, L.J. }
BOWEN, L.J. }
1890.
April 23.

In re DAVIES.
ISSARD v. DAVIES.

Practice—Evidence on Enquiry at Chambers—Order for Cross-examination—Time for closing Evidence—Discretion of Judge.

As there is no provision in the Rules of the Supreme Court, 1883, fixing the time at which the evidence is to close on any enquiry in chambers, the matter is one in the discretion of the Judge. In the chambers of CHITTY, J., the general practice (not as a hard and fast rule) is that the evidence must be closed before an order for the cross-examination of one of the parties to an enquiry will be made; and after the cross-examination of one party, the other party will not be allowed to file further affidavits; and the Court will not interfere with this practice except under special circumstances.

Decision of CHITTY, J., affirmed.

This was an appeal from a decision of Chitty, J.

The plaintiff in this action was the surviving trustee of the will of the testator Davies. The defendants were the executors of the residuary legatee. An account had been taken between the plaintiff and the residuary legatee, and the plaintiff had given a promissory note for the amount shewn to be due to the legatee. The plaintiff brought this action to set aside the promissory note and to have accounts taken. By the judgment in the action accounts were directed to be taken. Accounts were delivered by the plaintiff and gone into by the chief clerk, and the defendants obtained an order for the

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cross-examination of the plaintiff, and the cross-examination took place. Afterwards the defendants desired to adduce further evidence, including certain affidavits which had been obtained before the cross-examination of the plaintiff took place, but had not been filed, and the chief clerk refused to admit further evidence.

The general practice in chambers is that the evidence on an enquiry must be complete before an order will be made for the cross-examination of a party to it, and it appeared that when the defendants applied for the order for the cross-examination of the plaintiff, the plaintiff's solicitor pointed out that the defendants could not adduce further evidence after the cross-examination.

The defendants took out a summons before Chitty, J., for leave to file further evidence in answer to enquiries, and the accounts delivered by the plaintiff; or, in the alternative, for liberty to file evidence generally, notwithstanding the cross-examination of the plaintiff upon his accounts had taken place.

Chitty, J., refused the application, on the ground that, although there was no hard and fast rule, the general practice in chambers was not to make an order for cross-examination until the evidence was complete, and that after the cross-examination had taken place no further evidence would be allowed to be adduced except under special circumstances. The refusal would not prejudice the defendants if they could shew special circumstances.

The defendants appealed from this decision.

Swinfen Eady, for the appellants.—We are entitled as of right to file these affidavits after the cross-examination of the plaintiff has taken place; we must certainly be entitled to file those which were made before the cross-examination took place but were not then filed. If we are not entitled of right to file these affidavits, then our position is caused through a slip, and we are entitled to have the slip put right; the slip was that the defendants considered that they had a right to file further evidence after the cross-examination of the plaintiff had taken place. [He cited and referred to

Muir v. Kirby (1), *In re Chifferiel* (2), *Concha v. Concha* (3), and *In re Lord's Estate*; *Lord v. Lord* (4); Rules of Supreme Court, 1883, Order XXXVII. rule 21, Order XXVIII. rules 26–28.]

Romer, Q.C., and *McSwinney*, for the respondent, were not called upon.

LINDLEY, L.J.—I wish to say at once that anything which may fall from me now is without prejudice to any application for further time to file affidavits which the defendants may make on special grounds.

The appeal has been argued on the ground that the order of Mr. Justice Chitty is wrong, because it is not warranted by the rules and is contrary to the general practice.

There is no rule expressly dealing with this matter; but I have no doubt that, as Mr. Justice North held in *In re Chifferiel* (2), the Judge in chambers has power to fix a time for the closing of the evidence, but, independently of that, there is no provision in the rules.

It has been found convenient in chambers to lay down the rule, that under ordinary circumstances, if a party wishes to cross-examine a witness, he must put in all his evidence first. There is no general hard and fast rule, but that practice has been found to work well, and there is no reason why we should discourage it.

That practice is well known and understood, and every one who is familiar with the practice in chambers knows that he cannot get an order to cross-examine until all the evidence has been put in, and Mr. Eady's client was warned by the plaintiff's solicitors that if he obtained an order to cross-examine he would not be allowed to put in further evidence, and it was on that understanding that the chief clerk made the order. We are asked to condemn that practice. If a hard and fast rule had been laid down, I should condemn it; but that is not so, and I think the practice is a good one. Mr. Justice

(1) 32 Solicitors' Journal, 139.

(2) 36 W.R. 806.

(3) Law Rep. 11 App. Cas. 541.

(4) 35 Law J. Rep. Chanc. 683; Law Rep. 2 Eq. 605.

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Chitty considered he had a discretion, and as no special grounds were alleged why he should depart from the ordinary practice, he refused to do so, and I am of opinion that he exercised his discretion rightly.

BOWEN, L.J.—I am of the same opinion. I am impressed by the fact that Mr. Eady asks us to set him at large, without shewing any special circumstances upon which he might be entitled to the indulgence of the Court. The rules are silent as to this matter, and therefore it is left to the discretion of the Judge to fix the time when the cross-examination of a particular witness is to take place in each case, and so it should be. That being so, it is obviously for the convenience of business to say that, as a general rule, in the absence of special circumstances, cross-examination is not to take place until the evidence is complete, and that after cross-examination no fresh evidence can be adduced. This is not a hard and fast rule, and it may hereafter be necessary to give the defendants leave to add to their evidence. It has always been accepted by the Court of Appeal that a Judge who has a discretion reposed in him as to a particular matter can intimate to practitioners who come before him every day the lines on which in ordinary cases he should exercise his discretion, without laying down any hard and fast rule.

I have no doubt that here the solicitors before the chief clerk well knew the practice. The attention of one was called to it by the other. The chief clerk and the representatives of the clients before him must have understood that each was aware of the usual practice. We cannot, therefore, set the defendants at large without special reasons. They took the order on the terms that the usual practice would be adopted.

Appeal dismissed.

Solicitors—Minshall-Parry, Jones, Woosnam & Smith, agents for Martin Woosnam, Newtown, Montgomeryshire, for appellants; Talbot & Quayle, agents for Talbot & Watkins, Newtown, Montgomeryshire, for respondent.

CHITTY, J. }
1890. } THE CORPORATION OF BACUP
April 23. } v. SMITH.

Local Government—Paving of Streets—Notice to "Owner"—Validity—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150 and 4.

The term "owner," as defined in section 4 of the Public Health Act, 1875, does not include a receiver of rents and profits appointed by the Court, and service on him of a notice under section 150 of the Act is invalid.

Adjourned summons.

The plaintiffs, who were the urban authority for the Borough of Bacup, on the 8th of July, 1886, served upon J. Hitchen, who had been appointed, by order of the Court in an action, receiver of the rents and profits of certain premises, a notice under section 150 of the Public Health Act, 1875, requiring him to level, &c., and make good, part of a road upon which such premises abutted. This notice not having been complied with, the plaintiffs executed the works mentioned therein, and the proportion of the expense so incurred and payable in respect of these premises was ascertained under the section at 356*l.* 12*s.* 2*d.* Notice of this apportionment of the expense was, on the 28th of November, 1887, served on J. Hitchen, but he repudiated all liability in respect thereof, whereupon, on the 29th of March, 1888, a demand for payment of the same was served on him in accordance with section 257 of the Act, with a threat of legal proceedings in default of compliance.

By an order of the 10th of December, 1888, made in the action, in which Hitchen had been appointed receiver, the present plaintiffs were given liberty, notwithstanding the appointment therein of a receiver, to bring any action to enforce any right they might have under the Act in respect of the works mentioned in the notice; and they accordingly brought this action by originating summons against the trustees of the will of the testator, whose estate was the subject of the former action, asking for an order directing an account of what was due to them in respect of the

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apportioned expenses, and that their charge for the same on the premises under section 257 of the Act should be enforced by a sale in default of payment.

Upjohn, for the plaintiffs.—Service of the notice of the 8th of July, 1886, on J. Hitchen was sufficient under section 150 of the Public Health Act, 1875, for, as agent to collect the rents, he is within the definition of “owner” in section 4—*Eddleston v. Francis* (1), *Peek v. The Waterloo Board of Health* (2), *Cook v. Montagu* (3), and *The Mayor &c. of St. Helen's v. Kirkham* (4).

Byrne, Q.C., and *Warrington*, for the defendants.—A receiver appointed by the Court is neither agent nor trustee for any other person within the definition in section 4—*cf.* the definition of this term in section 2 of the Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121)—which was wider, and which is repealed by the Act of 1875—and in section 250 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), where the definition is similar to that of the Act of 1875, and does not mention a receiver or sequestrator appointed by the Court.

Upjohn, in reply.—By reading the words in section 4, “whether on his own account or as agent or trustee for any other person,” as in brackets, the term “owner” includes any one receiving the rack-rent of the premises.

CHITTY, J.—It is admitted that no charge has been created unless the notice was a good one. Whether it was good depends on section 4 of the Public Health Act, 1875. This is a defining section, and in the long list of terms there given the word “owner” occurs, and it is defined as “the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent.”

(1) 7 Com. B. Rep. N.S. 568.

(2) 2 H. & C. 709; 33 Law J. Rep. M.C. 11.

(3) 41 Law J. Rep. M.C. 149; Law Rep. 7 Q.B. 418.

(4) Law Rep. 16 Q.B. D. 403.

The notice here was served on the receiver appointed in an action by the Court. Now a receiver is not in the position of agent for other persons, nor is he a trustee. He is appointed by order of the Court; he is responsible to the Court, and cannot obey the orders of any party to the action, and in no sense can he be said to be the agent of the parties, at whose suit or at the suit of one of whom he has been appointed. Now I am not at liberty to change the words used in this section—agent or trustee—so as to make them include a person who has not this capacity. To do so would be to usurp legislative power. And it is to be borne in mind that what I have to construe is itself a defining section, which, in order to avoid ambiguity, defines the term in question with the object of making its meaning clear. Mr. Upjohn ingeniously argued that the words, “whether on his own account or as agent or trustee for any other person,” in the section should be considered as in brackets, so as to make the term “owner” equivalent to any person who is in receipt of the rack-rent; but he had to admit that if this were the meaning of the language used, it could not be said that a mere rent collector was an “owner” within the section, because it is clear from the authorities and the other sections of the Act that the person, whoever he may be, who is “owner” within this clause is personally liable. It is argued that I am to read these words in brackets as having been inserted with the view of extending the case of owners to persons who would not otherwise come within it, but I cannot adopt this construction. Therefore, upon the construction of this clause, I hold this notice was not a good notice. Curiously enough, the defendant's contention that a receiver appointed by the Court does not come within the words used in this section receives additional force from legislation—namely, the Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), which, by section 2, defines “owner” in terms similar to those used in the Act of 1875, with this remarkable difference, that after agent or trustee are inserted the words, “or as receiver or sequestrator appointed by the Court of Chancery, or under any order thereof,”

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and for the purposes of this Act it was of course held that a receiver came within the term "owner." But this Act was repealed by the Act of 1875, so that at this date the Legislature, having before it the wider definition of this Act, left these words out of the definition in this latter Act. And there is this, too, which shews even more strongly that the Legislature's attention was directed to the terms of this definition, for in the Act immediately preceding the other—namely, 18 & 19 Vict. c. 120. s. 250—occurs a definition of "owner" which does not include a receiver or sequestrator, being expressed precisely as in the Act of 1875, and omitting the words "receiver and sequestrator appointed by the Court." And they were omitted in the Act of 1875 advisedly, because great hardship might have been caused to a receiver or sequestrator, who is not always appointed in a suit to which the owner of the premises affected is a party—for instance, in the case of a mortgage by a tenant for life of his life estate, where the mortgagee procures the appointment of a receiver, and then the tenant for life dies. Under the construction which is contended for, the receiver would be "owner" within the Act of 1875, and as such he would be personally liable, though without any fund to look to for his indemnity. I hold, therefore, that the notice given in this case was bad. I may add that the Legislature has provided for the service of the notice under section 267, by posting it on the property itself.

Solicitors—Woodcock, Ryland & Parker, agents for Woodcock & Sons, Haslingden, for plaintiffs; Torr, Janeways, Gribble & Oddie, agents for Eastwoods & Sutcliffes, Todmorden, for defendant.

NORTH, J. } *In re CARLISLE. CLEGG v.*
 1890. } *CLEGG.*
 Feb. 22. }

Arbitration—Agreement to refer Matters in Dispute—Question of Law—Staying Legal Proceedings—Discretion of Court—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 4 and 19.

A deed made between four partners contained a clause providing that, whenever any difference should arise between all or any of the partners, or between any of them and the executors of any other or others of them, touching the construction of the deed, or anything therein contained, or any account, valuation, &c., or any other thing in anywise relating to the partnership, or the business or affairs thereof, such dispute should be referred to arbitration, pursuant to the provisions of the Common Law Procedure Act, or any then subsisting statutory modification thereof. After the death of two of the partners, the executors of one of them commenced an action against the two surviving partners and the executors of the other deceased partner, claiming payment from the defendants, jointly and severally, of a sum alleged by the plaintiffs to be due to them as executors in respect of their testator's share and interest in the partnership. Before delivery of any defence, two of the defendants took out a summons asking that, pursuant to section 11 of the Common Law Procedure Act, 1854, all proceedings in the action might be stayed and the matter in dispute referred to arbitration. The summons came on for hearing after the day when the Arbitration Act, 1889, came into operation. The Court, in exercise of the discretion conferred upon it by section 4 of the Act, ordered the summons to stand over until after the delivery of the defences, in order that the parties might have an opportunity of then applying to the Court to decide any question of law raised by the pleadings, before referring the matter to an arbitrator to decide any question of account.

Adjourned summons.

A deed of partnership between Henry Carlisle, William Clegg, William Hutchinson Clegg, and George Kirby, dated the

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3rd of February, 1879, contained the following clause:—

"Whenever any doubt, difference, or dispute shall hereafter arise between all or any of the partners, or between any of them, and the executors or administrators of any other or others of them, or between their respective executors or administrators, touching the construction of these presents, or anything herein contained, or any account, valuation, sale, or division of assets or liabilities, or any other thing in anywise relating to this partnership, or the business or affairs thereof, such doubt, difference, or dispute shall be reduced into writing, and be referred to two arbitrators, or their umpire, pursuant to, and so as, with regard to the mode and consequence of such reference, and in all other respects, to conform to the provisions in that behalf contained in the Common Law Procedure Act, or any then subsisting statutory modification thereof."

William Clegg died on the 24th of August, 1887, having by his will appointed the plaintiffs, Mary Ann Jane Clegg and Edward Carlisle, and William Hutchinson Clegg and George Kirby, two of the defendants, executors and trustees thereof.

After the death of William Clegg the partnership business was carried on by Henry Carlisle, and the defendants William Hutchinson Clegg and George Kirby, as co-partners.

Henry Carlisle died on the 10th of March, 1889, having by his will appointed the defendants Charles Henry Carlisle and John Webster Carlisle executors thereof. After the death of Henry Carlisle the said business was carried on by the defendants William Hutchinson Clegg and George Kirby as co-partners.

The writ in the action was issued on the 21st of November, 1889. By their statement of claim the plaintiffs, as executors of William Clegg, alleged that, under a general account and valuation of the assets and liabilities of the partnership, which were made on the 30th of June, 1887, the amount due to his executors on the 24th of August, 1887, in respect of his share and interest in the partnership, amounted to 30,119*l.*, and

that of that amount the sum of 28,341*l.* still remained owing to the executors of William Clegg.

The plaintiffs claimed a declaration that the defendants William Hutchinson Clegg and George Kirby, and the defendants Charles Henry Carlisle and John Webster Carlisle, as executors of Henry Carlisle, were jointly and severally liable to pay to the plaintiffs the sum of 28,341*l.*, with interest, or to have an account taken of what was due from the defendants to the plaintiffs, and an order for payment accordingly, either of the 28,341*l.*, with interest, or of what should be found due on taking the account.

On the 20th of December, 1889, this summons was taken out by the defendants, Charles Henry Carlisle and John Webster Carlisle, asking that, pursuant to section 11 of the Common Law Procedure Act, 1854, all proceedings in the action might be stayed, the matters therein in difference between the parties having been agreed to be referred to arbitration. No statement of defence had been delivered.

Hornell, for the summons.—In *Randegger v. Holmes* (1) it was held that when parties to an instrument had agreed to refer their differences to arbitration, it was no answer to an application for a stay of proceedings that the difference was one of law as to the construction of the instrument. That case was decided on section 11 of the Common Law Procedure Act, 1854, which is now superseded by section 4 of the Arbitration Act, 1889.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the plaintiffs.—The Court has a discretion in the matter—*Lyon v. Johnson* (2). The question is a mere question of law, and ought to be decided by the Court.

Napier Higgins, Q.C., and *Benn*, for the other defendants.

NORTH, J.—So far as I can judge at present, there is only a question of law to be decided. It would be absurd to refer that question to an arbitrator, who would,

(1) Law Rep. 1 C.P. 679.

(2) 58 Law J. Rep. Chanc. 626; Law Rep. 40 Ch. D. 579.

In re Carlisle.

in all probability, invoke the opinion of the Court under section 19. I have a discretion under section 4, and I think the best course will be to try the question of law first. I will not dismiss the summons now, but I will order it to stand over until after the defences have been delivered. It will then appear what point of law arises. When the defences have been delivered, any of the parties can apply to me to decide the point of law. If, after that point has been decided, any question of account remains, I can refer it to an arbitrator to settle the figures.

Solicitors—Merriman, Pike & Merriman; J. E. Phillips; Snow, Snow & Fox.

STIRLING, J. }
1890. } GRIFFITH v. POUND.
April 30. }

Practice—Parties—Numerous Persons having the same Interest—Foreclosure Action—Persons interested in the Equity of Redemption—Rules of Supreme Court, 1883, Order XVI. rule 9.

In a foreclosure action an order had been made in chambers, under Order XVI. rule 9, authorising two of a large class of persons, all having the same interest in the equity of redemption, to defend in the action on behalf and for the benefit of the others:—Held, that a foreclosure order could not be made unless all the persons interested in the equity of redemption were parties to the action.

This was an originating summons under Order LV. rule 5a, for the foreclosure of six mortgages, all executed in favour of the plaintiffs by one King, who had since become bankrupt, upon various properties belonging to him.

The defendant Pound had purchased the equity of redemption in some of the mortgaged properties, and the Billiter Street Offices Company (Limited) had purchased the equity of redemption in another. The company had issued mort-

gage debentures charging (*inter alia*) this property. It was now in liquidation.

On the 18th of January, 1890, an order was made by Stirling, J., in chambers, upon the application of the plaintiffs, under Order XVI. rule 9, authorising two of the thirty-eight mortgage debenture-holders of the company to defend in the action on behalf and for the benefit of the others.

Graham Hastings, Q.C., and Ingle Joyce, for the plaintiffs.

Swinfen Eady, for the two debenture-holders.

Chadwyck Healey, for the liquidator of the company.

George Henderson, for the defendant Pound.—No foreclosure order can be made in the action as at present constituted. The two debenture-holders cannot represent the class in a foreclosure action, for, as a general rule, all persons who have an interest in the right of redemption must be joined as parties in such an action—*Fisher on Mortgage* (3rd ed. vol. 2, p. 883; 4th ed. p. 811), and *Moore v. Morton* (1). Probably the best thing for all parties would be a sale of the whole of the mortgaged property, for which any party can apply under section 25, sub-section 2 of the Conveyancing Act, 1881. That section seems to contemplate all the persons interested in the equity of redemption being parties to the action.

Exceptions to the rule that all the persons interested are necessary parties to an action have been created by 15 & 16 Vict. c. 86. s. 42, rule 9, and by Order XVI. rules 8 and 9 of the Rules of 1883. In *Francis v. Harrison* (2), which was a case under rule 8, North, J., held that a second mortgagee who was a trustee could not properly represent his *cestuis que trust* as defendant to a foreclosure action by the prior mortgagee. The same principle applies to a case under rule 9. [He also referred to *Pearce v. Morris* (3).]

Talbot Crossfield, for the trustee in bankruptcy of King.

F. W. Pember, for a second mortgagee.

Graham Hastings, Q.C., in reply.—The

(1) W.N. 1886, 196.

(2) *Ante*, p. 248; Law Rep. 43 Ch. D. 183.

(3) 39 Law J. Rep. Chanc. 342; Law Rep. 5 Chanc. 227.

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order was made in the presence of Mr. Pound, who has taken no steps to get it upset. He cannot object to it now.

STIRLING, J.—A difficulty has arisen in this case, which I feel to be very great, and none the less so that I am partly responsible for it myself. An objection has been taken that an order for foreclosure cannot be made in the action constituted as it is. In my opinion, that objection is well founded, and an order for foreclosure cannot be made without having here all the persons interested in the equity of redemption.

Order LV. rule 5*a*, enables foreclosure proceedings to be taken by originating summons; and rule 5*b* provides that the persons to be served with such a summons should be such persons as under the existing practice of the Chancery Division would be the proper defendants to an action for the like relief.

In an action for foreclosure, unquestionably, according to the rules of the Chancery Division, all the persons interested in the equity of redemption ought to be defendants. The necessity of making all the persons interested in an action parties has been limited—as has been pointed out by Mr. Henderson—by rule 8 of Order XVI., which is to the same effect as rule 9 to section 42 of 15 & 16 Vict. c. 86, and provides that trustees, executors, and administrators may sue and be sued, as representing the property of which they are trustees or representatives, without joining any of the persons beneficially interested, and shall be considered as representing such persons.

Now, with reference to that, it has been held that where a second mortgagee is a trustee he does not, for the purpose of a foreclosure action, represent the *cestuis que trust*, and that the *cestuis que trust* are, notwithstanding rule 8 of Order XVI., necessary parties to the action. That was decided by Mr. Justice North in the case of *Francis v. Harrison* (2). It follows, therefore, that the rule does not apply when the defendants to the foreclosure action are trustees. *A fortiori*, a foreclosure order cannot be made in an action constituted as this is. In the present case there are no trustees, but an order

has been made under rule 9 of Order XVI. authorising two of a class of persons to represent the others. I made the order under that rule, and at the time when I made it I believe I was under the impression, rightly or wrongly, that I could make it to this extent, that the accounts might be taken in the presence of a certain number of the persons interested in the equity of redemption, so as to bind the rest, to find the amount due on the accounts; but I confess that I do not see how the foreclosure action can be worked out, unless all the persons who are interested in the equity of redemption are here before the Court. If the parties are desirous on this occasion to take an account of what is due upon the plaintiffs' mortgages simply in the way of a preliminary account, leaving it open hereafter—as may be done, I think, when preliminary accounts simply are directed—to add the rest of the parties interested in the equity of redemption, and bring them before the Court when that account is taken, I am willing to make an order to that extent; but it would be an order simply to take the preliminary accounts. I think that I cannot make a complete foreclosure order, or anything equivalent to it, in an action framed as this is. All I can do is to direct the preliminary accounts, in order to ascertain what is due on the plaintiffs' mortgages, making the order in such a way as to leave it open hereafter, at a later stage, to add all the necessary parties to the action. That is all that it seems to me proper to do upon this occasion, and beyond that I cannot do anything.

Graham Hastings, Q.C.—We would rather amend, and make all the debenture-holders parties, and then obtain foreclosure. ¹

STIRLING, J.—The order will be for the summons to stand over generally, with liberty to amend by adding parties.

Solicitors—Grover & Humphreys, for plaintiffs; Stanley & Woodhouse, for debenture holders; William Negus, for defendant; W. J. Crossfield, for liquidator.

KAY, J. } MOXON v. THE BERKELEY
1890. } MUTUAL BENEFIT BUILDING
Jan. 17, 20. } SOCIETY.

Mortgage—Marshalling—Security and Set-off—Separate Assignees.

*A member of a building society obtained an appropriation of 500*l.* in respect of certain shares, repayment of which was secured by mortgage to the society. He also continued his subscriptions after his appropriation. Afterwards he made default in his repayments under the mortgage, and also discontinued his subscriptions. By the rules of the society he was then entitled to have his subscriptions placed to his credit in respect of his repayments under the mortgage; but he made no request to this effect, and it was not done, but the society entered on the mortgaged estate, and ultimately sold it for a sum which, after repaying all moneys due to the society, left a surplus for the member. The member had mortgaged the equity of redemption in the mortgaged estate to A., and his other property, including the subscriptions, had been assigned to B.:—Held, that as between A. and B. the doctrine of marshalling applied, and the repayments to the society must be apportioned rateably between the mortgaged estate and the subscriptions.*

Special Case.

The Berkeley Mutual Benefit Building Society was established under the 6 & 7 Will. 4. c. 32, and in 1880 was incorporated under the Building Societies Act, 1874, its objects being to enable its members to purchase property, freehold, copyhold, or leasehold. The rules of the society provided, by rule 1, that it should consist of 1,400 shares of 125*l.* each, each member holding not less than four shares; and by rule 2, that the shares should be paid by weekly subscriptions of 9*d.* per share, but payments would not be received unless offered on four, or multiples of four shares.

Rule 18 was this: "A member, having obtained an advance in respect of any four shares, shall be excluded, so far as those shares are concerned, from all future appropriations, but may, if he think proper, continue to pay his subscription of 9*d.* per week per share regularly during the whole

time such member is repaying his appropriation; and after having repaid the same, such member shall continue to pay subscriptions at the rate of 1*s.* 6*d.* per share per week in respect of such appropriated shares until all the members shall have obtained their appropriations of 500*l.* upon every four shares; but if any member, who has obtained an advance, be desirous of withdrawing from the society, the amount of his subscription may be placed to the credit of his repayment account, subject to the deductions provided in rule 19."

Rule 19 provided that when the unappropriated money at the bankers' was expected to amount to 500*l.*, the trustees should declare an appropriation of the above amount to take place in the manner described in rule 21, . . . and the member obtaining such appropriation should request the secretary to direct the surveyor to view the property, the only restriction to the purchase being that, if leasehold, it should not have less than sixteen years to run, and in the opinion of the surveyor and committee of management should be capable of affording sufficient mortgage security to the society for the repayment of 500*l.*, or such less sum as might be required to be advanced thereon, at the rate of one tenth per annum, by weekly, monthly, or quarterly payments, as such members might in the first instance decide. The rule continued: "In case any member shall discontinue his subscriptions after receiving an appropriation, he shall forfeit a bonus of 10*l.* per share, and his mortgage be deemed unredeemable until such member shall have paid such sum of 10*l.* per share, as well as all payments covenanted to be paid by the said mortgage deed; but such member shall be entitled to have any sum he may have paid by way of subscriptions into this society placed to his credit in respect of his repayments and forfeiture of bonus; and immediately upon the completion of such payments such member shall, on request in writing to the secretary for that purpose, be entitled to have his title-deeds delivered over to him or as he shall appoint, with a receipt duly indorsed on his mortgage deed. . . . But in the event of any member who

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shall have received an appropriation being desirous of continuing his membership, he shall be compelled to make and continue a subscription of 1s. 6d. per share per week, pursuant to rule 18, until all the members shall have obtained their appropriations, or, in default of so doing for six weeks (if he has paid his subscription money during the whole time he has been repaying his appropriation), shall forfeit all profits on his subscriptions paid up to the time of default."

Rule 21 provided for the appropriation of each 500*l.* upon four shares, and that all future appropriations should be disposed of by competitive tender at a bonus as thereby provided.

Henry Robinson was a member of the society, and in 1872 obtained an appropriation of 500*l.* by competitive tender at a bonus of 103*l.* in respect of four shares, securing the repayment of the sums of 500*l.* and 103*l.* by a mortgage dated the 18th of April, 1872, to the trustees of the society of land and a house situate at East Moulsey, in the county of Surrey. The mortgage deed contained a personal covenant by the mortgagor for periodical repayments, and also contained a power of sale, with a provision that out of the moneys to arise therefrom the trustees should first satisfy all costs, expenses, and outgoing; and secondly, should retain in trust for the society all repayments, bonuses, fines, forfeitures, or other payments and sums, which should then be, or might thereafter become, due from the mortgagor, his heirs or assigns, in respect of the shares, or of that appropriation, and should pay the residue of the moneys (if any) to the mortgagor, his heirs or assigns.

In 1873, 1877, and April, 1880, Henry Robinson executed further charges on the East Moulsey property in favour of the society to secure other appropriations in respect of other shares, and by an indenture dated the 19th of July, 1880 (notice of which was given to the society), mortgaged the equity of redemption in the same property to his father, George Robinson, to secure 800*l.* and interest.

Henry Robinson continued to pay weekly subscriptions of 9d. in respect of his shares after the date of his appropri-

tions. He discontinued them in 1880, but did not in terms require the society to place his subscriptions to his credit in respect of his repayments and forfeiture of bonus pursuant to rule 19. He also about the same time made default in the repayments under the mortgage.

In April, 1881, Henry Robinson filed a liquidation petition under the Bankruptcy Act, 1869, and resolutions were passed for the liquidation of his affairs by arrangement, and subsequently resolutions were duly passed for the sale of the whole of the debtor's estate to Griffiths, for a sum sufficient to pay 3*s.* in the pound; and by an indenture dated the 26th of October, 1881, all moneys in the hands of the society and all other the real and personal estate of the debtor (except the East Moulsey property) were conveyed to Griffiths accordingly. By another indenture, dated the 13th of December, 1881, the East Moulsey property was also conveyed, subject to the existing mortgages, to Griffiths in fee.

In 1886 the society sold the East Moulsey property under their power of sale for 1,300*l.*, which satisfied the amount due to the society and left a surplus of about 500*l.* There was also a sum of about 336*l.* standing to the credit of Henry Robinson, representing the amount of subscriptions paid by him after the date of his appropriations.

George Robinson was dead, and the plaintiff was his personal representative. The whole of the 800*l.* and large arrears of interest were owing to the plaintiff on the mortgage to George Robinson.

The shares and subscriptions still stood in the name of Henry Robinson.

Every member of the society had received his appropriation or waived his right to it.

This was a Special Case stated under Order XXXIV. to decide the respective rights of the plaintiff and Griffiths to the 336*l.*

Renshaw, Q.C., and V. Smith, for the plaintiff.—The subscription moneys ought to have been applied by the society in reduction of the amount of the mortgagor's periodical repayments; and the plaintiff is, therefore, entitled to these moneys,

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which if so applied would have increased the surplus proceeds of sale of the mortgaged property.

Marten, Q.C., and *Boome*, for Griffiths.—Our client became entitled to the subscription moneys under the indenture of the 26th of October, 1881. At any rate, the doctrine of marshalling applies, and the repayment of the moneys due to the society ought, as between the plaintiff and Griffiths, to be made rateably out of the two funds.

Birrell, for the society.

Barnes v. Racster (1) and *Bugden v. Bignold* (2) were cited.

KAY, J.—If a person mortgages estates X and Y to A., and then mortgages or assigns estate X to B., and Y to C., the rights between B. and C. are to compel the payment of the first debt out of the two estates rateably, and throw it on them rateably, so that there shall be left of those estates the proper proportion for each of the separate assigns. That right exists. It is not a right which the first mortgagee can interfere with in any way. He cannot say, "I have paid myself out of this estate, and therefore the right is gone." The right is a right quite independent of him. It does not interfere with him, but if he chooses to pay himself the whole debt out of one estate, then, to the extent of the proportion of that estate as between the two separate assigns, it must be paid out of the other estate. The equity is an equity between the two separate assigns. It is the equitable mode of administering an estate which is subject to charges. Now I take it that that equity applies just as much where there is an express charge as where there is in effect a charge, because it arises from the circumstance that the first mortgagee has two funds out of which to pay himself. If A., the first mortgagee, has two funds, either or both of which he may apply in paying himself, and then one of those funds is assigned to B. and the other to C., the equity between B. and C. exists from the simple fact that A., the first mortgagee, has two funds out

of which he may pay himself. Now, whether that right arises from a positive charge, or whether it arises by operation of law in the circumstances under which the two funds came into his hands, it is a right which he can exercise against both the subsequent assigns of either fund; and where he can exercise that right against both the subsequent assigns of either fund, in my opinion an equity to an apportionment of his charge exists between the separate assigns of the funds against which he has that equity. Now, to apply that doctrine to this case, I must first find that this society had a right not only against the mortgaged estate, but against the fund which is now in question. Now, under the rules of this society, which is a building society, Henry Robinson obtained an advance. He mortgaged to the society property which belonged to him for the repayment of that advance, and all other payments he had to make in respect of the advanced shares. He was not bound to make any further subscriptions. His subscriptions had come to an end, unless he chose further to subscribe in respect of the advanced shares. He could possibly keep up his subscriptions long enough to entitle him to an advance. He did make further subscriptions; and then came a time when he was not able to continue those subscriptions or to continue the repayments which, by the terms of his mortgage, he ought periodically to have made. He did neither, and he never recommenced paying either his subscription or his repayments. Subsequently to the mortgage which charged all the shares, he made a further mortgage of the estate to one person, and then he made an assignment for the benefit of his creditors of all his property to another person. That other person, whose name is Griffiths, now claims the amount of subscriptions which he paid in respect of his shares after the mortgage. The society have sold the mortgaged property for 1,300*l.*, and they have repaid themselves out of the proceeds of the mortgaged property all their advance and everything that was due under the mortgage. The mortgage contains covenants for payment besides the charge, and those covenants for payment made all

(1) 1 You. & C.C.C. 401; 11 Law J. Rep. Chanc. 228.

(2) 2 You. & C.C.C. 337.

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the repayments that Robinson ought to have made to the society a personal debt from him. Now the question is, as between Griffiths, who has got a general assignment which would pass anything due to Robinson in respect of subscriptions, and the subsequent mortgagee of the estate, who is a different person, what is the equity between the two? The equity between the two is that which I indicated at the outset of what I have said. The question is, whether or not the society had a right of recourse for the advance not only against the mortgaged estate, but against these subscriptions, which amount to 336%. There is nothing in the rules which gives it to them in express terms. The end of the 19th rule is: If any member who has obtained an advance be desirous of withdrawing from the society, the amount of his subscription may be placed to the credit of his repayments account, subject to certain deductions. The 19th rule commences thus: "In case any member discontinues his subscriptions" (which is what happened in this case) "after receiving an appropriation, he shall forfeit a bonus of 10*l.* per share, and his mortgage shall be deemed unredeemable until he shall have paid such sum of 10*l.* per share, as well as all payments covenanted to be paid by the said mortgage deed; but such member shall be entitled to have any sum he may have paid by way of subscriptions to this society placed to his credit in respect of his repayments and forfeiture of bonus." Therefore, this is a case in which he was entitled by contract between himself and the society—because all these rules amount to a contract—to have the subscriptions placed against the repayments due in respect of his mortgage. His right is quite clear. Now had the society a corresponding right or not? I quite agree that that rule does not give it them. Nor is there any rule which says, by way of contract, that the society shall have a right to place subscriptions against the mortgage debt. But the mortgage debt is secured by covenant. Suppose the mortgagor had said, "It is true I owe you 500*l.* for my mortgage; but you owe me 336*l.* for subscriptions. Hand over those subscriptions to me." If, at the time he said that, the

mortgage debt was actually due, what would have been the answer of the society? It would have been this: "But you owe us more money than we owe you, and the law gives us a right to set off one debt against the other." Could there have been any answer to that? I confess I do not see it, and I have listened with attention to hear whether there could be an answer to that. If that is the law, that is the reason why it was not thought necessary to put into the 19th rule a provision that there should be a corresponding right on the part of the society to pay themselves out of these subscriptions. It seems to me that it would be the case that the law would give that right; and I have not heard a word that I can rely on as really disputing that proposition. Then it was the fact that when the mortgage debt was all due, the society had a right to resort not only to the mortgaged property, but to say, "We will set off this 336*l.* against money which you owe us on the covenant in the mortgage deed." The way to try it is this. Suppose the mortgaged property had turned out to be greatly insufficient to pay the mortgage debt, could the mortgagor have said to the society, "That is true, the mortgage is insufficient; nevertheless, you shall pay me over the amount you owe me for these subscriptions"? To my mind, it is quite plain that he could not. Therefore the result is, whether by contract or by the operation of the law of set-off, that the society had a right not only against the mortgaged property, but against this fund, and that neither the mortgagor, nor any one claiming under the mortgagor, could insist on having that fund paid over till the mortgage debt was satisfied. That brings it within the simple case which I stated at the outset of what I have said. The society had an estate and a fund to which they might resort for payment of the debt due to them from Robinson. Robinson afterwards assigned the estate to one person, and assigned the fund to another person. The equity between the two assigns is to have the debt paid rateably out of the two funds. It is no answer whatever to that, as I have already observed, to say, "But the society have paid themselves out of the fund, and, therefore,

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we cannot get rid of what they have done." That would be a hopeless argument. The Court has now to determine who is entitled to this other fund which has not been applied, and which is still in the hands of the society. I consider that the right mode to deal with it is to take the debt rateably out of the 1,300*l.*, the net proceeds of the estate, and the amount of the subscriptions, and then to hand over what remains of the subscriptions to Griffiths, and what remains of the estate to the assign who has the estate. The costs of all parties will be paid out of the fund.

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Solicitors—Badham & Williams, agents for W. L. Williams, Wakefield, for Emma Moxon; G. & W. Webb, for J. J. Griffiths; Laundry, Son & Kedge, for the society.

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STIRLING, J. } THE GUARDIANS OF TEND-
1890. } RING UNION v. DOWTON.
May 22. }

Street Improvements—Expenses of Paving and Metalling—Charge upon "Premises"—Land subject to a Restrictive Covenant—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4 and 257.

The charge created by section 257 of the Public Health Act, 1875, for expenses incurred by a local authority, for the repayment whereof the owner of the premises in respect of which the same are incurred is liable under the Act, is a charge upon "the premises," that is, the land itself, not the interest of any particular owner of the land, and such a charge takes precedence of a restrictive covenant affecting the premises.

This was a motion by the plaintiffs for judgment upon an admission of facts in the statement of defence.

The plaintiffs were the rural sanitary authority within the meaning of the Public Health Act, 1875, for the area of the Tendring Union. The defendant Dowton was the owner in fee-simple of a piece of land abutting upon Anglefield Road, Great Clacton, which was within the union. The land had been conveyed

to him subject to a covenant restraining him, his heirs, and assigns from building thereon. In March, 1886, the plaintiffs put into operation the provisions of section 150 of the Public Health Act, 1875, with respect to Anglefield Road, and served upon the defendant Dowton, and the other owners and occupiers of premises fronting upon the road, notices requiring them to level, pave, metal, flag, and channel it within a time specified. The notices not being complied with, the plaintiffs executed the works themselves, and their surveyor apportioned the money expended among the owners in default, the proportion of expenses payable by Dowton in respect of his premises being 131*l.* 1*s.* 9*d.*

Dowton did not dispute this apportionment, but he did not pay the amount demanded, and in March, 1889, an order was made by a Court of summary jurisdiction that he should pay to the plaintiffs the amount they claimed, with interest at five per cent., and 2*l.* 17*s.* 8*d.* for costs. A warrant of distress was issued against Dowton for these sums, but no goods of his were found to satisfy the warrant. The plaintiffs then brought this action, asking that the 131*l.* 1*s.* 9*d.*, with interest at five per cent., and the 2*l.* 17*s.* 8*d.* might be declared to be a charge upon the premises in question; and that, for the purpose of satisfying the charge, the premises might be ordered to be sold free from the restrictive covenant before mentioned.

The persons entitled to the benefit of this covenant were the owners of the neighbouring land, which had been sold in building plots, the vendor, who was then the owner of Dowton's land also, entering into a covenant with each purchaser that that piece of land should not be built upon. One of such persons, the defendant Slimon, was appointed by the Court to represent all the others. He, by his statement of defence, admitted, for the purposes of the action, the allegations in the statement of claim. The defendant Dowton did not appear.

A. Macmorran, for the plaintiffs.—Under section 257 of the Public Health Act, 1875, where a local authority have incurred expenses for the repayment

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whereof the owner of the premises for or in respect of which the same are incurred is made liable under the Act, such expenses may be recovered, with interest, from the owner of such premises, and until recovery the same are "a charge on the premises in respect of which they were incurred." That gives a charge on the actual land, not on anybody's interest in it—*The Tottenham Local Board of Health v. Rowell* (1) and *The Corporation of Birmingham v. Baker* (2). We are, therefore, entitled to have the land sold free from this covenant.

E. Beaumont, for the defendant Slimon.—My clients claim, in effect, an easement over the property. In *The Corporation of Birmingham v. Baker* (2) the claim was under a mortgage. If this land were being taken by a school board or railway company, they would not have to give us notice to treat, but we should be entitled to compensation as for land injuriously affected—*Clark v. The School Board for London* (3) and *The Duke of Bedford v. Dawson* (4). We should be entitled to compensation if the land were being purchased by the local authority under the Artisans' Dwellings Act, 1875 (38 & 39 Vict. c. 36. s. 20). They ought not to be allowed to realise their charge under the Public Health Act regardless of our easement.

STIRLING, J.—This application raises a question, which is, no doubt, a new one, but it seems to me to be governed in principle by the decision to which I have been referred in *The Corporation of Birmingham v. Baker* (2). [His Lordship referred to the facts, observing that it had been stated that subject to the covenant the piece of land in question was really worth little or nothing. After reading section 257 of the Public Health Act, 1875, he continued:] Turning to the definition of "owner" in section 4 of the Act, I find that it means "The person for the time being receiving the rack-rent of the lands or premises in

connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." So that any person for the time being receiving the rack-rent of premises is the owner, and that, I believe, has been held to be so, even though he may have no title at all, and another person is the real owner; and he is so, according to the terms of the Act, whether he is receiving it on his own account, or as agent of another person, so that the expenses may be recovered from the agent of any person who is actually in receipt of the rack-rent of the property. That being the very wide sense in which the word owner is used, what is the language with reference to the charge? It is that the expenses are to be "a charge on the premises," not on the interest of the owner in the premises, but on the premises themselves. That means on the land itself, and it accordingly has been held by the late Master of the Rolls in *The Corporation of Birmingham v. Baker* (2) that the charge under section 257 is a charge upon what he terms the whole proprietorship in the land, not upon any particular section or portion of the proprietorship, but upon the whole, and in that particular case he held that the charge thus created took precedence of a mortgage on the land in respect of which the charge was sought to be enforced.

It is said in the present case that the charge does not take precedence of the restrictive covenant. I am unable to follow that. If I did I should be holding in this particular case that the charge was constituted, not on the land itself, but on the interest of the particular person who happens to be the owner in fee-simple. That, in my opinion, would be contrary to the decision in *The Corporation of Birmingham v. Baker* (2). I declare that the sums in question are a charge upon the land, and that the charge overrides the covenant.

I think that this must be treated merely as an interlocutory application, inasmuch as all the persons entitled to the benefit of the covenant are not before the Court. There must be an enquiry as to who those persons are, and I direct the rest of the

(1) 49 Law J. Rep. Chanc. 147; 50 *ibid.* 99; Law Rep. 15 Ch. D. 378.

(2) Law Rep. 17 Ch. D. 782.

(3) 43 Law J. Rep. Chanc. 421; Law Rep. 9 Chanc. 120.

(4) 44 Law J. Rep. Chanc. 549; Law Rep. 20 Eq. 353.

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motion to stand over. It can then be brought on for judgment again when everybody is before the Court.

Solicitors—Oldman & Clabburn, agents for Russell Sewell Daniel, Manningtree, Essex, for guardians; Chamberlayne, Beaumont & Taylor, for defendant Slimon.

[IN THE COURT OF APPEAL.]

[Lunacy.]

LORD HALSBURY, L.C.

COTTON, L.J.

LINDLEY, L.J.

1890.

May 7.

In re BROWN.

Compulsory Purchase of Land—Payment into Court—Conversion of National Debt—Redemption of Consols—Payment of Amount into Court—“Cash under Control of Court”—Lord St. Leonards’ Act (23 & 24 Vict. c. 38), s. 10—Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 69—Rules of Supreme Court, 1883, Order XXII. rule 17, as altered by Rules of the Supreme Court, November, 1888—Costs of Investment.

Money in Court paid for the redemption of Three per Cent. Consols, representing money paid into Court under the Lands Clauses Consolidation Act, 1845, is “cash under the control of the Court” within the meaning of the Act 23 & 24 Vict. c. 38, s. 10, and may be invested as such.

Ex parte St. John the Baptist College, Oxford (52 Law J. Rep. Chanc. 268; Law Rep. 22 Ch. D. 93), followed.

Where a change of investment of a fund representing money paid into Court by a railway company under the Lands Clauses Consolidation Act, 1845, is rendered necessary, not by any caprice of the holder, but by the act of the Government, the railway company ought to pay the costs of the re-investment.

In 1884 the Midland Railway Company, under their compulsory powers, purchased land belonging to a lunatic, and paid the purchase-money into Court under sec-

tion 69 of the Lands Clauses Consolidation Act, 1845, and this sum was afterwards ordered, on a petition presented by the committee of the lunatic, to be invested in Three per Cent. Consols, and was so invested, and the railway company were ordered to pay the costs of the petition.

On the conversion of the National Debt in 1888, the committee did not consent to the conversion of the Consols into 2½ per Cent. Consols, and the Government accordingly, under the provisions of the National Debt Redemption Act, 1889, redeemed the Three per Cent. Consols and paid the redemption money into Court, to the account of the lunatic, *ex parte* the railway company.

A petition was presented in Lunacy, by the committee of the lunatic, that the sum of cash in Court might be invested in preference stock of the Great Northern Railway, and was heard by Lindley, L.J., and Bowen, L.J., on the 23rd of April, 1890, when an order was made for the investment of the sum in Court as prayed, and that the Midland Railway Company should pay the costs of the application and of the investment, except so far as the costs of investment might have been increased by reason of the redemption-money exceeding the amount of the purchase-money originally paid by the company. The order as to costs followed the order in *The Attorney-General v. The Mayor of Rochester* (1)—*Seton on Decrees* (4th ed.), vol. 2, pt. 2, p. 1441.

Before the order on the petition was drawn up, the petition was, by the direction of the Court, restored to the paper for re-argument on two points—first, whether the Court had power to sanction the investment of the fund as prayed; secondly, whether the railway company ought to pay the costs.

The petition now came on for re-argument.

Sturges, for the petitioner.—The Court has power to sanction the investment asked for by the petition. The fund to be invested consists of the redemption-money paid by the Government for a sum of Three per Cent. Consols, representing

In re Brown, App.

money paid into Court by the Midland Railway Company under section 69 of the Lands Clauses Consolidation Act, 1845; and money paid into Court under that Act is cash "under the control of the Court" within the meaning of the 10th section of Lord St. Leonards' Act, and may be invested in any of the securities sanctioned by the Rules of Court—*Ex parte St. John the Baptist College, Oxford* (2). "Cash under the control of the Court" may, under Order XXII. rule 17, as altered by the Rules of the Supreme Court, November, 1888, be invested in preference stock of railways. The order as to the payment of costs by the railway company follows the order in *The Attorney-General v. The Mayor of Rochester* (1). The re-investment is caused by the act of the Government. The committee could, no doubt, have elected to take New 2½ per Cent. Consols; but he considered it for the benefit of the lunatic not to accept the conversion. Under the circumstances of the case it is right that the railway company should pay the costs of the re-investment.

Sargant, for the railway company.—This is not the case of an original investment, but of a re-investment, and is therefore distinguishable from *Ex parte St. John the Baptist College, Oxford* (2). The sum sought to be invested is the proceeds of the original investment. Section 80 of the Lands Clauses Consolidation Act, 1845, which regulates the payment of costs in cases of investments of funds paid into Court under that Act, does not provide that the costs of every re-investment are to be paid by the company, but only when the money is re-invested in the purchase of land; and the reason for that is that the name of the company is taken from the account—*In re The Bristol Free Grammar School* (3).

Sturges, in reply.—In *In re The Bristol Free Grammar School* (3) the fund had come into the hands of the Official Trustee of Charitable Funds, who was in fact the absolute owner of it.

THE LORD CHANCELLOR (LORD HALSBURY).—I think the order made by the Court when the petition was before it on a former occasion was right. The case is covered by authority. The Court of Appeal, in *Ex parte St. John the Baptist College, Oxford* (2), held that money paid into Court under the Lands Clauses Consolidation Act is "cash under the control of the Court," and is capable of being invested as such. On the question of costs, if it were a case of capricious change of investment, the question might arise whether we ought to require the railway company to pay the costs; but that is not the case here. The change was the act of the Government; and, in my opinion, the railway company ought properly to pay the costs of this investment.

COTTON, L.J., concurred.

LINDLEY, L.J.—I had some misgiving as to whether there might not have been some oversight in making the order made on the previous occasion. I will add a few words, though it is not usual to do so in these cases. The case of *Ex parte St. John the Baptist College, Oxford* (2), which has been cited to-day, satisfies me that the Court has power to sanction the investment sought. Then as to the costs. The question in the present case is a small one; but it is likely to be very important as a precedent, on account of the number of persons who may be affected by the scheme for the conversion of the Three per Cent. Consols. I now think that the view taken by the Lord Justice Bowen and myself on the previous occasion was right. When the change of investment has been rendered reasonably necessary by the act of the Government, and not by any caprice of the holder, I think it right that the company should bear the costs. The order will bear date as of this day.

Solicitors—Hamlin, Grammer & Hamlin, agents for B. C. Pullan, Leeds, for petitioner; Bell, Brodrick & Gray, agents for Rawson, Best & Son, Leeds, for respondents.

(2) 52 Law J. Rep. Chanc. 268; Law Rep. 22 Ch. D. 98.

(3) 47 Law J. Rep. Chanc. 317.

KEKEWICH, J. } *In re* THE METROPOLITAN
1890. } COAL CONSUMERS' ASSO-
April 1. } CIATION. GRIEB'S CASE.

Practice—Costs—Taxation—Separate Proceedings for Similar Objects—Same Solicitor for Different Plaintiffs—Duplicate Copies—Counsel's Fees—Rules of Court, Order LXV. rule 27, sub-rule 8.

Where the same solicitor is employed by different persons to conduct proceedings for the same or a similar purpose, he is entitled to such costs as would have been allowed in either action if he had not been engaged in the other, except as regards attendances or other matters which might have been done at the same time in both actions; and if the same counsel appear in both actions they ought in each action to have such fees as if they had not been instructed in the other.

Adjourned summons.

This was a summons taken out by H. L. O. Grieb to review the taxation of his costs in successful proceedings against the association. The judgment, dated the 16th of January, 1890, was made on motion by Grieb to have his name removed from the list of shareholders, on the ground of fraudulent misrepresentation.

A like application was made by a Mr. Thursby, which was heard on the same day and before the same Judge, but before Grieb's application. The same solicitor and the same counsel appeared for both Thursby and Grieb, and a like order, directing the rectification of the register as prayed, and the payment of the applicant's costs, was made in each case.

The Taxing Master taxed Grieb's costs at 65*l.* 11*s.* 3*d.*, disallowing a number of items on the ground that they were duplicates of copies which had been allowed in Thursby's bill, and reducing counsel's fees as excessive. Grieb filed objections to the Taxing Master's certificate, in which he stated that his action was quite distinct from Thursby's, and based on different grounds; that he could not use Thursby's documents, which belonged to the latter; that it was only an accident that the same counsel and solicitor appeared for both, and that no agreement of any kind had been made between

him and Thursby. A Mr. Wainwright had previously been successful in a similar action against the association (reported *ante*, p. 281), and it was arranged that the evidence taken in Wainwright's action should be used in the other two actions, in which the counsel engaged was supplied with two identical copies of all the documents and evidence mentioned in the objections. The Judge also was furnished with identical copies. The items in Grieb's case, which had been disallowed, were copies of evidence taken in Wainwright's case, minutes of the association, notice to produce correspondence, shorthand notes, articles of association, petition to wind up the company, notes of inspection of minute-book, and a copy of correspondence for the Judge.

G. White, for the summons.—The Taxing Master ought to be directed to tax the costs on the same principle as if the parties had appeared by separate counsel and solicitors—*Oppenshaw v. Whitehead* (1), *Sharp v. Wright* (2), and *Robb v. Connor* (3).

Quin, for the official liquidator.—The question is one purely for the Taxing Master to exercise his discretion—Rules of Court, Order LXV. rule 27, sub-rule 8, appendix N.

KEKEWICH, J.—There has been a miscarriage of justice in this case. I regard the question from the client's point of view. Grieb sued the company for rescission of contract. He said that he had been induced to take shares by fraudulent misrepresentations. When he retained a solicitor, Grieb was entitled to say to him: "I will have my case taken into Court in the best possible way. The briefs and the proofs and the documentary evidence shall be complete; counsel must be instructed; you must go in to win." If the solicitor had said that he was engaged in another case of a similar character, and that it would save expense if he only made one copy of the documents and treated the two actions as one action—if he had said that—Grieb might have said, and if a sensible man he would have said: "I have nothing

(1) 9 Exch. Rep. 384; 23 Law J. Rep. Exch. 97.

(2) Law Rep. 1 Eq. 634.

(3) 9 Ir. Rep. Eq. 373.

In re Metropolitan Coal Consumers' Assoc.

to do with that action, but I am entitled to the full benefit of your experience, and I ask you to use it for me, and put my case fully before the Court." If that is a proper view for the client to take, the solicitor must be entitled to be paid for carrying out those instructions; and if he does the same thing for another client, he is entitled to be paid by him too. It is said that the cases were so much alike that the decision in one must cover the other. But this is a case of fraud, and it does not follow that what was conclusive in one case must be conclusive in the other; and if so, the defendants ought to have said: "Let us try one case, and we will then submit to a similar decision in the other." In my opinion the solicitor is entitled to be remunerated as if Grieb's case had been the only case. If he had had to serve a subpoena on the same person in both actions, or make a journey, he could not have made the full charge against both his clients, and there are several other matters of the same character which might require to be done but once for both actions, in which duplicate charges could not be allowed. That was held in *Oppenshaw v. Whitehead* (1), which is a useful case, and one which I shall endeavour to follow. Then there is the question of counsel's fees. I am extremely unwilling to refer this question back to the Master. He is competent to decide it, and in an ordinary case I should say nothing about it. But I cannot help seeing that the circumstances on which he relies on making the reduction are that the cases are similar and that they came on together. I do not think that is right. I think counsel ought to have proper briefs in every case. Accordingly, I will refer the whole bill back for taxation, with the direction that, except as regards attendances or other matters, which were, or ought to have been, done at one and the same time in both actions, the plaintiff's solicitor is entitled to charge in this action as if he had not been engaged in Thursby's action. The costs of the applicant will be paid to him in any event.

Solicitors—W. A. Colyer, for applicant; Lumley & Lumley, for official receiver.

NORTH, J. }
1890.
Jan. 30.
[Feb. 4.]

BERRIDGE v. BERRIDGE.

Principal and Surety—Indemnity given by Principal Debtor to one of several Co-sureties—Payment of Principal Debt by all Co-sureties—Right of Co-sureties to Benefit of Indemnity.

Five sureties executed a guarantee to a bank, by which they jointly and severally undertook to repay to the bank the balance for the time being owing to them by a customer on his current account, to the extent of 2,000l. Afterwards the principal debtor deposited with one of the sureties a policy of insurance on his own life to secure that surety against all liability in respect of the suretyship. The principal debtor became bankrupt, owing more than 2,000l. to the bank, whereupon the bank called upon the sureties to pay them 2,000l. under the guarantee. The sureties paid this sum in unequal amounts. The principal debtor afterwards died, and the policy money was received by the surety with whom the policy had been deposited:—Held, that inasmuch as the surety with whom the policy had been deposited was bound, upon the principle of *Steel v. Dixon* (50 Law J. Rep. Chanc. 51; Law Rep. 17 Ch.D. 825), to bring the policy money into hotchpot for the benefit of his co-sureties, the deposit in effect ensured for the benefit of all the co-sureties to the full extent of the principal debt, and that the policy money must accordingly be applied in repaying to the five co-sureties the amounts which they had respectively paid under the guarantee.

Special Case.

On the 9th of March, 1880, William Berridge, of Sibbertoft, James Berridge (one of the plaintiffs), William Berridge, of Upton, William Gilbert, and Alice Gilbert, at the request of Samuel Berridge, joined in a letter of guarantee to the Leicester Banking Company, by which they requested the bank to advance moneys to Samuel Berridge from time to time as he might require the same, "and in consideration thereof we jointly and severally undertake to repay you any amount that may be due to you on the

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balance of his current account, or on any other account or security whatsoever, not exceeding the sum of 2,000*l.*, whenever required by or on our behalf so to do."

On the 6th of April, 1880, William Berridge, of Sibbertoft, deposited with the bank the title-deeds of some land belonging to him, by way of security for the overdraft of Samuel Berridge with the bank, upon the terms of a memorandum dated the 6th of April, 1880, signed by the said William Berridge, and a receipt of the same date signed by the agent of the bank. By the memorandum which was addressed to the bank, William Berridge, of Sibbertoft, declared "that the deeds are deposited with you as a security for all sums of money now or hereafter to become due from my brother, Samuel Berridge, to the banking company, either upon the banking accounts or in any other matter whatsoever, including interest, commission, and all other usual banking charges." And William Berridge undertook, upon request, to execute to the bank a mortgage of the property for the better securing all sums of money intended to be thereby secured, such mortgage to contain a power of sale and all other usual clauses and covenants. The receipt for the deeds, signed by the agent of the bank on the same day, stated that they were deposited by William Berridge, of Sibbertoft, "as security for his brother Samuel Berridge's account when in excess of 2,000*l.*"

Some time prior to his death, which took place in 1887, Samuel Berridge had deposited with William Berridge, of Sibbertoft, two policies of assurance on the life of Samuel Berridge, each for the sum of 1,000*l.*, with bonus additions.

William Berridge, of Sibbertoft, died on the 6th of December, 1882, having by his will appointed the plaintiffs, James Berridge and John Earl, executors thereof, and they both proved the will. By the will he bequeathed all his moneys, securities for money, and all the residue of his personal estate, to his trustees, upon trust for sale and conversion as there mentioned, and to hold the proceeds and also his ready money upon trust, in the first place, thereout to pay his debts, including mortgage debts (if any), funeral and testa-

mentary expenses, and a legacy of 100*l.*, and to hold the residue thereof upon the trusts therein mentioned. By a deed dated the 28th of August, 1884, and made between Samuel Berridge of the one part, and the plaintiffs of the other part, after reciting to the effect that William Berridge, of Sibbertoft, became surety for the payment of certain moneys which might be owing by Samuel Berridge to the bank, and that Samuel Berridge, by way of indemnity, deposited with the said William Berridge the two above-mentioned policies on his own life, and that he, by his will, appointed the plaintiffs executors thereof, and that Samuel Berridge had, at the request of the plaintiffs, agreed to assign the policies in manner thereafter appearing, it was witnessed that, for the consideration aforesaid, Samuel Berridge, as beneficial owner, did thereby assign unto the plaintiffs the said two policies, whereby the sum of 2,000*l.* was assured to be paid to the executors, administrators, or assigns of Samuel Berridge at the end of six months after his death, subject to the annual premiums therein mentioned, together with all bonuses which might be added to the policies, or either of them, to hold the same unto the plaintiffs, their executors, administrators, and assigns, "provided always that, if the said Samuel Berridge shall, at any time hereafter, release or cause to be released the estate of the said William Berridge, deceased, from all liability in respect of the said suretyship, then the said policies shall be re-assigned unto the said Samuel Berridge, at his cost." It was also provided that, in case Samuel Berridge should not pay the premiums, the plaintiffs should pay them, and that Samuel Berridge should repay to the plaintiffs any moneys which they should pay for that purpose, with interest, and that in the meantime the moneys so expended, with interest thereon, should be an "additional charge on the policies and premises for the time being subject to this security."

On the 20th of January, 1886, a receiving order was made against Samuel Berridge, and on the 4th of February, 1886, he was adjudicated a bankrupt and a trustee was appointed. At the date of

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his bankruptcy Samuel Berridge was indebted to the bank in a sum of 3,842*l.* 14*s.* The bank proved for this sum in the bankruptcy, and received a dividend on their debt which reduced it to 3,334*l.* 9*s.* On the 6th of July, 1886, the bank applied to the guarantors under the guarantee of the 9th of March, 1880, to pay the sum of 2,000*l.* secured thereby, and the plaintiffs (on behalf of the estate of William Berridge, of Sibbertoft), the plaintiff James Berridge (on behalf of himself), the defendant Mary Alice Berridge (as representative of William Berridge, of Upton), William Gilbert, and Alice Gilbert paid to the bank the sum of 2,000*l.* in the proportions following—namely, the plaintiffs as executors of William Berridge, of Sibbertoft, 400*l.*; James Berridge, 500*l.*; the defendant Mary Alice Berridge, 500*l.*; and William Gilbert and Alice Gilbert, 600*l.* The bank afterwards called upon the plaintiffs, as executors of William Berridge, of Sibbertoft, to pay the sum of 1,334*l.* 9*s.*, the balance then remaining of the debt of 3,334*l.* 9*s.* due to the bank from Samuel Berridge, and the plaintiffs paid this sum to the bank on the 9th of November, 1886.

After the bankruptcy of Samuel Berridge, the plaintiffs paid the premiums on the policies, amounting together to the sum of 165*l.* 16*s.* 8*d.*

Samuel Berridge died in 1887 without having obtained his discharge. His estate had been wound up and the trustee in his bankruptcy released. The plaintiffs received the sum of 2,490*l.* in respect of the policies on the 18th of June, 1888.

William Berridge, of Upton, had died intestate. The defendant Mary Alice Berridge was his administratrix. William Gilbert and Alice Gilbert had both been adjudicated bankrupt, and the trustee of their respective estates was a defendant. The trustee in the bankruptcy of Samuel Berridge was also a defendant.

The questions submitted for the opinion of the Court were:—

1. Whether the said sum of 2,490*l.* should be applied—first, in payment to the plaintiffs, as executors of William Berridge, of Sibbertoft, of the sums expended by them in respect of premiums

on the policies, with interest thereon, and in payment of the plaintiffs' costs, charges, and expenses, in respect of the policies and of the deed of the 28th of August, 1884; secondly, in payment to the plaintiffs, as executors of William Berridge, of Sibbertoft, of the sums of 400*l.* and 1,334*l.* 9*s.* respectively, with interest thereon; and, thirdly, whether the residue of the said sum of 2,490*l.* should be paid to the defendants and the plaintiff James Berridge in his own right, or some or one of them; or

2. How otherwise the said sum of 2,490*l.* ought to be dealt with and distributed.

3. How the costs of this application ought to be paid or borne.

Cozens-Hardy, Q.C., and *Dibdin*, for the plaintiffs.—When one co-surety obtains from the principal debtor a counter-security against his liability, he is bound to give his co-sureties the benefit of it *pari passu*. After the estate of the plaintiffs' testator has been repaid out of the policy moneys what it has paid to the bank on the further security, the plaintiffs, as his executors, will be entitled to retain out of the balance of the policy moneys the amount which the estate has paid to the bank on the guarantee. The co-sureties will then be entitled to participate in this sum. This process will have to be continued until all the co-sureties have been paid in full or the money has been exhausted—*Steel v. Dixon* (1) and *In re Arcedechne* (2).

Ingle Joyce, for the trustee in bankruptcy of Samuel Berridge.—The claim of the plaintiffs is an attempt to extend the doctrine of *Steel v. Dixon* (1). That case only shews that if one co-surety obtains a counter-security from the principal debtor, he must bring into hotchpot for the benefit of his co-sureties what he receives from that source. He is not, however, then entitled to obtain anything more out of the counter-security. A person who becomes surety for a debtor at the request of

(1) 50 Law J. Rep. Chanc. 591; Law Rep. 17 Ch. D. 825.

(2) 53 Law J. Rep. Chanc. 102; Law Rep. 24 Ch. D. 709.

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a co-surety cannot call upon that co-surety for contribution—*Turner v. Davis* (3) and *De Colyer on Guarantees* (2nd ed.), p. 313.

The other defendants did not appear at the trial.

Cozens-Hardy, Q.C., in reply.—*Steel v. Dixon* (1) shows that the fact that the indemnity was given after the contract is immaterial. The 1,334*l.* 9*s.* is entitled to priority over the 2,000*l.*

NORTH, J. [after reading the original guarantee of the 9th of March, 1880, the memorandum of deposit and the receipt, continued:] I do not see anything in the memorandum which shews that William Berridge thereby undertook any personal liability, by reason of which he can be sued in debt in respect of the amount covered by that security. If the security had been given by the principal debtor who was receiving the advance from the bank, the matter would, in my opinion, have stood in a totally different position. But the liability of the surety must be measured by that which is expressed in the written document, which alone constitutes the security, and here he merely deposits the documents as security. That, in my opinion, does not amount to a contract that he is also to be personally liable for the repayment of the debt. Then there is the receipt for the deeds signed by the agent for the bank; and I think the terms of the deposit are contained in the two documents, and I must read the two as if they were one. The second document makes it clear what the nature of the deposit was. It was to be a security for the surplus of the debt to the bank in excess of the 2,000*l.* After that Samuel Berridge deposited with William Berridge, of Sibbertoft, two policies of assurance for 1,000*l.* each. There is nothing to shew at what date the deposit was made. It must, I think, have been after the original agreement of suretyship of the 9th of March, 1880; but whether it was between the 9th of March, 1880, and the 6th of April, 1880, or whether it was subsequently to the 6th of April, 1880, I have no means of judging. Then came the deed of the 28th of August, 1884. [His Lord-

(3) 2 Esp. 478.

ship read the deed, and continued:] Samuel Berridge became bankrupt; he did not pay anything to the bank. He has since died, and a sum of 2,490*l.* has been received by the plaintiffs in respect of the policies. The question is how that money is to be applied. The 2,000*l.* was paid to the bank by the five sureties in unequal proportions. The plaintiffs, as executors of William Berridge, of Sibbertoft, paid their proper proportion of 400*l.*; James Berridge paid 500*l.*; Mary Alice Berridge, as representative of William Berridge, of Upton, paid 500*l.*; and William Gilbert and Alice Gilbert paid only 600*l.* between them, which was less than their proper contribution. Of course, the construction of the deed of August, 1884, cannot be affected by the actual course of events afterwards. For the purpose of considering the construction of that deed, let me suppose that the bank had claimed from the plaintiffs, as executors of William Berridge, of Sibbertoft, payment of the whole debt due from the principal debtor, and that they had then paid the whole amount; what, in that case, would have been their right as against the policy-moneys? The policies were to be reassured to Samuel Berridge only if he should at any time thereafter release the estate of William Berridge, deceased, "from all liability in respect of the said suretyship." Now, at the moment of which I am speaking, all liability in respect of the suretyship would, in one sense, have been at an end, because the principal debt would have been paid off by the surety. But it would be absurd to suppose that so soon as one of the sureties had paid off the principal debt, the deposit, by way of security to that surety, was to be at an end. Of course, the meaning is that the policies are to be a security to the surety so as to relieve him from liability, not only in the sense of paying off the principal debt, but by repaying to him whatever he has had to pay in order to satisfy the liability of the principal debtor. Therefore, in the case which I have put, it is clear that William Berridge's estate would have been entitled to receive back the 2,000*l.* which it had paid in satisfaction of the security. That event did not, how-

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ever, happen, and, in fact, William Berridge's estate has paid only 400*l*.

But now, the policy-money being divisible, the question is in what shares it ought to be divided. The other co-sureties now claim to have the benefit of the security which was taken by William Berridge, of Sibbertoft, upon the policies belonging to the principal debtor. It is said that they have never yet made any such claim. There is no reason why they should have made any such claim until the present moment, because nothing has yet been repaid to any one out of the estate of the principal debtor, and it is only now, when the policies have been realised and the money is forthcoming, that the question how it ought to be divided arises for any practical purpose. When it is suggested that 400*l*. should be paid to the plaintiffs, the other co-sureties say, "If that sum is to be paid to the plaintiffs, we claim to share in it." Thereupon the plaintiffs reply, "If that 400*l*. is to be divided among all the co-sureties, the payment of 400*l*. will not be a complete indemnity to our testator's estate," and, therefore, the question is really at large what is to be done with this money for the purpose of indemnifying the plaintiffs. I think it is quite right that the premiums should first be repaid with interest, and then the costs in connection with the equitable mortgage and the costs of the action. The next claim is the 1,334*l*. 9*s*., which the plaintiffs paid in respect of the equitable mortgage which their testator gave. It is clear that they paid that sum out of his personal estate in order to redeem the deposited deeds, because under his will they were bound to apply his personal estate in redeeming the deeds. That was, therefore, a proper payment, and the plaintiffs are entitled to receive the 1,334*l*. 9*s*. out of the proceeds of the policies. Then the plaintiffs are also entitled to the 400*l*. which they paid to the bank on account of the 2,000*l*.; and when that 400*l*. has been paid to the plaintiffs or retained by them it cannot be applied solely in satisfying them; but it must, according to the doctrine of *Steel v. Dixon* (1), be shared between them and the other co-sureties. Then, will the plaintiffs be entitled to

receive anything more? In my opinion they will, because otherwise the estate of their testator will not have been released "from all liability in respect of the suretyship." It will only have been repaid one fifth part of the 400*l*. which it has paid to the bank, because the rest of the 400*l*. will have gone to pay the co-sureties, who, on the principle of *Steel v. Dixon* (1), had a legal right to share in the 400*l*. That being so, something more must be paid to the plaintiffs. There must be paid to them such a further sum as will make up to them that which has been taken away from them by reason of the claim of the other co-sureties to share in 400*l*. Then, again, that further sum, when it has been paid to them, will have to be distributed in a similar manner; and, therefore, if the rights were worked out in that way, there would be successive payments made out of the policy-money to the plaintiffs until the rights of all the co-sureties had been satisfied, and then only the plaintiffs would be in a position to say that they had got the 400*l*. to which they are entitled under the deed of August, 1884.

In my opinion, this result necessarily flows from the doctrine of *Steel v. Dixon* (1), though I do not think that the point was actually decided there. In that case, the plaintiffs, for some reason I could never understand, limited their claim to a share of the first payment received by their co-surety by means of his counter-indemnity, and did not ask to share in any subsequent payments to him. They did not claim to share in the whole of the proceeds of the counter-security, but only to the extent of the 400*l*. I think the principle of the decision would have entitled them to more, if they had asked for it, and I think it entitles the co-sureties in the present case to the relief which I have mentioned.

There would be no further question if the proceeds of the policies were sufficient, after the prior payments which I have mentioned, to pay both the 1,334*l*. 9*s*. and the 2,000*l*. in full; but those proceeds are not sufficient. The question, therefore, arises, whether the 1,334*l*. 9*s*. ought to be paid in priority to the 2,000*l*.? I do not

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see any reason why it should. The deposit of the policies was made to release the estate of the plaintiffs' testator from all liability in respect of his suretyship for the principal debtor, and I can find nothing in the deed of August, 1884, which makes a distinction between his liability under the memorandum of deposit and his liability under the original guarantee.

That being so, I think the surplus of the policy-money, after making the prior payments which I have mentioned, must be applied, so far as it will extend, rateably in satisfying the 2,000*l.* and the 1,334*l.* 9*s.*

Cozens-Hardy, Q.C., for the plaintiffs.—A question arises with regard to those co-sureties who have paid more than the others. Two have paid 500*l.* each; the plaintiffs, as executors, have paid 400*l.*; and William and Alice Gilbert have paid 600*l.* between them—probably each 300*l.* I submit that, after payment of the premiums and costs, so much of the balance of the policy-moneys as is apportioned to the 2,000*l.* should be applied, first in paying to those sureties respectively who have paid more than 300*l.* the sum required to bring their payments down to 300*l.* each, then that the residue should be divided rateably among the five.

NORTH, J.—I think that is the right mode of division.

Solicitors—Bridges, Sawtell, Heywood & Co., agents for Howes, Percival & Ellen, Northampton; W. Murton, Solicitor to the Board of Trade.

[IN THE COURT OF APPEAL.]

LORD HALSBURY, L.C.

LINDLEY, L.J.

BOWEN, L.J.

1890.

April 24, 25.

In re JODRELL.
JODRELL v. SEALE.

Will—Construction—Illegitimate Relations—"Named"—"Relatives hereinbefore named."

A testator gave a series of legacies in trust for the respective children of several named persons whom he respectively described as his cousins, some of whom were not legitimately related to him, and he gave other legacies in trust for persons whom he described as nieces, some of whom were related by affinity only; and he directed his residuary estate "to be equally divided amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest." By a codicil he revoked the legacies in favour of the persons described as his nieces, and directed that they should not participate in the division of his residuary estate as directed by the will. At the date of the codicil there was only one person legally related to the testator and mentioned by name in the will who was entitled to take under the residuary bequest:—Held, reversing the decision of STIRLING, J., that the children of persons named as cousins, whether legally related or not, were "relatives hereinbefore named" within the meaning of the residuary clause. Principles of construction discussed.

The Rev. Sir Edw. Repps Jodrell, Bart., by his will, dated the 23rd of March, 1868, appointed his wife and two other persons executors and trustees, and after making certain pecuniary bequests he bequeathed "to my cousin Richard Jennings" the marble bust of his grandfather, and after his decease he bequeathed the same to his (the cousin's) heir-at-law, and he also bequeathed "to my cousin the Rev. Charles Philip Paul Jodrell" a gold chain to be selected by his executors. He then devised and bequeathed a sum of Consols, and certain policy moneys, and his general freehold, copyhold, and leasehold estate to his trustees and executors, upon trust for sale and conversion, and he directed the

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trustees to hold the proceeds, together with all the stocks, funds, and securities of which he should die possessed, upon trust to pay the dividends to his wife for life.

By clause 15 of the will he desired his trustees to sell and convert such stock, funds, and securities after his wife's death, and out of the proceeds to set apart and pay the legacies specified in the twenty following paragraphs.

By clause 16 the testator directed his trustees to set apart the sum of 5,000*l.*, and to divide the same "amongst such one or more of the children of my late cousin Major Edward Jodrell other than his eldest son, whom I exclude because he is sufficiently provided for, as shall be living at my wife's death, and as shall have attained or shall attain the age of twenty-one years, and if more than one, in equal shares."

By clause 17 he bequeathed the sum of 5,000*l.* upon similar trusts for the benefit of the children of "my cousin the Rev. Henry Jodrell," excluding the eldest daughter, who was stated to be otherwise provided for.

By clause 18 he bequeathed the sum of 5,000*l.*, upon trust to pay the income "to my cousin Mary Bishop" for life, and after her death upon trust for such of her children as should survive her and the testator's wife and attain twenty-one.

By clause 19 he bequeathed the sum of 5,000*l.*, upon trusts for "my said cousin Richard Jennings" and his wife during their respective lives, and after the decease of the survivor upon trust for such of the children as should survive them and the testator's wife and attain twenty-one.

By clause 20 he bequeathed the sum of 2,000*l.* upon trust for "my cousin Louisa Buller" for life, and after her death in trust for Charles Seale Hayne, Esq., of Kingsmere Castle, Devonshire, if he should survive the testator's wife and the said Louisa Buller. But if he should not survive them both, he directed the said sum to sink into the residue.

By clause 21 he bequeathed the sum of 3,000*l.* in trust for "my niece Emily Higgins," if she should survive the testator's wife and attain twenty-one. But if she should not survive the testator's

wife, or should die under twenty-one, he directed the said sum to sink into the residue.

By clause 22 he bequeathed the sum of 2,000*l.*, in trust to be divided between "my two nieces Mary Champagné and Blanche Champagné," if they should survive the testator's wife and attain twenty-one. If either of them should die in his wife's lifetime or under twenty-one, then the whole was to belong to the other; and if both, then he directed the said sum to sink into the residue.

By clause 23 he bequeathed 5,000*l.* in trust for "my cousin Major George King" for life, and, after his death, in trust for such of the children as should survive him and the testator's wife, and attain twenty-one.

By clause 24 he bequeathed 5,000*l.* upon trust for "my cousin Georgina Forde" for life, and after her death upon similar trusts for her children.

By clause 25 he bequeathed 5,000*l.* upon trust for "my cousin Emily MacDonnell," and after her death upon similar trusts for her children.

Clause 37 was as follows: "As to all the residue and remainder of my real and personal estate not hereby effectually disposed of, I direct the same to be equally divided amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property; and as to such of them as are females, for their separate use respectively and without power of anticipation."

The testator made several codicils to his will.

By the 1st codicil, dated the 23rd of March, 1868, the testator revoked the bequest of 2,000*l.* in favour of his nieces Mary Champagné and Blanche Champagné.

By the 5th codicil, dated the 26th of July, 1882, he revoked the bequest of 3,000*l.* in trust for his niece Emily Higgins (then Mrs. Churchill).

The 10th clause of the codicil recited that the testator had by the 1st codicil to his will revoked the bequest of 2,000*l.* in favour of his nieces Mary Champagné (then the wife of Col. Phillips) and Blanche Champagné, and that he had,

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by the codicil now in statement, revoked the bequest of 3,000*l.* in favour of his niece Emily Higgins (then Mrs. Churchill); and it continued as follows: "Now I hereby direct and declare it to be my intention that neither of my above-named three nieces shall be entitled to participate in the division of my residuary estate as directed by the 37th clause of my will, and I hereby expressly exclude them from coming under the provisions of such clause."

By clauses 11 and 12 the testator revoked the 2nd and 4th codicils to his will and confirmed his said will and the 1st and 3rd codicils thereto.

The testator died on the 12th of November, 1882, leaving a widow, who died on the 1st of March, 1888.

After the widow's death, an originating summons was taken out by the trustees and executors of the will to determine who were the persons entitled under the residuary gift; and certain enquiries were directed by the Court, including an enquiry as to which of the persons named in the will were relatives of the testator.

The chief clerk found as follows:—

Charles Philip Paul Jodrell died in 1875.

Major Edward Jodrell died in 1882, leaving several children, all of whom were now living.

The Rev. Henry Jodrell was still living.

Mary Bishop died in 1875, leaving one child, who was now living.

Richard Jennings survived his wife, and was still living.

Louisa Buller died in 1879, leaving one son, Charles Seale Hayne, who was now living.

Major George King died in 1877, leaving four children, who were all now living.

Mrs. Forde died in 1887, leaving three children, who were all living.

Mrs. MacDonnell died in 1883, leaving five children, who were all living.

Major King, Mrs. Forde, and Mrs. MacDonnell were not legitimately related to the testator, but were legitimate descendants of persons who, with the testator's mother, were the natural children of one Caroline Morison.

The other persons referred to by the testator in his will as cousins were legally his cousins.

Mary Champagné (now Mrs. Phillips) and Blanche Champagné were not included in the chief clerk's certificate as relations, and were in fact nieces of the testator's wife.

Stirling, J., held, first, that "transmissible" in the residuary clause meant capable of transmission after death, and consequently that persons who took life interests only under the will were not entitled to participate in the residue; and, secondly, that "relatives hereinbefore named" meant only legitimate relatives mentioned by name, and accordingly he declared that Charles Seale Hayne was the only person entitled under the residuary gift.

Appeals were brought against the latter part of this decision by two classes of legatees: the children of the testator's legitimate cousins, and the children of persons named in the will as cousins, but not legitimately related to the testator. There was no appeal from the decision so far as it related to the meaning of the word "transmissible."

Romer, Q.C., Moulton, Q.C., and W. B. Trevelyan, for some of the children of Major Jodrell, the children of the Rev. Henry Jodrell, and the child of Mrs. Bishop.—According to the interpretation put upon the will and codicils by Stirling, J., at the date of the will there were only three possible recipients, C. P. Jodrell, Hayne, and Miss Higgins; and at the date of the codicil only one. But the form of the residuary bequest is against that view of the testator's intention, and the codicil shews that the testator contemplated a division of his estate. In nearly all the bequests to relatives the persons ultimately entitled are first cousins once removed to the testator, whether legitimately related or otherwise. The intention of the testator is to treat all his relations on the same footing; only two are excluded, and they are stated to be otherwise provided for. If the residuary gift is so construed as to include all those children, the result will be a fair and equitable division of the testator's estate. We submit that the children are named sufficiently for the purpose of identification. C. S.

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Hayne and Emily Higgins are referred to by their names only because in each case they constituted the entire class. In this will "named" and "mentioned" are equivalent terms. If no persons had been mentioned *nominatim*, could it have been contended that the children ought to be excluded? So if the gift had been to the children of A., including John, would the Court have excluded the younger children?

Vaughan Hawkins and *Swinfen Eady*, for another child of Major Jodrell, referred to *Co. Litt.* (book 1, cap. 1, 3b).

Sir Horace Davey, Q.C., and *Rashleigh*, for the children of Major King.

Crackanthorpe, Q.C., and *Hadley*, for the children of Mrs. Forde and Mrs. MacDonnell.—The classes referred to in the will could not be named in the strict sense of the word. "Hereinbefore named" has reference to "relatives," and the meaning is "persons hereinbefore named as relatives." That lets in the illegitimate relations.

Owen v. Bryant (1) covers this case.

Rigby, Q.C., and *Christopher James*, for the respondent Charles Seale Hayne.—"Named" must have its primary meaning unless there is some context to the contrary, and here there is no such context. The *prima facie* meaning of "to name" is to mention a person by his or her name. "Relative" in legal documents means next-of-kin according to the Statute of Distributions. It is used in a popular sense to include persons related by affinity as well as those related by consanguinity. But there must be some context in order to give the word its popular sense. If "named" is used in its secondary sense in this will it is inoperative. We admit that "relatives" is used so as to include persons related by affinity, but that is not a reason for extending the word so as to include illegitimate relations. The mere fact that a person has been named as a relative does not make him a relative for all the purposes of the will. Illegitimate relations cannot be included unless the ordinary legal interpretation of the word gives rise to some repugnancy or incon-

sistency. The will must be construed according to what the testator has said, and it is not for the Court to guess what his meaning was.

They referred to *Johnson's Dictionary*, *Webster's Dictionary*, the *Imperial Dictionary*, *Megson v. Hindle* (2), *Smith v. Lidiard* (3), *In re Brown* (4), *Nannock v. Horton* (5), *Dorin v. Dorin* (6), *In re Humphries*; *Smith v. Millidge* (7), and *Edmunds v. Fessey* (8).

[THE LORD CHANCELLOR referred to *Wilkinson v. Adam* (9) and *Allen v. Webster* (10).]

Lytellon Chubb, for the executors and trustees of the will.

Sir H. Davey, Q.C., in reply.—It is the duty of the Court to look first at the general scope of the testamentary instrument, and then to look at the particular words—*Abbott v. Middleton* (11). As to the meaning of relatives, the decision of the House of Lords in *Hill v. Crook* (12) explains the principles on which the Court ought to act. This case differs from other cases in that the persons who claim under the residuary bequest are not themselves illegitimate. It is admitted that "relatives" in this will include persons related by affinity, but it is a less violent extension to make the word include persons related by blood, although not legally related by reason of the illegitimacy of one of their ancestors. The cases cited on behalf of the respondent shew that the test in determining whether illegitimate relations who have been previously described as relations are entitled under a residuary bequest, is whether there is a sufficient connection between the residuary gift and the previous gift. There is no longer any

(2) Law Rep. 15 Ch. D. 198.

(3) 3 Kay & J. 252.

(4) 58 Law J. Rep. Chanc. 420.

(5) 7 Ves. 391.

(6) 45 Law J. Rep. Chanc. 652; Law Rep. 7 E. & I. App. 568.

(7) Law Rep. 24 Ch. D. 691.

(8) 29 Beav. 233; 30 Law J. Rep. Chanc. 279.

(9) 1 Ves. & B. 422.

(10) 6 Jur. N.S. 574.

(11) 7 H.L. Cas. 68; 28 Law J. Rep. Chanc. 110.

(12) 42 Law J. Rep. Chanc. 702, 716; Law Rep. 6 E. & I. App. 265, 285.

(1) 3 De Gex, M. & G. 697; 21 Law J. Rep. Chanc. 860.

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question of public policy involved in the admission of illegitimate children—*Occleston v. Fullalove* (13). As to the meaning of “named,” it appears from *Mill’s Logic*, c. ii. that “name” may be the designation of a person by a description. “Named” is susceptible of meaning “named as a class”—*Bromley v. Wright* (14) and *In re Holmes* (15).

LORD HALSBURY, L.C.—I am called upon to express an opinion on what is the meaning of this written instrument, and I repudiate entirely the notion of laying down any canon of construction which is to extend beyond the particular instrument which I am called upon to construe. I do not know what the testator meant except by the words that he has used. I do not think that the law is intended to afford any presumption whether a testator intends to benefit those who are related to himself in the strict sense, or related to his wife. I do not know that the law presumes that he means to make a provision for those in respect of whom it may be said they are connected by blood, although not, in every link of the pedigree, by wedlock. The law makes no presumption, I believe, upon the subject; and it would be very strange if it did, because the law will allow you, if you choose expressly and in terms, to leave things to your wife’s relations, or to leave things to persons who are not your legitimate descendants; and, inasmuch as the law permits both these things to be done expressly, I myself am wholly unable to understand in what way a Court of construction is called upon to put particular interpretations upon particular words with reference to any supposed presumption that the law makes either way. For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document, and not a part of it; and, having looked at the whole of the document, to see (if I can) through the instrument what was the mind of the testator. Those are general principles for the construction of all in-

struments—and to that extent it may be said that they are canons of construction. But the moment I depart from those general canons of construction applicable to all instruments, and am overwhelmed with authorities about what particular Judges have thought about other particular instruments, and as to whether in this or that particular instrument the Judge has been sufficiently satisfied that such and such was the meaning of the testator, I confess myself to be in a hopeless state of confusion. In the first place, I do not know what mental thermometer there is to ascertain what exact degree of certainty is to be obtained. If there is sufficient to establish the meaning, it is sufficient. And what does that mean? It must mean sufficient in the mind of the particular tribunal that has to decide the question. That there are particular words and phrases, and particular sets of phrases, to which the law would attach a particular meaning is true; and when such words or such phrases are found in an instrument, unqualified and unexplained by anything else, of course you must give to them the meaning which the law has attached to them, and it would be unreasonable if you did not; because you must suppose, in the absence of any other explanation, that the person who has used one of those particular words or those particular phrases has used the phrase or the word in the sense which has hitherto been attached to it by the law, and there is no reason to go out of what you might call the ordinary and *prima facie* meaning of such an expression.

I now come to construe this particular instrument, and in construing it I desire to adopt the language of Lord Cairns in *Hill v. Crook* (12). He says, referring to the use of the words “children,” “husband and wife,” and “marriage” by the testator in that case in relation to an irregular connection: “If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms that he has used, that is all which the law (as I understand the case) requires.” It seems to me that that was a very simple test, and adding only to that the circumstances of the case with which

(13) 43 Law J. Rep. Chanc. 297; Law Rep. 9 Chanc. 147.

(14) 7 Hare, 334.

(15) 1 Drew. 321; 22 Law J. Rep. Chanc. 393.

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the testator was dealing, in order that you may dive into the mind of the person who has made the instrument which you are endeavouring to construe, it appears to me you have all the legitimate materials from which you can deduce the meaning of the testator.

Now, applying to the present case those general observations which are applicable to the interpretation of all such instruments, I find that the testator has described a number of persons as his cousins. I do not think the particular word which we have to construe—the word “relative”—occurs in any other earlier part of the instrument than in that residuary clause which we are called upon to interpret, and when we do come to the word “relative,” in the 37th clause, we must find out what the testator has meant by that word. The first observation that strikes one is that he has described, according to the statement in the residuary gift (I use for the moment the word “described,” leaving out for the present the word “named,” which requires separate treatment)—he has described as relatives a number of persons in respect of whom his view is that, by the provisions that he has made, some of them may become entitled to a “vested transmissible interest” in some part of his property by virtue of the trusts or provisions thereinbefore contained—that is the first guide to the interpretation which I am called upon to make; and I find, therefore, that the word “relative” is used as a general word applicable to some of the persons whom he has thereinbefore described.

Now, that observation applies to Major King, Georgina Forde, and Emily MacDonald. Those are persons who are not cousins in the strict sense which is insisted on by the respondent. They are all persons with respect to whom the bar sinister would prevent the actual application in strictness of that language.

Then did the testator mean that they were to be persons who were to come within that other description—that they were persons who might become entitled to a vested transmissible interest in any part of his property? With respect to Major King, the provision is that after his death there should be a trust for such

one or more of his children as should survive him and the testator's wife, and should have attained, or should attain, the age of twenty-one years. And I think that formula is repeated with respect to each of them. Did he mean those persons when he spoke of his “relatives”? I confess for myself I cannot entertain the smallest doubt that they were in his mind as relatives. The whole framework of the will (I say nothing for the moment about the codicil) seems to me to point in that direction, and that direction only; and without repeating the same observations, I may say the same about those persons who are described by the testator as his nieces. He has, therefore, to use the language of Lord Cairns, given me a dictionary whereby I find that his wife's relatives, the nieces, and his illegitimate cousins are his relatives. Under those circumstances I am in a position to construe what he meant when I refer to the 37th section, and find that he directs his real and personal estate not effectually disposed of “to be equally divided amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property; and as to such of them as are females, for their separate use respectively, and without power of anticipation.” So far there seems to me to be no question of doubt at all.

Having satisfied myself that the testator used the word “relative” in an extended sense so as to include his wife's relations and those who are related in the way I have pointed out, I come to the next question, whether it was only those persons whose Christian names and surnames were inserted that he referred to, and that depends upon the true construction to be given to the words “hereinbefore named.” I confess that I have been a little puzzled to know in what way this will was to be construed, if the strict construction of that word “named” was to be given. Remembering that the will and the codicil are to be read together, I really do not know in what way more than one of the provisions of this will could be given effect to. But I find that

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the 37th section contemplates a division "equally amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions," and so forth, and I find that at the date of the codicil there was only one person who satisfied the description, if we adopt the limitation upon the language used by the testator that is insisted upon by the respondent; and therefore it seems to me that not only must we assume the testator not to have known the meaning of the particular words that he was employing, but we must assume that, although he knew, as he must have known, the position of his family, he reiterated the direction that the residuary estate was to be divided with all this particularity among such of his "relatives hereinbefore named," and so on, at a time when he must perfectly well have known that there was but one single person who could have satisfied that description.

Now, is it reasonable in construing the whole of an instrument, and looking to the state of the mind of the testator at that time, and assuming him to be aware of the meaning which he had himself previously attached to the language which he had used, and to the fact that he contemplated at that time a division, and a proportionate division, which, according to the argument for the respondent, was impossible in the events that had happened, to give such a construction to this instrument as, it appears to me, would completely frustrate the intentions of the testator as exhibited by the language which he himself has used, and by reason of some supposed overwhelming necessity to attach a peculiar technical meaning to words which it is not denied under some circumstances and with a sufficient context may bear a meaning which will give full effect to every part of the testator's complete testamentary disposition?

Under those circumstances I cannot entertain a doubt that we ought not to follow the decision of the learned Judge below. I think that the decision was erroneous, and I think that it must be reversed.

LINDLEY, L.J.—This will is long, and is

made longer by the addition of five codicils; but if one addresses one's mind to the will, for the purpose of ascertaining the intention of the testator from the language which he has used in the will and the codicils, it appears to me that the conclusion to be arrived at is not difficult to get at. In truth, in this case, as in many others, the difficulty arises when you look away from the document which you have to construe—when you look into cases, that is to say, which have been decided on other documents more or less like the one before you. I do not propose to deal with decided cases at all. It may be that there were expressions in the wills dealt with in these cases which made the Judges come to conclusions which I cannot arrive at when I come to look at the will and codicils with which I have to deal. In matters of construction I do not consider that a decision which is more or less at variance with other cases is wrong because it is so at variance. Cases of construction are useful when they lay down canons or rules of construction, and they are useful when they put an interpretation on common form phrases, whether in deeds, wills, or mercantile documents. They are valuable guides; but when I am told that because something occurs in one will I am to give a precisely similar effect to a similar expression occurring in another will dealing with a different property and in another context, I object altogether to do it. The only principle that I know of is that which has been expressed by the Lord Chancellor. "Look at the words, avail yourself of such evidence as is legitimately admissible, and see what the testator has said, and expound it as best you can with reference to what is legitimately before you." Now we have got to consider what the real meaning is of the 37th clause of this will. In order to do that, one must look far beyond clause 37. You must look at the whole will and all the codicils too; and when you look at the whole will you see this. First of all, the testator gives certain small legacies—some to persons who are relatives, some to servants, and some to other persons. Then he creates a trust fund which consists of the bulk of his property. He vests

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that in trustees, and he tells the trustees what they are to do. He subdivides it into sums of considerable amount—5,000*l.*, 3,000*l.*, 2,000*l.*, and so on—and he gives those sums, or tells the trustees to hold those sums, in trust for persons whom he describes as his “cousins,” as his “nieces,” and as “children of his cousins.” Then he says, by clause 37, “As to all the residue and remainder of my real and personal estate not hereby effectually disposed of, I direct the same to be equally divided amongst such of my relatives hereinbefore named, as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property, and as to such of them as are females to their separate use respectively without power of anticipation.” What does he mean by that? He has not said that the rest of his property is to be equally divided amongst his relatives. He has said nothing of the sort. If he had, a difficulty would arise which would be a formidable one; but it is “my relatives hereinbefore named,” and I cannot agree at all with the construction which was put upon this will, giving no meaning to those words “hereinbefore named.” On the contrary, those words appear to be the key to the whole thing. When we bear in mind that in point of fact some of the persons called cousins were not cousins (some of them were not legitimately related), when we bear in mind that some of the persons he calls “my nieces” were not his nieces (they were his wife’s nieces), the importance and the necessity of introducing some such expression as “hereinbefore named” become apparent, and it is obvious that you cannot, without doing violence to the language, treat those words as superfluous. In other words, you cannot treat the expression, “my relatives hereinbefore named,” as equivalent to “my relatives.” You must look at whom he has heretofore named as relatives. Now he has referred to them as relatives in two ways. He has referred to some of them by their names; he has referred to others of them in this way—he has called them children of persons whose names he gives. Are not the children of persons whose names he gives

“hereinbefore named” within the true meaning of this clause? It is said that they are not; but I cannot come to that conclusion. You may name a class, you may name a person by calling him the son of his father just as well as by calling him John Thomas; and to say that this expression “relatives hereinbefore named” excluded all those relatives who were before referred to as children of persons named would lead to a conclusion which I will shew presently appears to me to be entirely contrary to the testator’s manifest intention. That appears from the language of the 5th codicil. At the date of the 5th codicil, if the construction put upon this will by Mr. Justice Stirling is right, the only person who could take the residue was Mr. Charles Seale Hayne. Now, when the testator made his 5th codicil, he excluded from the persons amongst whom the residue was to be divided three persons called nieces in his will; and having excluded those, there is only one, according to Mr. Justice Stirling, who can take his residue. By the 5th codicil he confirms his will. What does that mean? It means he repeats at the date of his 5th codicil that his residue is to be divided amongst a class of people. How is that language apt to a state of things when the whole goes to one. There being an alternative construction which will let in a number of people whom he has already designated as the children of relatives and treated as relatives, is it consistent with the language of his 5th codicil, when he again directs his residue to be divided amongst those persons, to exclude the whole of them, and to give the whole of the property to one person? That conclusion appears to me so startling, and so entirely at variance with what he has said in his 5th codicil, that I unhesitatingly reject it. That leaves us in this position, that he means by the 37th clause of his will to include, and not to exclude, those relatives whom he has named by referring to them as a class, and it appears to me that that is the true view and the true construction of this will.

The case does not stop there, because he goes on—“such of my relatives herein-

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before named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property." That language is perfectly applicable to these children. They are all described as children who shall attain twenty-one, and shall survive his wife (I think that occurs in all). I do not say that that is conclusive, because the same words are applicable to some of the persons named—not as to all, but as to some. Then it goes on—"as to such as are females." Mr. Rigby relies upon the word "are." It seems to me the true answer to that is to be found in the clause. Recollect, the clause is a direction to the trustees. It says in substance the trustees are to divide the residue "amongst such of my relatives," and so on, "and as to such as are females for their separate use." What does that mean? What does the expression "are" refer to? Does it mean when he makes his will? Obviously not. Does it mean when he dies? No. Does it mean when the division has to be made? It appears to me, obviously, yes; and it is not doing violence to the word "are" to say that what he means is, "You are to divide my property among certain persons; and 'as to such as are females'—that is, those whom you find to be females then—'for their separate use.'" That appears to me, I confess, to be the true construction of this will; and I cannot myself entertain any doubt about it until I confuse myself by looking at other decisions. That I decline to do. Therefore, it seems to me that we should, if the Lord Chancellor and my brother Bowen acquiesce, make a declaration to this effect: "Declare that, according to the true interpretation of the testator's will and codicils, the testator's residuary estate has become divisible between such persons and children of persons mentioned or referred to by the testator as were, or are, referred to by his will as his relatives," and as survive his widow, and as have attained, or shall attain, twenty-one. Then we must add this—"with exception of the persons expressly excluded by the testator." Some are expressly excluded, and, of course, they cannot take.

BOWEN, L.J.—I am of the same opinion, and should add nothing at all to what has been said by the Lord Chancellor and Lord Justice Lindley, except that, as we are overruling the judgment of a very experienced Judge, it is rather more respectful to him that I should add a few words embodying my own judgment; but they will be based exactly on the lines which have been laid down in the judgment of those members of the Court who have preceded me. It seems to me, as it seems to them, that all we have to do is to take the words of the will and the codicil, and to examine them by the light of such evidence as is admissible in these cases, and when we have examined the will and the codicil by the light of that evidence to arrive at a conclusion as to what the testator's meaning is as expressed by him in his will. In this particular case, the words which we have to construe in the 37th clause of his will—the words "relatives hereinbefore named"—are words which receive, as it seems to me, a construction partly from the will itself and partly from the 5th codicil, which renders, I think, one, and only one, interpretation a reasonable one. You cannot put a reasonable interpretation upon the codicil unless you assume that, by the words "hereinbefore named" in the will, the testator intended, not merely such persons as were named by name, but such of his relatives as he had indicated before by the will as "relatives," and by a term appropriate to such a relationship. And I think it also follows that the term "relatives" must be taken not in the strict legal sense—not in the sense of those who are connected only with the testator by ties which the law recognises as legitimate—but all those in the previous part of the will who have been in effect called by him relatives, whether the legitimate tie exists between him and them or whether it does not. We were told that the law as established by authorities is that when the testator has used language in his will which designates the persons who are intended to receive benefits from him by the name of a tie which the law recognises, you must not include in the class even such persons as might popularly be included in

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the tie, unless you are driven by absolute stress of necessity, unless you can see the testator in the clearest and in the most unmistakable way has so said. It seems to me that the law as laid down in *Hill v. Crook* (12) by Lord Cairns is the true law, and although I do not disguise from myself that many Judges, from Lord Eldon's time down to the present, Judges of the highest authority and of the greatest learning, have used language (so to speak) of warning, and language that amounts to more than Lord Cairns has said—have used language to the effect that you must, before you can include under the name which the law usually appropriates to a legitimate tie persons who stand outside that strict line, find a necessary inference or a very clear intention—it seems to me that the only effect one can give to such language is to treat it, not so much as a canon of construction, as a counsel of caution to warn you in dealing with such cases not to give way to guesses or speculation as to the probabilities of an intention, but to act only on such clear evidence as can lead a reasonable man to a distinct conclusion. But I protest, that as soon as you see upon the will, read by the light of such extrinsic circumstances as you may survey, what the true construction is, and what the true intention expressed by the testator is, then your journey is performed—you require no more counsellors to assist you; and after once arriving at the journey's end, to pause in giving effect to the true interpretation of the law because, forsooth, the language has not been expressed according to some measure or standard of correct expression, which is supposed to be imposed by the law out of regard for social or other reasons, appears to me to be using the language of such learned Judges, not as laying down canons for construing a will, but as a justification for misconstruing it. As soon as you once arrive at your journey's end, you have no more to do than to give effect to the true construction as you see it. It seems to me that here the true construction of the will must be that in the term "relatives hereinbefore named" the testator intended to include all those he had before treated as relatives, whether he was correct in law in so treating them or not,

and the children of those whom he had referred to in the preceding clauses.

Solicitors—Witham, Lambert & Roskell, for first appeal; Hasties, for second appeal; Wadeson & Malleeson, for third appeal; Walker & Whitfield, for fourth appeal; Druces & Attlee, for respondent Hayne; Satchell & Chapple, for executors and trustees.

STIRLING, J. }
1890. } PHILLIPS v. HOMFRAY.
April 17, 23. }

Compensation for Minerals wrongfully taken—Interest upon—3 & 4 Will. 4. c. 42. s. 29.

By a decree made in 1871 the defendants were declared to be liable in respect of certain minerals removed by them from under adjoining land of the plaintiffs, and an enquiry was directed as to the quantity of minerals taken, and their value, with an allowance for the cost of carrying to the pit's mouth, but none for working. After the decree the defendants died. The enquiry was continued as against their representatives, and the official referee had reported the value of the minerals taken. On the further consideration of the suit the plaintiffs claimed to be entitled to interest on the sum named in the report, with half-yearly rests:—Held (1), that the action must be treated as in the nature of an action for money had and received, and interest could not be given as damages under section 29 of 3 & 4 Will. 4. c. 42, which did not apply to such an action; (2) that there was no fiduciary relation between the parties upon which the claim could be based; (3) that the claim ought to have been made at the trial, so that directions might have been inserted in the decree as to how the interest was to be ascertained, and it was too late to make it on the further consideration.

This was the further consideration of a suit, instituted in 1866, asking for a declaration that the defendants, a partnership firm carrying on business under the style of the Tredegar Iron Company, were liable in respect of certain minerals re-

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moved by them from under adjoining land of the plaintiffs, and for consequential relief.

In 1871 a decree was made declaring the liability of the defendants Homfray & Fothergill, and the estate of their deceased partner Forman, in respect of the minerals so removed; and the liability of the first-named defendants to make compensation to the plaintiffs for the user of all roads and passages under their land; and an enquiry was directed as to what quantities of minerals had been so removed as aforesaid; and it was ordered that the market-price of all such minerals at the pit's mouth should be certified, all just allowances being made to the defendants in respect of the cost of carriage to the pit's mouth, but none for the expense of getting or working the minerals. Further enquiries were also directed with regard to the compensation to be made by the two first-named defendants in respect of the use of the roads and passages under the land, and the manner in which they had worked the minerals (1).

In 1883, Fothergill being then dead, these last enquiries were stayed as against his representatives (2); and in 1884 they were stayed as against the representatives of Homfray, who was then dead.

The first enquiry was prosecuted, and the official referee reported that the value of the minerals taken was 9,028*l.* 6*s.*

Graham Hastings, Q.C., and F. T. Procter, for the plaintiffs.—We claim interest at five per cent. on the value of the minerals taken, from the time when they were removed, with half-yearly rests. The Court can give damages in the nature of interest in actions of trover or trespass *de bonis asportatis* under section 29 of 3 & 4 Will. 4. c. 42. This may be regarded as an equitable action of trover, according to what was laid down by Parke, B., in *Wood v. Morewood* (3)—*Mayne on Damages* (4th ed.), p. 372. This sum is damages for a wrongful act of the defendants against us—*Dreyfus v. The Peruvian Guano Company* (4).

(1) Law Rep. 6 Chanc. 770.

(2) 52 Law J. Rep. Chanc. 401, 833; Law Rep. 24 Ch. D. 439.

(3) 3 Q.B. Rep. 440*n.*

(4) 58 Law J. Rep. Chanc. 758; Law Rep. 42 Ch. D. 66; 43 *ibid.* 316.

[STIRLING, J.—The principle upon which damages in such a case are to be assessed is laid down in *Martin v. Porter* (5).]

They have sold our coal, and it must be presumed that they have used the money in their own business. They ought not to be allowed to derive any advantage from their wrongful act—*Burdick v. Garrick* (6), *Jones v. Foxall* (7), and *Williams v. Powell* (8). They have put themselves into the position of trustees for us as regards the proceeds of our coal that they have taken, and are liable to account to us—*The Attorney-General v. Alford* (9).

The maxim "*Actio personalis moritur cum persona*" does not apply in this case, as the money has gone into the pockets of the deceased. The further consideration is the proper time to raise the question of interest; it did not arise till the value of the takings had been found. We have been kept out of our money for twenty-five years, and have lost compound interest on the value of the coal.

They also referred to *Livingstone v. The Ranvards Coal Company* (10).

Rigby, Q.C., and Osler, for the representatives of the defendant Homfray.—Penal damages have been given partly as a punishment for a wrongful act, and partly as compensation. No interest will be given in addition. If this is an action of trover or trespass, the maxim "*Actio personalis moritur cum persona*" applies to it; if it is not, it is not within the section of the Act relied upon.

A trustee has to pay interest on money which he has lost, because he has lost income which it was his duty to get for his *cestuis que trust*. There was no fiduciary relation between the plaintiffs and defendants in the present case, and the defendants ought not to be made to pay interest. The plaintiffs' claim is a money claim. The sum due was only ascertained by the report of the referee, and could not have been paid before.

Buckley, Q.C., and Sangster Green, for

(5) 5 Mee. & W. 351.

(6) 39 Law J. Rep. Chanc. 369; Law Rep. 5 Chanc. 233.

(7) 15 Beav. 388; 21 Law J. Rep. Chanc. 725.

(8) 15 Beav. 461.

(9) 4 De Gex, M. & G. 843.

(10) Law Rep. 5 App. Cas. Sc. 25.

(11) 1 Cowp. 371.

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the representatives of the defendants Fothergill and Forman.

Graham Hastings, Q.C., in reply.—Lord Mansfield, in *Hambly v. Trott* (11), seemed to think that where an action of trover would lie against a man, an action would also lie against his executors in respect of any benefit accrued to the testator's estate by reason of his wrongful act.

Cur. adv. vult.

STIRLING, J. (on April 23), stated the facts, and continued: The first ground on which it is sought to charge interest is that the plaintiffs are entitled to it under the statute 3 & 4 Will. 4. c. 42. s. 29.

Then the question arises whether this is an action of trover, or trespass *de bonis asportatis*. Both these actions are actions of *tort*, and as to them the maxim applies which has already been applied as regards three of the four enquiries directed in this very case, "*Actio personalis moritur cum persona*." The question is whether I can treat this present action as an action—as it was put in argument—in the nature of an equitable action of trover. It was decided in the case of *Hambly v. Trott* (11) that an action of trover was one to which the rule of law which I have just mentioned applies. There the action was brought against an executor for a conversion by his testator. The case was twice argued, and, after judgment reserved, Lord Mansfield, in delivering the judgment of the Court, concludes as follows: "The form of the plea is decisive—namely, that the testator was not guilty; and the issue is to try the guilt of the testator. And no mischief is done; for so far as the cause of action does not arise *ex delicto* or *ex maleficio* of the testator, but is founded in a duty, which the testator owes the plaintiff, upon principles of civil obligation, another form of action may be brought, as an action for money had and received." Thereupon the judgment which had been gotten was arrested.

That case was very much considered and discussed in this very case upon the appeal (12), and, after reading carefully the judg-

ment of Mr. Justice Pearson (13) and the judgments delivered in the Court of Appeal, it does not appear that the proposition on which *Hambly v. Trott* (11) was decided was in any way disputed. It was accepted by all the Judges as good law, that an action of trover was one which dies with the person. The question on which the majority of the Court of Appeal differed from Lord Justice Baggallay and Mr. Justice Pearson seems to have been this, whether any form of action could be suggested which could be brought at law, in which the damages or the sums which were sought to be recovered by means of the enquiries 2, 3, and 4 could be recovered against an executor, and the opinion of the majority of the Court of Appeal was that no such action could be suggested. The judgment of Lord Justice Bowen seems to me to shew that very clearly. I will read one or two passages from it which appear to me to contain the substance of all that I need mention. He says: "The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property belonging to another have been appropriated by the deceased person, and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance." [His Lordship continued reading the judgment down to the words, "an indirect benefit may have been reaped thereby" (14).] Then, after discussing the case of *Hambly v. Trott* (11), and the judgment delivered by Lord Mansfield, he says: "The true test to be applied in the present case is whether the plaintiff's claim against the deceased R. Fothergill, in respect of which enquiries 2 and 3 were directed in his lifetime, belongs to the category of actions *ex delicto*, or whether any form of action against the executors

(13) 52 Law J. Rep. Chanc. 403; Law Rep. 24 Ch. D. 444.

(14) 52 Law J. Rep. Chanc. 836; Law Rep. 24 Ch. D. 455.

(12) 52 Law J. Rep. Chanc. 833; Law Rep. 24 Ch. D. 439.

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of the deceased, or the deceased man in his lifetime, can be based upon any implied contract or duty. In other words, could the plaintiffs have sued the deceased at law in any form of action in which 'not guilty' would not be the proper plea? If such alternative form of action could be conceived, it must be either an action for the use, by the plaintiffs' permission, of the plaintiffs' roads and passages, similar in principle, though not identical with an action for the use and occupation of the plaintiffs' land; or it must be in the shape of an action for money had and received, based upon the supposition that funds are in the hands of the executors which properly belong in law or in equity to the plaintiffs. We do not believe that the principle of waiving a *tort* and suing in contract can be carried further than this—that a plaintiff is entitled, if he chooses it, to abstain from treating as a wrong the acts of the defendant in cases where, independently of the question of wrong, the plaintiff could make a case for relief." That is the ground of the decision of the majority of the Court of Appeal, which I need not say is binding upon me. Having regard to that, I am of opinion that this action cannot be treated as in the nature of an action of trover, but rather as in the nature of an action for money had and received.

It appears to me, therefore, that section 29 of the Act which has been relied upon does not apply, and that, if any section does apply, it is the preceding section, section 28. That section was not relied upon in the opening of the case by the learned counsel for the plaintiffs, and in his reply he stated expressly that he could not bring himself within that section. The application for interest, so far as it is based upon the statute, fails.

Then it was further said that the defendants were accounting parties, and that there was a general principle that accounting parties may be charged with interest. The cases which were cited in support of that proposition were two very well-known cases—*Burdick v. Garrick* (6) and *The Attorney-General v. Alford* (9). In both those cases a fiduciary relation subsisted between the plaintiffs and the defendants, and the right to interest on the part of

the plaintiffs was treated as arising out of and by virtue of that relation, and the duty which the defendants owed to the plaintiffs by reason of it. No such relation exists here, and, therefore, the cases cited do not apply. It was on those grounds that the plaintiffs rested their case. They appear to me to fail, and perhaps it might be sufficient to stop there; but I think it right to add this, that, in my opinion, the decree as it now stands is not consistent with the claim which is put forward by the plaintiffs. The decree appears to me to be framed so as simply to give the plaintiffs the damages, or the compensation for the value of this property, to be ascertained by means of the enquiry No. 1. If the defendants were to be charged with interest, it seems to me that the right course would have been to have made that case at the trial, and to have inserted in the decree proper directions as to the mode in which the interest was to be charged and ascertained. No such directions are to be found in it, and I think that it is too late now for the plaintiffs to come forward and ask to charge the defendants with interest. The decree was not made till 1871. At the trial it must have been known that all the improper workings which were complained of had taken place prior to this, and it would appear to me that the plaintiffs obtained a decree in which they charged the then defendants with the value upon the footing on which the compensation is ascertained when the defendants have been guilty, not of a mere accidental trespass, but of a wilful tortious act. That gives the plaintiffs more than the simple value of the property, because it gives them the value of the property without any allowance for the expense of getting, or severing, or working the minerals. For these reasons, I think the claim for interest cannot be sustained. I only desire to add this, that I do not think that in the present decision I in any way interfere with anything that was laid down or decided in the case of *Dreyfus v. The Peruvian Guano Company* (4), to which I was referred. In that case, first of all, the form of the judgment was different. There the enquiry directed was, what damages had been sustained by the plaintiffs by reason

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of the detention by the defendant company of the cargoes of guano in question in the action; and in working out that enquiry as to damages, which is in a different form to that here, the chief clerk allowed interest. It was held by Mr. Justice Kay, and, as I understand, also by the Court of Appeal, that he was justified in so doing by reason of the statute. But, as I say, in the first place, that was a different form of enquiry, and, in the second place, there was no room for the application of the maxim "*Actio personalis moritur cum persona*," the defendant there being a company, and being in existence as such at the date of the further consideration as at the time when the wrongful acts complained of were committed. I think, therefore, that no interest can be allowed.

Solicitors—Ullithorne, Currey & Villiers, agents for Simons & Plews, Merthyr Tydfil, for plaintiffs; Field, Roscoe & Co., and T. W. Denby, for defendants.

[IN THE COURT OF APPEAL.]

COTTON, L.J.	} TUCKER v. THE NEW BRUNSWICK TRADING COMPANY OF LONDON.
LINDLEY, L.J.	
LOPES, L.J.	
1890.	
April 2.	

Practice—Injunction—Undertaking as to Damages—Extent of.

An undertaking as to damages is the price which a person asking for an injunction has to pay for it; and such an undertaking should not be confined to the damages that may be sustained only by the party enjoined, but should extend to all the defendants asking for it.

But the Court has no power to extend an undertaking given by a plaintiff so as to cover damages that may be sustained by a party who never asked for it when the injunction was granted.

In March, 1890, the plaintiff, who was a shareholder in the New Brunswick Trading Company, instituted this action against the company, J. T. Matthews, Lamplough & Co., and the Bank of Montreal, claiming an injunction to restrain the company from confirming an agree-

ment dated the 26th of February, 1890, between C. E. Lamplough of the first part, Matthews of the second part, W. Lamplough & Co. of the third part, and the company of the fourth part, or another agreement of the same date between the company and Matthews, and an injunction to restrain Matthews and the company from registering either agreement in Canada.

On the 7th of March the plaintiff moved for an injunction, the defendant Matthews and the company being served with notice of the motion. Chitty, J., ordered it to stand over for a week, granting an interim injunction, extending over that period, to restrain the company from passing any resolution approving or confirming either of the agreements without the previous consent of the Bank of Montreal.

On that occasion *Stokes*, counsel for Matthews, asked for the usual undertaking as to damages; and *Romer, Q.C.*, for the plaintiff, replied that it would, of course, be given.

The order, as drawn up by the Registrar, limited the undertaking to damages sustained by the defendant company only. It was argued before the Registrar whether the undertaking ought not to extend to damages sustained by Matthews as well; the Registrar decided that it should not, and the order was passed on the 12th, with an undertaking limited as above.

The motion came on again on the 14th, and was directed to stand over, and no order was made. The Bank of Montreal had in the meantime presented a petition to wind up the company.

On the 18th of March Matthews and Lamplough gave notice of appeal, asking that the order of the 7th of March might be reversed or varied so far as it limited the plaintiff's undertaking to damages sustained by the company, and that it might be extended so as to include damages sustained by Matthews and Lamplough or either of them.

Stokes, for the appellants.

Alexander Young, for the plaintiff.—The injunction was against the company alone, to restrain them from giving a

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security to Matthews, and nothing else; and it is only as against the person enjoined that the person obtaining the injunction can be required to give an undertaking. Lamplough never appeared at all, nor asked for an undertaking, and the Court of Appeal cannot impose an undertaking on the plaintiff now. The plaintiff, rather than give an undertaking, would have given up his injunction.

Stokes, in reply.—An undertaking ought to be given to everybody who can be injured by the injunction. Matthews and Lamplough were both parties to the agreement, and they may be injured by the company being restrained from carrying it into effect.

He referred to *Chappell v. Davidson* (1).

COTTON, L.J.—This is an unusual appeal. An injunction was granted against the company on the terms of the plaintiff giving the usual undertaking as to damages. The company and Matthews, who were served with notice of motion, appeared at the hearing of the motion. Counsel for the defendant Matthews asked for the usual undertaking as to damages; and Mr. Romer, the plaintiff's counsel, said that it would, of course, be given. The order was drawn up, passed, and entered, with an undertaking only as to damages that might be incurred by the company. I think that was wrong. Counsel for Matthews had applied for and obtained an undertaking for damages, and it ought to have been embodied in the order. That gets rid of the objection, in the case of Matthews, that he is applying for an undertaking that was not given. It was given, and therefore when the order was drawn up by the Registrar it ought to have contained an undertaking applying to Matthews as well as to the company. We are not granting an appeal from the order, but are only setting right an order which does not in fact express the intention of the Judge.

But Lamplough is making the same application; and I think he must fail. I do not think we can impose on a plaintiff by way of order an undertaking which he never gave. All the Court can do is to

say that the plaintiff shall not obtain an injunction unless he gives the undertaking. Therefore, so far as regards Lamplough, we cannot impose on the plaintiff the undertaking; for at the trial, if an undertaking had been asked for, he might have said, "I do not care for the injunction." As a general rule, I think that when an injunction is granted, the undertaking ought not to be confined to the persons restrained. In *Pemberton on Decrees* (4th ed.), 435, I find it stated, "The undertaking applies to all the defendants, although one or more only may be restrained." He does not refer to any authority for this; but I consider it to be a correct statement of the practice.

As regards the costs, I think that if Chitty, J., had been applied to he might have set this matter right; for though the order was passed and entered he had jurisdiction to correct it as not expressing rightly the order he had made. Extra costs have no doubt been occasioned by coming here, and I think that we ought to give no costs to either party.

LINDLEY, L.J.—The cases of the two defendants are distinguishable. There is no difficulty as to Matthews. He asked for an undertaking, and got it. The Registrar made a mistake. As regards Lamplough there is more difficulty. An undertaking is the price of an injunction, and if a man gets an injunction he must pay the price. Lamplough did not ask for an undertaking, and Mr. Young says that if he had been asked to give one he would have declined to take the injunction. I think, therefore, the undertaking must be confined to Matthews. I agree as to costs.

LOPES, L.J.—I am of the same opinion.

Solicitors—Parker, Garrett & Parker, for appellants; Kearsy, Hawes & Walsh, for plaintiff.

(1) 2 Kay & J. 123; 8 De Gex, M. & G. 1.

[IN THE CHANCERY DIVISION AND IN
THE COURT OF APPEAL.]

STIRLING, J.
1888.
Aug. 2, 7.
Dec. 5, 6, 18.
1889.
April 11.
COTTON, L.J.
BOWEN, L.J.
FRY, L.J.
Nov. 9, 11, 13,
14, 15, 16, 18.
Dec. 21.

ROBERTSON v. HARTOPP.

Right of Common of Pasture—Inclosures on Common by Lord of Manor—Test of Sufficiency of Common.

In determining whether there is sufficiency of common for the rights of pasture of the commoners, the test is not as to the average number of sheep which have, in fact, been turned out by the commoners for a great number of years, but whether there is pasture for the sheep which the commoners can maintain on their respective tenements during the winter, and which they are entitled to turn out on the common.

Quære, whether any modern practice of farming ought to be considered.

Lake v. Plaxton (10 Exch. Rep. 196; 24 Law J. Rep. Exch. 52) and Lascelles v. Lord Onslow (46 Law J. Rep. Q.B. 333; Law Rep. 2 Q.B. D. 432) considered.

This was an action by the plaintiffs, who claimed to be the owners of freehold lands and copyhold lands held of the manor of Banstead, in the county of Surrey, and of freehold lands formerly copyhold of the manor, but now enfranchised, on behalf of themselves and all other owners and occupiers of such lands (except such of them as have already released their rights of common), to establish the title of the plaintiffs, and the other persons on whose behalf they sued, to certain rights of common over the commons and waste lands of the manor, and to obtain an injunction against certain acts which they alleged were an interference with those rights.

The writ in the action was issued in January, 1877, and at that time the sole defendant was Sir John Hartopp, then

the lord of the manor and the owner of the wastes over which the rights of common were claimed. As against him the case was disposed of by an order on the 7th of August, 1886; but previously to that date—namely, in January, 1885—two other defendants had been added, namely, the Earl of Abingdon and the Honourable and Reverend Alberic Bertie, who then were mortgagees in possession of part of the aforesaid wastes.

The plaintiffs, by their statement of claim, claimed as follows:—Paragraph 4: “A right of pasture of all sorts of cattle and sheep *levant* and *couchant* on their tenements; a right of common of estovers to cut so much heath, gorse, and brake as may be required for fodder and litter for cattle *levant* and *couchant* upon their respective tenements, and for other purposes of agriculture and husbandry necessary for the beneficial and profitable enjoyment and use of their said tenements, and for fuel to be used and burnt within and upon their said tenements; a right of common of turbary, to cut and dig turves necessary for burning; and also a right to dig gravel, sand, and loam necessary for repairing and draining the land within and upon their respective tenements.”

Paragraph 7: “The rights exercisable by the freehold and copyhold tenants of the manor by the said enfranchised copyholders and grantees of land formerly copyhold are co-extensive, and as such are described in paragraph 4 of this statement. They have been uniformly respected by all former lords of the manor from time immemorial, and have been continuously enforced by the Courts Baron and customary courts of the manor for several centuries.”

Paragraph 8: “Since the purchase of the said manor, the defendant, Sir William Cradock Hartopp, has formed the design of enclosing the said waste lands, and defeating the rights of the plaintiffs and the other persons entitled to common there, and, having negotiated with some of the principal copyhold tenants with a view to the purchase or extinguishment of their rights, or to avert opposition to his said design, in the month of February, 1871, he proceeded, of his own authority and

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unlawfully, to enclose and build on certain parts of the said waste lands, and he threatens and intends, unless restrained by legal proceedings, ultimately to enclose the whole of such waste lands, and to sell or appropriate the same for his own use." The statement then set out four enclosures made by Hartopp, and stated the title of the other defendants as mortgagees, and proceeded (paragraph 13): "The defendants, the Earl of Abingdon and Alberic Edward Bertie, have assumed to enter into possession, as mortgagees, of the said waste lands comprised in the said mortgage indenture of the 31st of January, 1875, and since such entry into possession have destroyed, and still continue to destroy, the pasturage on the said last-mentioned waste lands in various places by stripping the surface of the greensward, and by digging out the loam and other soil from parts of the said waste lands, to the great injury of the commoners; and they threaten and intend to continue to destroy in manner aforesaid the said pasturage, and unless restrained by the order of this honourable Court they will, in course of time, utterly destroy all the available pasturage on the said waste lands." And the plaintiffs claimed: "A declaration that the plaintiffs, and the other persons on whose behalf they sue, are respectively entitled to the rights of common hereinbefore set forth, on and over the several commons and waste lands of the manor of Banstead;" an injunction "to restrain the defendants from proceeding with the erection of the cottages now in course of erection, as hereinbefore stated; and from erecting, or causing or permitting to be erected, any other houses or buildings, or any fences or enclosures upon the said waste lands or any part thereof, and from suffering the said enclosures hereinbefore described to remain thereon, and from destroying any herbage, furze, gorse, or ferns or underwood now or hereafter growing upon the said waste lands, and from digging and removing any turves," &c., "so as to interfere in any manner with any of the rights hereinbefore set forth and claimed in this action." Damages.

The mortgagees, by their defence, admitted in paragraph 4: "That the free-

hold and copyhold tenants of the said manor were from time immemorial, and that such freehold and copyhold tenants other than those whose rights of common have been released or otherwise extinguished, and other than tenants of new copyholds granted under the custom of the said manor mentioned in the last paragraph hereof, are entitled to a right of common of pasture for sheep in and over the wastes included in the said securities, limited to two sheep for every acre of the respective tenements belonging to such tenants *levant and couchant* upon their tenements;" but, save as aforesaid, they denied that the freehold and copyhold tenants ever had a right of pasture over the wastes for all sorts of cattle and sheep *levant and couchant* upon their tenements. They then stated that on an application to the late Master of the Rolls by the plaintiffs to restrain the defendant Sir John Hartopp from enclosing, on an undertaking given by the said defendant not to make or permit new enclosures so as to interfere with the plaintiffs' right to pasture sheep on the said waste lands, limited to two sheep per acre, and without prejudice to any question in the action, no order was made on the motion. They further stated "that the court rolls of the said manor contain some evidence of the ancient right of the tenants of the manor to cut gorse and heath, to cut and dig turves upon the said wastes or some parts thereof for the purposes and subject to the limitations mentioned in the 4th paragraph of the statement of claim, and to dig gravel, sand, and loam upon the said wastes or parts thereof for the support and repair of the buildings on their respective tenements, but not for dressing the land belonging thereto, and that the said court rolls contain other entries which negative the said evidence. The defendants do not know whether the rights claimed by the plaintiffs on behalf of the freehold and copyhold tenants of the said manor have been respectively, or when and by whom exercised, save that they have been informed and believe that some of the freehold and copyhold tenants or their under-tenants have cut heather and gorse for use as fodder and litter for cattle. And under the circumstances

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aforesaid they submit whether the freehold and copyhold tenants of the said manor other than as hereinafter mentioned are entitled to exercise the said rights or any of them. But they deny that such of the said tenants whose rights of common have been released or extinguished as aforesaid, or the tenants of new copyholds granted under the custom, are respectively entitled to exercise the said rights or any of them." In paragraph 8 they said: "The defendants knew nothing of the designs or negotiations or intentions of the said Sir John William Hartopp;" but they believe that "he did make the enclosures and erected the cottages mentioned in the 8th paragraph of the said statement of claim, and in so doing he may have temporarily destroyed a small part of the herbage and surface of the common by carting materials, but the same has long since been restored. The defendants also believe that the defendant Sir John William Hartopp did strip the surface of some parts of the said waste lands of its greensward, and that he dug out loam and other soil from some parts thereof, and that in so doing he necessarily destroyed the pasture of the land so stripped and dug. But the defendants believe that he did the last-mentioned acts lawfully, in exercise of his rights as owner of the soil, and not to the injury of the commoners. The said enclosures and buildings were not made or erected under the authority or with the knowledge of the defendants, but they believe that the same have caused no injury to the commoners, and they are informed that the enclosure was made in consideration of a release." In paragraph 13 they admitted that they "did in fact enter into possession as mortgagees of the waste lands comprised in the said mortgage indentures of the 31st day of January, 1875, subject to the rights of the persons entitled to rights of common thereon, with which rights they have never interfered." Then they stated the order for foreclosure, and said that "upon taking possession of the said hereditaments they continued to cut turf and to dig loam and gravel from part of the said waste lands, but not in larger quantities than had been cut and dug by the lords

of the said manor, predecessors in title of the said Sir John William Hartopp, for many years last past, and by the last-named defendant before the commencement of the action;" that "such cutting of turf and digging of loam and gravel was lawfully done by the defendant Sir John William Hartopp and his predecessors in title, lords of the said manor, in pursuance of the custom thereof and as owners of the soil of the said wastes, and by the defendants as the grantees of the last-named defendant." They admitted that "they have necessarily destroyed a small part of the pasture growing on the said waste lands, but they deny that they have done so to the great or any injury of the commoners. . . . The defendants have, in fact, in cutting turf and digging loam and gravel, only exercised their rights as the legal owners of the soil of the said waste lands to do that which their predecessors in title have lawfully done for many years, and which the defendants are lawfully entitled to do, subject to the rights of the commoners, a very great number of which have, however, been lately extinguished." They denied that "they threaten and intend to destroy to the injury of the commoners the pasturage of the said wastes, and that they will in course of time destroy all the available pasturage on the said waste lands. They say, on the contrary, that much more than a sufficient quantity of the pasturage upon and other products of the said wastes has always been and still is left for the use of the remaining persons entitled to rights of common over the same, to which rights the part of Banstead Downs not included in the defendants' security, and also the waste called Park Down, containing 74 acres or thereabouts, and the waste called Burgh Heath, containing 87 acres or thereabouts, are also subject. And the defendants are informed and believe that none of the plaintiffs have in fact exercised any rights of pasture upon the waste lands."

The action came on for trial in July, 1886. Sir John Hartopp did not appear. The plaintiffs adduced evidence shewing that the owners of certain farms known as North Tadworth Farm, Canon Farm, and Reed's Rest Farm (of which Lord

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Egmont was and is beneficial owner) had exercised and were entitled to exercise such rights. These farms were alleged by the defendants not to be held of the manor, and consequently not to be among the lands on behalf of whose owners and occupiers the plaintiffs sued.

On the 7th of August, 1886, an order was made, of which the following are the material parts:—"It is ordered that as between the plaintiffs and the defendants the Earl of Abingdon and the Honourable Alberic Edward Bertie the following questions arising in this action be referred to Mr. Meadows-White, one of Her Majesty's Counsel learned in the law, as special referee, to enquire and report, that is to say: Who are the classes of persons and persons entitled and in respect of what lands to any and what rights of common of pasture and estovers and other commonable rights upon and over the said waste lands of the said manor of Banstead; and whether, notwithstanding the said inclosures made by the defendant Sir John William Cradock Hartopp, there is still sufficiency of common on the said waste lands for the persons entitled to exercise the said rights. And the plaintiffs by their counsel assenting for the purpose only of the said enquiry as to sufficiency, and without prejudice to the plaintiff's rights, that the right of common as to sheep over the said waste lands is limited to two sheep for every acre of the tenement in respect of which such right is exercisable, by consent the referee is to adopt the said measure of two sheep per acre in making his report as to sufficiency." Further consideration was adjourned.

In pursuance of this order, the enquiries as directed were prosecuted before the referee, who made his report, in which he said: "I do report as follows:—The classes of persons entitled to exercise rights of common over the wastes or commonable lands of the manor of Banstead are the freehold, customary freehold, and copyhold tenants of the manor, except certain of them whose rights have been surrendered or otherwise extinguished. The occupiers of ancient tenements within the manor have also rights of common

specially mentioned hereafter. The rights of common which have been proved before me to be now exercisable by the freehold, customary freehold, and copyhold tenements are:—A right of common of pasture for all sorts of commonable cattle, *levant* and *couchant*, upon the tenements of the freehold and copyhold tenants of the manor, and appurtenant or appurtenant thereto, and the right of common for sheep, which I have assumed for the purpose of this case to be limited, as above mentioned. A right of common of estovers to cut so much heath, gorse, fern, and brake as may be required for fodder and litter for cattle and sheep *levant* and *couchant* upon the respective tenements of the freehold and copyhold tenants of the manor, and for other purposes of agriculture and husbandry necessary for the beneficial and profitable enjoyment and use of the said tenements and fuel to be used and burned within and upon the said tenements. A right of common of turbary to cut and dig turves necessary for burning within, and also a right to dig loam necessary for repairing the ancient tenements held of the manor. The occupiers of such ancient tenements within the manor have also a right to cut and take fern, brake, and furze to be used for fuel and otherwise, within and upon such ancient tenements." He then reported who were entitled to the rights of common, and in respect of what lands, including the trustees of the Earl of Egmont in respect of part of Warren Farm, called Little Burgh, part of Canon and Reed's Rest Farms, and in respect of North Tadworth Farm. He found that the owner of South Tadworth Farm was entitled to common for 200 sheep, and, upon the assumption of two sheep being allowed for each acre of land, there would be a right to turn out 2,356 sheep on the common. He further found "that, notwithstanding the said enclosures made by the defendant Sir John William Hartopp, there is still sufficiency of common on the said waste lands for the persons entitled to exercise the said rights of common of estovers and turf for burning in their tenements. But that there is not sufficiency of com-

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mon of pasture on the said waste lands for the persons entitled to exercise the said rights of common of pasture as above mentioned. That the defendants admitted that there were persons entitled to exercise the rights of common of pasture over the said waste lands in respect of lands of an acreage of 272a. 1r. 28p., which, at the limit aforesaid, would give a right of pasture for 543 sheep. I find that there would be sufficient common for such a number of sheep if the sheep were turned out, and the commons used according to the modern and present practice of sheep farming, rearing, and management, for I find that the said common would carry 1,200 sheep if used according to such practice, but I find that there would not be sufficient common of pasture for such a number of sheep as 543, if during the usual months of the year for turning out, and in average seasons, the sheep were turned out to get all their sustenance from the common, such a number of sheep would require all that the common would yield by way of sustenance, and more." And proceeded: "I further report that, judging from what has been proved before me as to the past user of the common for (say) the last twenty years, I find that although the right of turning out sheep in respect of the above-mentioned tenements, taken at the measure of two sheep to the acre, would amount in the aggregate to a right of turning out 2,356 sheep, yet by reason of the probability that the number of sheep actually from time to time kept on the farms would not amount to the full number of two sheep to the acre, and that in some cases the farmers would not keep sheep at all or exercise their rights at all, even if they kept sheep, and also by reason of the modern practice of using commons above-mentioned, it is not probable that the commons would, in point of fact, be used by or required for the use of more than 1,200 sheep at any one time."

A motion was made on behalf of the defendants to vary this report, and Stirling, J., found that rights of common of pasture existed for 1,430 sheep, instead of 2,356 as found by the learned referee. The case then came before Stirling, J., on further consideration.

The Attorney-General (Sir R. E. Webster) and McClymont, for the plaintiffs.

Sir H. Davey, Q.C., Jeune, Q.C., and Stuart Moore, for the defendants.

STIRLING, J. (on April 11, 1889) [after stating the facts as above, proceeded as follows:] A motion was made on behalf of the defendants to vary this report, and upon this coming on I asked the learned referee to give me explanations as to certain of his findings; and from them it appeared that the referee was of opinion that North Tadworth Farm and a large portion of Canon and Reed's Rest Farms were not proved to have been held of the manor of Banstead. As the result of the motion to vary, I have come to the conclusion that the owner and occupier of North Tadworth Farm was entitled to common of pasture for 300 sheep, on parts of the common called Burgh Heath and Banstead Heath, and I have adopted the report of the referee as regards Canon and Reed's Rest Farms to this extent, that the owners and occupiers of those farms are entitled to common of pasture for 300 sheep. In the result, therefore, it appears to me to be established that there exist rights of common of pasture over the wastes of the manor for upwards of 1,400 sheep. The referee's report shews that if these rights were exercised to the full, the wastes would be largely insufficient to provide common of pasture for that number of sheep. He finds that there would not be sufficient common of pasture for 543 sheep if, during the usual months of the year for turning out and in average seasons, the sheep were turned out to get all their sustenance from the common; and that, even if the commons were used in accordance with the modern and present practice of sheep farming, rearing, and management, there would still be insufficiency, for in such a case the referee finds that the common would carry 1,200 sheep only. At the same time the referee finds that it was not probable that the common would in point of fact be required for the use of more than 1,200 sheep, for the reasons given in his report.

Under these circumstances it seems to me that, on both enquiries the plaintiffs have been substantially successful. As

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regards the first, the rights of common have been proved to exist in respect of a larger number of sheep than the defendants were prepared to admit either before the referee or myself. As regards the second enquiry, the findings appear to me to establish that a sufficient quantity of pasturage for all the persons entitled to rights of common over the wastes does not exist, and that the use on the contrary set up by the defendants in paragraph 6 of their defence is not in accordance with facts.

In coming to this conclusion I do not think I am departing from anything laid down in the case of *Lascelles v. Lord Onslow* (1), which was much relied on by the defendants. That case was decided on a Special Case stated by an arbitrator, and the findings on it were very different from those of the learned referee in this case with whose decision I am dealing. In the first place, in *Lascelles v. Lord Onslow* (1) there was no finding as to the persons actually entitled to exercise the rights of common over the waste there in question. The statement with regard to the persons entitled to exercise those rights of common appears in paragraph 7 of the Special Case set out at page 434 of the report. [His Lordship read the paragraph, also paragraph 31 of the statement, and continued:] That is dealt with in the judgment as follows: "The Case finds explicitly that, notwithstanding the leases and the acts done under them by the defendants and their predecessors, there has always been a sufficiency of turf left. It also finds that the acts done were not such as to cause any insufficiency of estovers. As to these, therefore, no actual injury has been sustained, and the only question is whether any legal injury—any injury to the right—has been committed. But as regards the rights of common of pasture, the finding is not so explicit." The learned Judge read the 31st paragraph of the Special Case, which I have already read, and proceeded: "This statement seems to imply that if the tenants had continued to turn out as many cattle as they formerly did,

there would not now in ordinary seasons be sufficient pasture left. But it does not say so in terms, nor would it have been conclusive if that had been found as a fact. The rights of the lord, as owner of the soil, are subordinate only to the rights of the commoners. Changes in the modes of managing farms, in the description of cattle kept, and the kind of food given, and in the produce raised, the appropriation of the land to other uses, its conversion into nurseries, hop gardens, market gardens, or building ground, or other changes, may permanently diminish the demand of the commoners on the pasture of the common. The right to turn out is measured by the capacity of the commonable tenement to maintain; it is to turn out so many commonable beasts as the winter eatage of the tenement, together with the hay and other produce obtained from it during the summer, is capable of maintaining—*Whitelock v. Hutchinson* (2) and *Scholes v. Hargreaves* (3). There never has been an insufficiency, and in ordinary seasons there will not be, if the average demand for the last ten years is to be taken as a fair measure of the requirements of the commoners for the future. And we cannot see why it should not be. In the absence of any evidence tending to an opposite conclusion, we see no reason for supposing that the requirements of the commoners for the future will be greater than they have been for the last ten years. On the contrary, looking at the situation of Chobham, and the advance of population on all sides, we think that the capacity of the commonable tenements as a whole to maintain commonable cattle is more likely to be a decreasing than an increasing quantity. We, therefore, come to the conclusion that a sufficiency of pasture has been left, and that the plaintiffs have failed to make out any cause of complaint on this head of claim. We do not lose sight of the rule which casts the *onus probandi* in such a case on the lord; but the facts found, and the considerations to which we have adverted, raise a presumption so strong as to call on the plaintiffs to rebut it." The

(1) 46 Law J. Rep. Q.B. 333; Law Rep. 2 Q.B. D. 432.

(2) 2 Moo. & R. 265.

(3) 5 Term Rep. 46.

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Court in that case, therefore, came to the conclusion, in the absence of any rebutting evidence on the part of the plaintiffs, that a sufficiency of common had been left. Here, however, it is found that rights of common in respect of 1,430 sheep actually exist, and that even when used in accordance with the modern practice, the commons are now incapable of carrying more than 1,200 sheep; and although, under present circumstances, it may be more or less probable that the commons will not be required to carry so many, still it appears to me to be perfectly possible that changes in farming practice which may hereafter occur will lead to the commons insisting on their full rights, and I cannot come to the conclusion that I ought to treat those rights as being to any extent practically gone for ever.

Notwithstanding these findings, no actual present damage is shewn to have been suffered by any person entitled to rights of common over the waste; and it was contended on behalf of the defendants either that no relief ought to be given to the plaintiffs in the action, or, at all events, that they ought not to be called upon to pay any costs.

Now relief is sought by the statement of claim against the defendants, the mortgagees, in respect of two matters—first, the maintenance of enclosures actually made by Sir John Hartopp; and, secondly, the cutting of turf and digging of loam and other soil by the defendants themselves. As regards the first, it is said by the defendants that they do not by their defence claim the right of enclosing the common, and that at the trial they did not oppose an order removing the existing enclosures, and that, in any event, these enclosures are not shewn to actually injure the commons, and ought not to be ordered to be removed.

Now, although no actual damage to any commoner is proved, I think that, as sufficiency of common is not established, the maintenance of any enclosures which would permanently exclude the commoners from a portion of the common is such an injury to the legal rights of the commoners as entitles them to an order for the removal of these enclosures if they insist

upon it. The case of *Arlett v. Ellis* (4) appears to me to shew that the commoners are entitled themselves to remove, and *a fortiori* to have an order for the removal, of those enclosures, so as to restore to themselves those rights of common which would be injured by their continuance. The plaintiffs, however, I understand, do not press for an immediate order for removal, but are willing that the enclosures should continue, at all events for the present. It seems to me that, as regards this part of the case, justice may be done if an order is made in this form:—Declare that the defendants are not entitled to continue the existing enclosures of the pieces of land in the statement of claim mentioned; and the plaintiffs not pressing for an order for the immediate removal thereof, let them be at liberty to apply for an injunction to restrain the defendants from permitting or suffering the said pieces of land to be or remain enclosed or built upon.

I now proceed to consider the rights and remedies (if any) of the plaintiffs in respect of the cutting of turf; but before dealing with this, it is necessary to state a few of the facts relating to this portion of the case. The quantities of turf cut by the defendants prior to their being made parties to the action were thus stated by the leading counsel who represented them before the referee. From the 1st of January to the 31st of December, 1881, the number of turves cut was 32,605, covering an area of over three acres; in 1882 it was 52,750; in 1883 it was 43,000 odd; in 1884 it was 60,000 odd. In February, 1885, the defendants were made parties, and in that year only 7,625 turves were cut. It thus appears that, prior to the defendants being made parties to the action, they removed turf to the extent of at least between two and three acres per annum. As regards the time required by the places from which turf had been removed to recover themselves, the evidence was somewhat conflicting; but the fair result of the passages to which my attention was called by counsel (and I assume that these included everything in the de-

(4) 7 B. & C. 246; 5 Law J. Rep. K.B. 391.

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positions which is material) appears to me to be that the time required varied, in different parts of the common, from two to six years, and possibly to a still greater number of years in places where the soil was poor.

I have then to determine whether the acts of the defendants in removing turf to this extent constitute an injury to the plaintiffs, bearing in mind on the one hand the findings as to sufficiency of common, and on the other the fact that no actual damage to any commoner is proved. The law as to the position of the lord has been stated by Vice-Chancellor Hall in a passage in his judgment in *Hall v. Byron* (5), which was accepted by Lord Justice Fry as correct in *Robinson v. Dhuleep Singh* (6). It is this: "The law I consider to be that the lord may take gravel, marl, loam, and the like, in the waste, so long as he does not infringe upon the commoners' rights, his right so to do being quite independent of the right of approvement under the Statute of Merton or at common law, and existing by reason of his ownership of the soil, subject only to the interests of the commoners. Mr. Justice Bayley, in *Arlett v. Ellis* (4), said: 'The lord has rights of his own reserved upon the waste; I do not say subservient to, but concurrent with, the rights of the commoners. He has a right to stock the common, and to every benefit to be derived from the soil, not inconsistent with the rights of commoners. And when it is ascertained that there is more common than is necessary for the cattle of the commoners, the lord, as it seems to me, is entitled to take that for his own purposes.'" To that I will add one further sentence from the judgment of Mr. Justice Bayley, which is this: "He" (that is, the lord) "may also exercise his right by turning in rabbits, provided he leave a sufficiency of common for the commoners."

The question then is, were the acts of the defendants, under these circumstances which I have mentioned, consistent with the rights of the commoners? And for the purpose of answering this question, it

appears to me desirable to refer to one or two of the older cases, in order that it may be ascertained precisely what the legal rights of commoners are. In *Robert Mary's Case* (7), Lord Coke twice states what is necessary in order that an action by a commoner may lie against a stranger in respect of an invasion of his rights of common. The two statements together do not precisely coincide, and gave rise subsequently to some differences of opinion. The first is this: "For every feeding by the cattle of a stranger the commoner shall not have an assize nor an action on the case as his case is, but the feeding ought to be such *per quod* the commoner, &c., common of pasture, &c., for his cattle, &c., *habere non potuit sed proficuum suum inde per totum id tempus amisit*, &c. So that if the trespass be so small that he has not any loss, but sufficient in ample manner remains for him, the commoner shall not take them damage feasant, nor have any action for it; but the tenant of the land may in such case have an action." Then a little farther on, he says: "So in the case at bar, the lord of the soil shall have an action of trespass done in the waste or common as an immediate trespass to him, be it greater or less, but the commoner shall not have an action but by consequence—namely, if the trespass be such *per quod proficuum communis suae*, &c., *amisit*, or that he could not have his common in so beneficial a manner as he had before."

The question as to the true rule arose and was decided in *Wells v. Watling* (8). That was an action against a stranger, and the plaintiff declared possession of the lands for which he was entitled to common of pasture, and the defendant, "on the 1st of January, 1777, and afterwards, wrongfully turned 3,000 sheep thereon, whereby the plaintiff could not enjoy the benefit of his common in so ample a manner" as he could before. Certain facts were proved at the trial; but no evidence was given whether, in the particular year 1777, the plaintiff turned on any sheep; and it was contended that the plaintiff could "not maintain this action for an injury, because

(5) 46 Law J. Rep. Chanc. 297; Law Rep. 4 Ch. D. 667.

(6) 48 Law J. Rep. Chanc. 758; Law Rep. 11 Ch. D. 798.

(7) 9 Rep. 112.

(8) 2 W. Black. 1332.

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he had suffered no damage, as it did not appear that he turned any sheep on the common that year." The Lord Chief Justice said: "The defendant has mistaken the ground of his objection. It is material for the plaintiff, and he must shew that he could not exercise his right *tam amplo modo*, &c. This has been both laid in the declaration and also proved by consequence; for every unlawful surcharge is *pro tanto* a diminution of the right and profit of every other commoner. It is certainly necessary that the plaintiff received some actual injury in order to maintain this action; but it is laid down in *Mary's Case* (7) that the plaintiff must shew the injury to be such *quod non potuit habere*, &c. The question is merely upon the nature of the defendant's act, in the greatness or smallness of it, not on the plaintiff's exercise of his right. It is sufficient if the right be injured, whether it be exercised or not." Then Mr. Justice Gould says: "I always thought the doctrine of Lord Coke in *Mary's Case* (7), that there must be a loss of the common in order to maintain this action, a singular doctrine of his own, and not any part of the judgment of the Court. The injury consists in preventing the enjoyment of the common *tam amplo modo*. It appears from 2 *Brownlow*, p. 147, that an action lies for this damage, let it be ever so minute." Mr. Justice Blackstone then says: "I always have understood that an action on the case lay by one commoner against another for a great and exorbitant surcharge, which is proved to be the present case. It amounts to a kind of disseisin, and probably was so in the present case; for when the defendant had so grossly surcharged, the profit of the common was gone, and it was in vain for the plaintiff to turn out afterwards. Any act that will ground a *per quod*, and lessen the profit of the common, will support an action against the commoner. Any act that totally destroys the herbage, as feeding a common with rabbits, will support an action against the lord. Nor do I see anything singular or repugnant to this in the doctrine of *Mary's Case* (7). The commoners, says the book, must shew that '*proficuum communie sue per totum id*

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tempus amisit'; or 'that he could not have his common in so beneficial a manner as before.' It is not necessary he should have lost his common, but only the profits of his common—that is, that he could not take them so well as before." This doctrine so laid down was followed in *Hobson v. Todd* (9), and was referred to in *Pindar v. Wadsworth* (10). These cases appear to me to shew that any act of a stranger, whereby the commoner is prevented from having the use and enjoyment of his common of pasture in as ample and beneficial a manner as he otherwise would, is a legal injury for which an action will lie, even although no actual damage may be proved.

Such being the law as between the commoner and the stranger, how does it stand as between the commoner and the lord? In considering this, I first of all refer to a passage in the judgment of Vice-Chancellor Hall in the case of *Hall v. Byron* (5), at page 680. He says this: "The defendant does not by his answer claim to be entitled to dig and cut loam and turf, not leaving sufficient of the wastes for the commoners, which if it had been claimed would have required me (had there been evidence establishing that the defendant had exercised such alleged right) to say whether or not *Bateson v. Green* (11) is or is not to be followed. I should add that I do not think there is ground for the suggested distinction that the lord cannot dig or cut for the purposes of sale. In reference to this question of right I consider the *onus probandi* is on the tenant, and not, as in the case of improvement, on the lord. The *onus probandi* being on the lord in the case of improvement would seem to arise from this, that the lord having made a grant over the whole waste, his right to enclose is treated as a right conditional upon his establishing that there is sufficient waste left for the tenant to enjoy the right of common granted; whereas as regards the lord's getting marl, that is, by virtue of his ownership of the soil, subject only to the tenants complaining, if they can esta-

(9) 4 Term Rep. 73.

(10) 2 East, 154.

(11) 5 Term Rep. 411.

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blish their complaint of his unduly availing himself of his ownership of the soil, just as the tenants may complain that the lord turns too many beasts on to the common, in which case the *onus probandi* would be on them." Beyond that, I derive no assistance either from *Hall v. Byron* (1) or *Robinson v. Dhuleep Singh* (6), for in both cases the Court arrived at the conclusion that the plaintiff had failed to establish insufficiency of common.

In *Coney's Case* (12) the question was whether a commoner was entitled to kill coney which the lord had turned on the waste. Lord Chief Justice Gawdy says, "He cannot kill the coney, because he may have other remedy." Mr. Justice Shute says, "A commoner cannot take or distrain the cattle of a freeholder for damage feasant, and therefore he cannot kill or destroy the coney, and he hath a remedy, for he may have an action upon the case or an assize against him for putting in of the coney if he do not leave sufficient common for the commoners." This, it will be noticed, agrees with the sentence I have quoted from the judgment of Mr. Justice Bayley in *Arlett v. Ellis* (4).

Atkinson v. Teasdale (13) related to the rights of one commoner against another, but the rights of the commoner against the lord were discussed both in the argument and in the judgment. I will read a few passages from the judgment. The Lord Chief Justice says: "The lord may approve against a tenant that hath common of pasture as often as he please, so that he leave sufficient common; but if he doth enclose any part and leave not sufficient common in the residue, the commoner may break down the enclosures, because it standeth upon the ground which is his common. If the owner of the soil plougheth up the land, the commoner shall have an action upon the case in the nature of a *quod permittat*; a commoner may have an action upon the case or an assize against the owner of the land for putting on more cattle than he ought to put on,

and thereby not leaving sufficient common for the cattle of the commoner." Then he explains the nature of the *quod permittat*, and refers to one or two other cases. Then he says: "From this case it seems that in an action against the lord it is necessary to shew a particular surcharge; and in *Lutwyck*, page 107, it was so held *per curiam*; but that was not the point there in judgment, so it's not a judicial determination." Then he says: "It seems clear that when an action on the case is brought against the owner of the soil for obstructing a commoner in the enjoyment of his common, the particular injury done must be shewn in the declaration. If the lord surcharge the common, a commoner cannot chase the lord's beast out of the common, but the beasts of a stranger the commoner may distrain damage feasant or may chase them out of the common, for a stranger has no colour to have his cattle there; a commoner cannot kill coney upon the common, but if the lord surcharged the soil with coney the commoner upon this particular loss may have an action upon the case; which is a sufficient remedy against the lord."

In the notes to *Mellor v. Spateman* (14), the law is thus stated: "If the defendant be lord of the manor, or put his cattle on the common with the lord's licence, the commoner cannot maintain an action unless he has sustained a specific injury. It is not enough to shew that the cattle consumed the grass as in the case of a stranger, but it must appear that there was not sufficiency of common left, in order to support the action." These authorities seem to me to shew that acts which, if done by a stranger, could support an action at law by the commoners against him, will also support an action against the lord, provided the commoner can shew that sufficiency of common is not left for him.

Here the plaintiffs prove that if all the persons entitled to common of pasture exercised their rights to the full, there would not be sufficiency of common. They also prove acts by the defendants which would deprive the commoners of

(12) Godbolt, 124; 2 Leon. 201.

(13) 2 W. Black. 817; but more fully in 3 Wils. 278.

(14) 1 Wms. Saund. 346.

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the benefit of a substantial portion of the common for periods varying from two to six years. In my judgment those acts constitute an injury to the legal rights of the plaintiffs, and I think that in respect of them the plaintiffs could maintain an action at law and recover nominal damages.

Whether the plaintiffs are entitled to an injunction appears to me much less clear. The acts of the defendants do not permanently deprive the commoners of their rights; there is no immediate probability of the commoners exercising their rights to the full; and even if they did, any loss which they might incur might, so far as I can see, be adequately compensated for by damages. Under these circumstances I should, as at present advised, feel great difficulty in granting an injunction. The plaintiffs, however, do not ask me to do so; they are content with a declaration of their rights; and it is unnecessary that I should go through the form of awarding them nominal damages. I propose, therefore, as regards this part of the case, to declare that the cutting by the defendants of the pasture, herbage, or turf growing in or upon the waste lands of the manor constitute an injury to the rights of common of the plaintiffs, and the other persons on whose behalf they sue, over the waste lands.

I have now to deal with the question of costs. The plaintiffs, as I hold, are entitled to some relief in respect of the enclosures. Ought I to deprive them of costs because the defendants do not by their defence claim the right to enclose, and because their counsel at the trial said that he did not object to an order for the removal of the existing enclosure? In the first place it is to be observed that the defendants do not by their defence offer to submit to an order for removal; on the contrary, they say that they believe that the enclosures do no harm to the commoners. And although at the trial the defendants' counsel said that he did not object to an order for the removal of these enclosures, yet I think that the defendants carefully avoid making any such admission as to the sufficiency of the commons as would have entitled the plaintiffs to an order as of right for their removal.

Before the referee the defendants strenuously resisted findings on the enquiries which would go to establish the plaintiffs' case as to insufficiency of common; and in fact one learned counsel who represented them asked that the question of sufficiency should be dealt with in such a way as to enable the defendants to ascertain whether they could enclose or not. [His Lordship read certain passages in the proceedings before the learned referee and continued:] In my opinion the defendants, though not caring (doubtless for good reason) to insist on a right to maintain the existing enclosures, nevertheless were very desirous to avoid an adverse decision as to the sufficiency of common.

Under these circumstances I should have thought that even if the plaintiffs had entirely failed as regards the cutting of turf, they ought nevertheless to have a very considerable portion of the costs of the action; but, as I have come to a conclusion in their favour, I am of opinion that the general costs of the action ought to follow the event. The costs will, therefore, fall on the defendants; but as regards the motion to vary the referee's report, each party will bear his own.

From this judgment the mortgagees appealed; and the plaintiffs gave notice of cross-appeal to vary the judgment with regard to the number of sheep to be allowed at North Tadworth, and to restore the finding of the referee.

Sir Horace Davey, Q.C., Jeune, Q.C., and Stuart Moore, for the mortgagees, cited and referred to *Kitchin on Courts Leet* (3rd ed. p. 19), *Mellor v. Spateman* (14), *Lake v. Plaxton* (15), *Lascelles v. Lord Onslow* (1), *Robert Mary's Case* (7), *Hall v. Byron* (5), *Robinson v. Dhuleep Singh* (6), *Wells v. Watling* (8), *Hobson v. Todd* (9), and *Atkinson v. Teasdale* (13).

Rigby, Q.C., and Hopkinson, for the plaintiffs, cited and referred to *Lake v. Plaxton* (15), *Lascelles v. Lord Onslow* (1), 3 & 4 Will. 4. c. 27. s. 36, *Williams on Rights of Common* (p. 121), *Stephens' Blackstone* (vol. 3, p. 238), *Wells v. Watling*

(15) 10 Exch. Rep. 196; 24 Law J. Rep. Exch. 52.

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(8), *Hobson v. Todd* (9), *Atkinson v. Teasdale* (13), *Greenhow v. Halsey* (16), *Willis v. Ward* (17), *Hall v. Byron* (5), *Carr v. Lambert* (18), *Bullen on Pleading* (3rd ed. p. 715; 4th ed. pt. 2, p. 356), *Morley v. Clifford* (19), *Chitty on Pleadings* (1st ed. pt. 1, p. 510), *Tynningham's Case* (20), *Arlett v. Ellis* (4), *Crossley v. Lightowler* (21), and *Hest v. Gill* (22).

Sir Horace Davey, Q.C., in reply, cited and referred to *Tynningham's Case* (20), *Lascelles v. Lord Onslow* (1), *Fitzherbert's Natura Brevium* (ed. 1735, p. 290; ed. 1794, p. 121), *Law of Commons*, Anon. (ed. 1720, p. 80), *Williams on Rights of Common* (p. 120), and *Lake v. Plaxton* (15).

Cur. adv. vult.

FRY, L.J. (on Dec. 21, 1889).—The judgment I am about to read is that of the Court.

The plaintiffs in this action sue as tenants of the manor of Banstead, and the defendants defend as purchasers from the lord of the manor of the freehold of the wastes of the manor.

By his judgment in the action Mr. Justice Stirling has declared that the defendants are not entitled to continue certain existing enclosures of parts of the waste, and has given liberty to apply for an injunction in respect of these enclosures. He has also declared that the cutting and digging by the defendants of the pasture, herbage, turf, and loam in and upon certain of the wastes constitute an injury to the rights of common of the plaintiffs and the other persons on whose behalf they sue.

The lengthy enquiries as to facts to which this litigation has given rise were conducted partly before the learned Judge and partly before a special referee—a cir-

cumstance which has certainly not lessened the intricacy of the arguments before us.

It was, amongst other things, found by the referee that the freehold, customary freehold, and copyhold tenants of the manor were entitled to a right of common of estovers, a right of common of turbary, and a right to dig loam necessary for repairing the ancient tenements, and that the occupiers of such ancient tenements had a right to cut and take fern, brake, and furze for fuel. No controversy appears to have been raised before the learned Judge, and none certainly has arisen before us, as regards these rights, and they must therefore be taken as established.

With regard to the declaration as to enclosures and the liberty to apply for an injunction in respect of them, the appellants did not at the bar contest the propriety of the judgment of the learned Judge.

The controversy before us was, therefore, confined to the propriety of the residue of the judgment. According to the finding of the referee or the admissions before us, the tenants of the manor were entitled to common appendant for 640 sheep, and in addition to this the referee found that certain lands outside the manor were entitled to common appurtenant as follows: South Tadworth for 200 sheep; North Tadworth for 876 sheep; Canon's and Reed's Rest for 640; making a total in respect of common appurtenant of 1,716 sheep, which, added to the 640 in respect of common appendant, give a gross total of 2,356 sheep.

Mr. Justice Stirling dissented from the finding of the referee to this extent: that he held North Tadworth and Canon's and Reed's Rest farms each entitled only to common for 300 sheep, thus reducing the grand total to 1,440 sheep.

Of these rights of common, the only one which has been in controversy before us is that of North Tadworth Farm, in respect of which it has been contended, on the one hand, that the number of sheep ought to be restored to the finding of the referee, and on the other that no right of common exists.

The first point was raised on an agreement between the parties as to the rate of two sheep per acre at which common was

(16) Willes, 619.

(17) 2 Chit. 297.

(18) 35 Law J. Rep. Exch. 121; Law Rep. 1 Exch. 168.

(19) 51 Law J. Rep. Chanc. 687; Law Rep. 20 Ch. D. 753.

(20) 4 Rep. 36 b.

(21) 36 Law J. Rep. Chanc. 584; Law Rep. 2 Chanc. 478.

(22) 41 Law J. Rep. Chanc. 761; Law Rep. 7 Chanc. 699.

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to be taken, and it was to this that the cross-appeal was directed. This agreement was held by the learned Judge, and we think rightly, to apply only to common appendant.

The question whether North Tadworth Farm is or is not entitled to common arises only with reference to the question of sufficiency, and has been argued in the absence of the owners of that estate, who are not, as such, tenants of the manor; and the owners of North Tadworth, South Tadworth, and Canon's and Reed's Rest are none of them plaintiffs by representation in this action, and any decision in this suit will, therefore, not be binding if the question should arise between these owners and the defendants. There is a considerable conflict of evidence before us as to this right.

It appears from the evidence that for many years the owners of North Tadworth and of Canon's and of Reed's Rest Farms have each turned on to part of the common 300 sheep, and that the owners of the soil of the commons have taken no steps to question their right so to do, and there is an entry in the court rolls that South Tadworth is entitled to common for 200 sheep, and we think that, without deciding anything as to the right of the owners of North Tadworth and of Canon's and of Reed's Rest Farms, except for the purpose of estimating the sufficiency of pasture, 800 sheep must be added to the number of the sheep for which the plaintiffs, the tenants of the manor, are entitled to common of pasture.

The lord can, as is well known, exercise his right to approve, subject only to the proof by him that the commoners have not only free ingress and egress, but also sufficient pasture, as much as belongeth to their tenements "*sufficientem pasturam quantum pertinet ad tenementa sua*," to use the words of the Statute of Merton, and the controversy before us has been on this question of sufficiency.

For several years past the pasture on the wastes has been injuriously affected by the paring of the turf and the digging of flints and loam by the defendants; and it has been found by the referee that there would be sufficient of common of pasture

for 543 sheep (the number admitted by the defendants before him as having the right) if the sheep were turned out and the commons used according to the modern and present practice of sheep farming, rearing, and management; for he found that the said commons would carry 1,200 sheep if used according to such practice, but that there would not be sufficient common of pasture for 543 sheep if during the usual months in the year for turning out, and in average seasons, the sheep were turned out to get all their sustenance from the commons.

In reference to these findings the appellants have contended that in ascertaining sufficiency, regard should be had, first, to the modern and present practice of sheep-farming; and, secondly, to the average number of sheep which have in fact been turned out for a great number of years; and they have insisted that, taking such average number, there would be sufficient pasturage left.

On the first of these points we do not propose to express any opinion; but, in our judgment, the contention that the average number of sheep turned out is the measure cannot be maintained. The right of the commoner is to have pasture for the sheep which his tenement is capable of maintaining during the winter; and as the rights of common have been found to extend to 1,440 sheep, and the commons have been found to carry 1,200 sheep, and no more, even if used according to the modern practice, we think that this contention fails.

"It is necessary to be knowne," says the author of the treatise on "*Surveyenge*," usually attributed to Sir Anthony Fitzherbert (1539), "what is sufficient of common, and that me seemeth by reson should be thus: to see howe moche cattell the hey and the strawe that a husband getteth upon his owne tenement will fynde sufficiency in wynter if they lye in house, and to be kept there with all the wynter season for soo moche cattell shoulde he have common in sommer, and that is sufficient." "If my land," said Mr. Justice Walmesley and Mr. Justice Owen in *Smith v. Bonsall* (23), in the 39th year (23) Gouldb. 117.

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of Elizabeth, "to which I claim common belonging, can yield me stover to find a hundred cattell in winter, then shall I have common in summer for a hundred cattell, in the land out of which I claim common, and so for more or fewer proportionably." And in *Cole v. Foxman* (24) a dictum of Chief Justice Coke on circuit was cited and approved by Mr. Justice Warburton and Mr. Justice Hutton that "so many of the cattell that the land, to which the common is appurtenant, may maintain in the winter, so many shall be said *levant* and *couchant*."

The right of the owner of a tenement entitled to common appendant or appurtenant is, in our opinion, not affected by the fact that his farm may be understocked—*Leech v. Widsley* (25)—nor by conversion of arable into pasture land, nor by the fact that his land may have been put to a use which at least temporarily renders the maintenance of cattle or sheep upon it impossible. Levancy and couchancy, to adopt almost the language of Mr. Justice Wills in delivering the judgment of the Exchequer Chamber in *Carr v. Lambert* (18), is rather the measure of capacity of the land than a condition to be actually and literally complied with by the cattle lying down and getting up, or by their being fed off the land.

It appears to us to be plain that the rights of common must be ascertained and measured in the same way in reference whether to the plaintiff in any action or to the other commoners. For each of the commoners separately, and as between each of them and himself, the lord is bound to leave pasture enough to satisfy the commoner's separate right, whether such right be likely to be exercised or no; and it would be strange if, in calculating the total amount which will suffice for all, an element of uncertainty and probability were to be introduced which may not be introduced in considering the limit of each individual right. If it is no answer to one separate commoner's complaint that he himself is not likely to require to use his entire right, how can it be an answer to all collectively that some of the body

are not likely to use their rights to the full? This is an action on behalf of all the commoners. The measure of the common which should be left for all ought, we think, according to sound reason, to be that amount which will be sufficient for the enjoyment of all their existing rights, if such rights are to be fully enjoyed.

So far as the learning of counsel or our own research has gone, no early case can be adduced which is in any way inconsistent with this conclusion, or which refers to the manner of enjoyment as an ingredient in the question of sufficiency.

But two cases were pressed on us as inconsistent with this conclusion. One was *Lake v. Plaxton* (15), where it was held that the right of the Crown to turn deer on the waste did not form an element for the consideration of the jury on a question of sufficiency of common in a case where no deer had been turned on the waste for upwards of twenty years. The ground of this decision is not very clearly stated in the judgment; it may, perhaps, have turned on the peculiar nature of the Crown's right. If otherwise, the case is one which may require further consideration.

In *Lascelles v. Lord Onslow* (1) the Court held that the fact that, notwithstanding the enclosures complained of, there had been sufficient pasture for the average number of animals which had for the last ten years at least been turned out, was evidence that the enclosures had not interfered with the rights of the commoners. The case, perhaps, proceeds upon the view that in the absence of any other evidence, the actual user of the common for the last ten years might be regarded as some evidence of the extent of the rights of the commoners, and in that point of view the case may be correct. But some of the language or reasoning in the judgment appears to us open to criticism, and if the case goes beyond the view above suggested, we doubt whether it can be maintained.

Neither of these cases was determined in the Court of Appeal, and there appears to be no earlier precedent for the novelty which, according to the argument of the appellants, has been introduced into the law of commons by these cases.

(24) Noy, 80.

(25) 1 Vent. 54; 2 Keb. 590.

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In our opinion the defendants cannot rely upon the numbers which have in fact been turned out to shew that there is a sufficiency of pasture left, and it follows from what we have said that the defendants have, in our opinion, failed to shew that sufficient common has been left, notwithstanding the enclosures and the cutting and digging of turf and loam, for all persons having rights of common over the wastes; and as the acts complained of have been going on for several years, and if unrestrained would constitute evidence of a custom in diminution of the rights of the plaintiffs—*Bateson v. Green* (11)—we think that they are properly the subject of the declaration contained in the judgment appealed against.

The majority of the Court are, however, of opinion that the form of the judgment is open to objection as appearing to contain a declaration of the rights of parties who are not before the Court, and we therefore vary the judgment of Mr. Justice Stirling by omitting the paragraph relative to the adoption and variation of the referee's report, and substituting therefor a declaration of the rights of the plaintiffs in the terms of the second paragraph of the referee's report.

This variation in the form of the judgment will have no effect upon the costs. The costs of the appeal and cross appeal must be paid by the respective appellants.

Solicitors—Laurence, Graham & Long, for appellants; Horne & Birkett, for respondents.

NORTH, J. }
1890. }
Jan. 29. }

SMITHETT v. HESKETH.

Practice—Foreclosure Action—Successive Incumbrances—Annuitant—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 15—Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 12—Form of Order.

In a foreclosure action the plaintiffs were first mortgagees, and also third mortgagees. The defendants were the second incumbrancer, who was a jointress, and several subsequent incumbrancers, whose priorities had not been ascertained. An order was made on the hearing of the action giving the jointress a period of six months within which to redeem; in case she did not redeem, the subsequent incumbrancers were to have one period of three months within which to redeem; but in case the jointress did redeem, the plaintiffs, as third mortgagees, were to have a period of three months within which to redeem subject to the jointure; and a further period of three months was given to the subsequent incumbrancers within which to redeem.

Action.

This was a foreclosure action by the first mortgagees of the Haldon estate. The defendants were the trustees of the property under the Haldon Estate Act, 1885; Lord Haldon, the tenant for life; the Hon. Laurance William Palk, an infant, the first tenant in tail in remainder; the dowager Lady Haldon, and several other persons claiming to be puisne incumbrancers on the property.

The following were the incumbrances on the property so far as they had been ascertained: First, a mortgage to the plaintiffs, who were an insurance society, dated February, 1841, to secure 35,000*l.* and interest. Secondly, a mortgage to the plaintiffs, dated May, 1841, to secure 50,000*l.* and interest. Thirdly, a jointure of 1,500*l.* a year settled, by an indenture of 1845, upon the Dowager Lady Haldon, charged upon the Haldon Estate. Fourthly, a mortgage to the plaintiffs, dated 1868, to secure 15,000*l.* and interest. There were also several subsequent incumbrances which had not been proved,

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nor their respective priorities ascertained. The whole of the sums secured by the first and second mortgages was due. Of the 15,000*l.* secured by the mortgage of 1868, 3,200*l.* had been paid off. On the hearing of the action a question arose as to the form of the decree.

Cozens-Hardy, Q.C., and *Bramwell Davis*, for the plaintiffs.—The proper order now to make is a foreclosure order giving the puisne incumbrancers one period of redemption, according to the well settled rule of the Court—*Doble v. Manley* (1), *Platt v. Mendel* (2), and *Coleman v. Llewellyn* (3). In the present case the subsequent incumbrancers have not shewn their priorities; it will, therefore, be impossible to give them separate periods for redemption. The plaintiffs wish to have a second period to redeem *Lady Haldon*, and they are entitled to this, since they hold a mortgage next in priority to her. We, therefore, ask that in case *Lady Haldon* redeems under section 15 of the Conveyancing Act, 1881 (amended by the Act of 1882, section 12), our debt of 85,000*l.*, that the legal estate may be conveyed to us or to our nominee, and that it may be ordered that we be at liberty to redeem her by paying back what she shall have paid and all arrears of her jointure, and that we may resume the priority as against subsequent incumbrancers we have in respect of the 85,000*l.* and what we shall have paid her, leaving her to take the second place in respect of future instalments of her jointure.

Herbert Lake, for *Lady Haldon*.—The judgment should be in the form given in *Parry v. Parry* (4). The plaintiffs can only redeem against *Lady Haldon* subject to her annuity.

Frank Evans, for a subsequent incumbrancer, asked that a sale should be directed.

[*NORTH, J.*—I cannot direct a sale now, as there is nothing to shew the value of

the property. The parties can apply for a sale at any time before an order for foreclosure is made.]

Henry Terrell, E. S. Ford, Church, Dawney, and F. Thompson, for subsequent incumbrancers, asked that successive periods of redemption should be allowed.

They referred to *The Mutual Life Assurance Society v. Langley* (5).

Vernon Smith, for trustees under the *Haldon Estate Act*.

Chadwyck Healey, for the infant tenant in tail in remainder.

NORTH, J.—The tendency of the Court now is certainly much greater than it was to prevent foreclosure suits continuing for years, with successive opportunities for redemption given to the parties; ordinarily, it gives one period in the first instance, and no more.

The case which lays down what I understand to be the law on the subject at present is *Doble v. Manley* (1), where Mr. Justice Chitty said he had consulted with Mr. Justice Kay and Mr. Justice Pearson, and they were all unanimously of opinion that where the defendants did not appear, one time only should be fixed for redemption, whether the statement of claim alleged that they were "entitled," or only that they "claimed to be entitled," to incumbrances. To fix several successive periods was to make a decree as between co-defendants, which should not be granted except upon the request of a defendant. If any subsequent mortgagee appeared and claimed to have successive periods fixed, the Court would have to consider whether he was entitled to them. Applying that case to the present, in that case the defendants did not appear. In the present case there are a good many of them, at any rate, that do appear. But what then? They appear, and some request to have successive foreclosures. Then, to apply that judgment, it is for them to shew that they are entitled to this. No doubt, if they can make a case shewing it is right that successive periods should be given, the Court can do it; but, as it was put in the case cited, they are the persons to point out why it should be done, and, I think, to

(1) 54 Law J. Rep. Chanc. 636; Law Rep. 28 Ch. D. 664.

(2) 54 Law J. Rep. Chanc. 1145; Law Rep. 27 Ch. D. 240.

(3) 56 Law J. Rep. Chanc. 1; Law Rep. 84 Ch. D. 143.

(4) Seton on Decrees (4th ed.), p. 1146.

(5) Law Rep. 32 Ch. D. 460.

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entitle them to such an order, they must put the Court in possession of the materials upon which it can make the order they ask. In the present case there are a great number of defendants, and their priorities are certainly not admitted, and the mortgagees have not proceeded to prove their securities. I disclaim altogether the duty, if each had proved his security, to proceed to sort them out in the decree, and to make a decree giving successive periods for redemption, based upon my investigation of their respective securities. Of course, I could not do that. No doubt, if one had the dates, *prima facie*, in the absence of anything else, that would be the order of priority; but it would not always be so, because there may be tacking, or consolidation, or something of that kind. It is absolutely impossible for me now to make any declaration as to the priorities of the parties.

Then I have asked in vain for any authority that shews I can direct an enquiry as to what their priorities are, and, when that has been answered, make on further consideration for the first time a decree for foreclosure according to the priorities so ascertained by an enquiry in chambers. I am not in a position to do it. The case relied on by counsel for the later incumbancers seems to me, as far as I can judge from such a slight examination as I can give it here, to be an authority directly against their contention, instead of in favour of it.

This is a case in which I ought to adopt the general practice of the Court of the present day, in the absence of special circumstances, and ought not to give the defendants separate periods for redemption.

As the plaintiffs, however, in their capacity of fourth mortgagees, ask for a further period of redemption, and as that is what all those behind them wish (except that it is not going so far as they want), and it is for their benefit, because it gives them longer time, I will give the plaintiffs a further period of three months, and give the subsequent mortgagees a third period of three months.

As regards the right of the plaintiffs to redeem the jointress if she pays them off, I do not see my way to giving such a special direction as Mr. Cozens-Hardy asks

for, and for this reason. If the plaintiffs are redeemed, the jointress will have paid them 85,000*l.*; she will then stand in the position of the first mortgagee; she will then have the right to have the first mortgages assigned—I will not say necessarily to any party she may name, because difficulties may arise if they are assigned to a person outside the suit—but her right to have the charges kept alive in some way is absolutely clear, and it is not necessary at present to consider how; but, assuming the charges are kept alive for the benefit of the jointress, when she has paid them off, then the plaintiffs come forward again as fourth mortgagees, and what they ask me to do is to direct that the first and second mortgages shall be transferred to them or some nominee of theirs by the jointress, subject to their paying to her all that she has paid to the first and second mortgagees, and also, of course, her own costs and all arrears of her jointure, but without making any provision for the jointure itself; and it is said that she will be in the same position as now, she will be jointress, subject to the 85,000*l.* But as the jointress has a right to redeem in priority to the fourth mortgagees, then she might have a right to say, “Hand back to me what you have compelled me to transfer to you, and transfer it to me.” That may go on from time to time, and I do not see the end of it.

What the plaintiffs are entitled to as fourth mortgagees is to have a transfer by the jointress of all the property to them, subject to her jointure, in the same way as was decreed in the case of *Parry v. Parry* (4) with respect to an annuity, which seems much the same thing. It is said it would be a hardship on the plaintiffs, who have clearly the two first mortgages, to put the jointress over them. Supposing that the jointress had commenced proceedings for foreclosure and redemption, she might have redeemed the present plaintiffs as first and second mortgagees, and then the plaintiffs as fourth mortgagees would clearly be entitled to redeem her. It may be that in that case she would have to transfer to them, and to part with the securities which they, calling on her to redeem, were entitled to call for. But then she might be in a difficulty, because

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she was the person who, as plaintiff, had set the ball rolling. In the present case it is the plaintiffs who have done that, and if they insist on their right to take away from her the property she has acquired by redeeming them, it seems to me they can only do it subject to the charge in her favour, which is admittedly prior to them. Therefore, I do not see my way to make any order as between them, excepting that upon the plaintiffs, as fourth mortgagees, paying off the jointress all that shall be found due upon taking the account, which will include all arrears, then she should convey to them, subject to the jointure.

If the jointress does not redeem she will be foreclosed; there will then be an account of what is due to the plaintiffs on all their mortgages, and the others will be foreclosed, unless they pay in three months; so there will be a second period in that case instead of a third (6).

Solicitors—Wood, Bigg & Nash, agents for H. M. James, Exeter, for plaintiffs; Lake, Beaumont & Lake, for jointress; Simpson, Hammond & Richards, for trustees; Carlisle, Unna & Rider, for tenant in tail in remainder; E. J. Richards; C. B. Dalton; G. S. & H. Brandon; Burrows, Barnes & Pears; J. C. Stogdon; and Kaye & Guedalla, for subsequent incumbrancers.

(6) The minutes provided that the jointress should have a period of six months from the date of the chief clerk's certificate as to what should be due to the plaintiffs within which to redeem; that, in case she did not redeem, the subsequent incumbrancers should have one period of three months from the date of a fresh certificate as to what should be due to the plaintiffs within which to redeem; but that, in case the jointress did redeem, the plaintiffs should have a period of three months from the date of a certificate as to what should be due to the jointress within which to redeem, subject to the jointure; and that the subsequent incumbrancers should have a further period of three months from a certificate as to what should be due to the plaintiffs or the jointress, as the case might be, within which to redeem.

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

STIRLING, J.

1890.

April 25, 26.

COTTON, L.J.

LINDLEY, L.J.

BOWEN, L.J.

May 3, 5.

LISTER AND COMPANY (LIMITED) v. STUBBS.

Principal and Agent—Money had and received—Commission received by Agent upon Orders on Principal's Behalf—Investments made by Agent with Money so received—Right of Principal to follow Money into.

The defendant was employed by the plaintiffs as their foreman, and was intrusted by them with the purchase of materials used in their business. From one of the firms from which he had purchased, he had received commissions upon the amounts of the orders he had placed with them. In an action to recover the money so received, the plaintiffs moved, before the trial, for an injunction restraining the defendant from dealing with certain real estate bought with such money, and an order directing him to pay into Court the residue of the money:—Held, affirming the decision of STIRLING, J., that a debt was due from the defendant to the plaintiffs, but the money he had received was not the money of the plaintiffs in his hands as trustee for them, and the order asked for could not be made.

Semle (per COTTON, L.J.), that the plaintiffs would have a right to set aside the contract with the firm supplying the goods, and to sue such firm for the purchase-money paid to them.

This action was brought by the plaintiff company to recover from the defendant, an agent employed by them, money received by him by way of commission upon orders given on behalf of his principals.

The plaintiff company carried on business as silk spinners and manufacturers at Bradford. The defendant had been employed by them as foreman dyer, and had for some years been intrusted with the purchase of dye-stuffs used in the business. One of the firms to whom he had given large orders for materials, on behalf of the plaintiffs, was Messrs. Varley, a firm of dyersalters, and they, in considera-

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tion of the orders placed with them by the defendant, had been paying him large sums by way of commission.

The money so paid to the defendant had, it was alleged, been invested partly in the purchase of real estate, and partly in other investments, and part of it still remained as cash. The plaintiffs claimed to be entitled to follow the money into the investments, and now moved, asking that the defendant should be restrained from dealing with the real estate, and should be ordered to bring the cash and other investments into Court.

Stirling, J., refused the application, being of opinion that the defendant could not be regarded as a trustee of the money for the plaintiffs. From this decision the plaintiffs appealed.

Crackanthorpe, Q.C., and *Ashton Cross (Graham Hastings, Q.C.)*, with them, for the appellants.—We submit that on the facts as stated in our affidavits, which the defendant has not contradicted, the money which came into Stubbs's hands is our money, and that we are entitled to follow it into the investments now representing it—*In re The Canadian Oil Works Corporation; Hay's Case* (1), *Morison v. Thompson* (2), and *The Metropolitan Bank v. Heiron* (3). Stubbs ought to be ordered to pay into Court so much of it as is now in a form in which it can be so dealt with—*Jervis v. White* (4), *Porrett v. White* (5), *Freeman v. Cox* (6), *Dunn v. Campbell* (7), *Hampden v. Wallis* (8), and *Wanklyn v. Wilson* (9). *Cozens-Hardy, Q.C.*, and *J. G. Wood*, for the defendant, were not called upon.

COTTON, L.J.—The case here is this—the defendant was in the confidential em-

ploy of the plaintiffs, and he made a corrupt bargain with persons who supplied the plaintiffs with dye-stuffs. The bargain was most manifestly corrupt, but does that make the money which the defendant received in pursuance of that bargain the money of the plaintiffs? I think I took a correct view in the judgment which I gave, and which was referred to by Mr. Justice Stirling, in a somewhat similar case, *The Metropolitan Bank v. Heiron* (3); and, according to the view which I take, this is not the money of the plaintiffs, so as to make the defendant a trustee of it for them, but is money acquired in such a way that, according to all rules applicable to such a case, the plaintiffs, when they bring the action to a hearing, can get an order against the defendant to pay that money to them. That is to say, a debt is due from the defendant to the plaintiffs in consequence of what he has done, but the money which he has received cannot be treated as being still the money of the plaintiffs, which was handed by them to him, to be paid to Messrs. Varley, in discharge of a debt which was due from the plaintiffs to Messrs. Varley on the contract between them.

When the facts are found out, the plaintiffs will have the option of setting aside the contract altogether, and returning the stuff, or, without setting aside the contract, of suing Messrs. Varley for the money which they have fraudulently handed over to the defendant; but, in my opinion, it cannot be said that the money so paid by Messrs. Varley to the defendant is the money of the plaintiffs, before any judgment or decree in some such action has been made. I know of no case where, because it was highly probable that, if the action were brought, the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security till that has been established by the judgment or decree. The plaintiff might apply, if so advised, for an immediate order under Order XIV., and then, if the defendant applied to defend, he could only do so on such terms as the Judge might think reasonable. But, in the present case, that course has not been taken. In my opinion, we cannot hold, however corrupt the bar-

(1) 44 Law J. Rep. Chanc. 721; Law Rep. 10 Chanc. 593.

(2) 43 Law J. Rep. Q.B. 215; Law Rep. 9 Q.B. 480.

(3) Law Rep. 5 Ex. D. 319.

(4) 6 Ves. 738.

(5) 55 Law J. Rep. Chanc. 79; Law Rep. 31 Ch. D. 52.

(6) 47 Law J. Rep. Chanc. 560; Law Rep. 8 Ch. D. 148.

(7) Law Rep. 27 C. D. 254n.

(8) 54 Law J. Rep. Chanc. 1175; Law Rep. 27 Ch. D. 251.

(9) 56 Law J. Rep. Chanc. 209; Law Rep. 35 Ch. D. 180.

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gain was, that under the circumstances of the case the money was the money of the plaintiffs.

Hay's Case (1) was cited to us, but that was very different. There, Hay himself was a director of the company in question, and he had authorised a cheque to be drawn ostensibly in part payment for certain property to be bought by the company. That cheque was, in fact, not drawn for any such purpose. It was drawn for the purpose of being paid to Hay, to enable him to pay for his shares. That is a very different thing. There Hay, a director of the company, had received the cheque, which was drawn ostensibly for a particular purpose, and then applied it, and knew that he was intended to apply it, to an entirely different purpose, which was, as against the company, fraudulent. That being so, the Judges were quite right in holding that that cheque was still to be considered the money of the company, and therefore that the payment of that cheque in discharge of the calls on the shares was nothing but paying the company with its own money, and that Hay was still liable to pay the calls. That is entirely different, in my opinion, from the case which is here before us; and I think that the first and main line of argument upon which the plaintiffs base their case cannot avail them. Then there is said to be a second point—namely, that there is such an admission here by the defendant that this sum of money is due, that we ought to order it into Court as security for the debt which, *prima facie*, the plaintiff will make out is due to him. As I say, there is no case at all for anything of that sort being done, unless it is done as a condition of allowing the debtor to defend. But that is not what is asked for here.

Then there were a number of cases quoted, which were cases where a trustee was held liable to pay into Court a sum of money which, *prima facie*, was due from him. In those cases the money was not due from the defendant as a debt, but due from him as a trustee to his *cestui que trust*, so that if, as I think, the plaintiffs' first contention is wrong, those cases will not in any way help them. The only question really discussed in them

was whether there was a sufficient admission to enable the Court to deal in that way with the trustee.

But here, if the money sought to be recovered is not the money of the plaintiffs, we should be simply ordering the defendant to pay into Court a sum of money which he has, because there is a *prima facie* case against him that at the hearing it will be established that he owes the money to the plaintiffs. In my opinion that would be wrong in principle. I will not go through the cases that have been cited to us by Mr. Cross; but it would be introducing an entirely new and wrong principle, which we ought not to do, even though we may think it highly just, having regard to the circumstances of the case, if we were to order the defendant to give security such as the plaintiffs ask for.

In my opinion the appeal fails.

LINDLEY, L.J.—If we were to accede to this application, I do not think that Stubbs could complain; but the question is, whether we can do it properly, having regard to the rules by which we are governed. I am clearly of opinion that we cannot, though it is a temptation to us to stretch the law to an extent which, if we did it, would, in my judgment, entail very alarming consequences indeed.

The real state of the case as between the plaintiffs, Varleys, and Stubbs is this: the plaintiffs buy goods of Messrs. Varley at certain prices, and pay for them. The ownership of the goods, of course, is in the plaintiffs; the ownership of the money is in Messrs. Varley. So far there is no difficulty about it. Then Messrs. Varley enter into an agreement with Stubbs, who ordered goods of them, to give Stubbs a commission. That is what it comes to. What is the legal position between Messrs. Varley and Stubbs? They owe him the money. He can recover it from them, I suppose, by an action; but Mr. Cross has asked us to say that Messrs. Varley were Stubbs's agents in getting it. That appears to me to be an entire mistake. The relation between Messrs. Varley and Stubbs is that of debtor and creditor; they are to pay him. Then comes the question, as between the plaintiffs and

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Stubbs, who is entitled—I will not say to that money—but can Stubbs keep the money he has received without accounting for it? Obviously not. I apprehend that he is liable to account for it the moment that he gets it. It is an obligation to pay and account to the company, with or without interest, as the case may be—I say nothing at all about that. But the relation between them is that of debtor and creditor, it is not that of trustee and *cestui que trust*. We are asked to hold that it is, which would involve consequences which, I confess, startle me. One consequence, of course, would be that, if Stubbs were to become bankrupt, this property into which the money has gone would be withdrawn from the mass of his creditors, and handed over bodily to the plaintiffs. Can that be right? Another consequence would be that the plaintiffs could compel Stubbs to account to them, not only for the money with interest, but for all the profits which he may have made by embarking in trade with it. Can that be right? It appears to me that those consequences shew there is some flaw in the argument. If, by logical reasoning from the premisses, conclusions are arrived at which are shocking to the sense, I, for one, go back and look at the premisses, and see if they are sound. I am satisfied that they are not sound in the argument which has been put forward in this case—the unsoundness consisting in confounding ownership with obligation. It appears to me that the view taken of this case by Mr. Justice Stirling was correct, and that we should be doing what I conceive to be very great mischief if we were to accede to this application, tempting as it is.

I think that the appeal ought to be dismissed.

BOWEN, L.J.—I am of the same opinion. I really do not think that I need add anything to what has been said.

Appeal dismissed, with costs.

Solicitors—Speechly, Mumford & Co., agents for Mumford & Johnson, Bradford, for appellants; W. & J. Flower & Nussey, agents for Berry, Robinson & Scott, Bradford, for respondent.

CHITTY, J. }
1890.
June 4. }

In re TUNNO.
RAIKES v. RAIKES.

Will—Specific Legacies out of Sale Money—Deficiency—Lapse of one Legacy—Abatement of other for Benefit of Residue.

Specific bequest of jewels upon trust to sell for the best price obtainable, and to pay thereout two legacies of fixed amounts; there was a residuary bequest, but no other gift of any surplus sale money. The price obtained was insufficient to pay both legacies, but one of them lapsed:—Held, that the other legacy was not liable to abate in favour of the residuary legatee, as it would have done in favour of the other legatee, if his legacy had taken effect.

Page v. Leapingwell (18 Ves. 463) distinguished.

Adjourned summons.

The testatrix, by her will, gave and bequeathed to the trustees thereof certain diamond ornaments, upon trust to sell and dispose of the said ornaments for the best price or prices that could be obtained for the same, and upon trust, by, with, and out of the proceeds to arise from such sale, to lay out and expend a sum, not exceeding in the whole 600*l.*, in repairing a parish church (here followed certain conditions as to this expenditure), and also upon trust to lay out and expend the sum of 700*l.* in building six labourers' cottages on the Warnford estate, which was described as being then in the possession of Sartoris. The will contained also a residuary bequest. The ornaments had been sold, but had realised only about 900*l.* At the testatrix's death the Warnford estate had ceased to be in the possession of Sartoris, and the Court had already declared that the gift of the 700*l.* had accordingly failed, and that this sum fell into the residue.

With respect to the sum of 600*l.*, the representative of the residuary legatee contended that the conditions as to its expenditure had not been complied with, and took out this summons for a declaration that, on the true construction of the will, and in the events which had happened, the whole of the proceeds arising from the sale of the ornaments fell into

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the residue. The Court, however, held this contention to have failed, and that the gift of the 600*l.* took effect. But the applicant further contended that the proceeds of sale of the ornaments being insufficient to provide for the two sums of 600*l.* and 700*l.*, the former sum ought to abate in the proportion of 900*l.* to 1,300*l.*, leaving the balance to fall into the residue.

Romer, Q.C., and *S. Dickinson (Rigby, Q.C.*, with them), for the applicant.—The sums given being specific must abate rateably, each legatee taking a proportionate sum—*Page v. Leapingwell* (1)—and the sum representing the legacy which has failed falls into the residue. One specific legatee ought not to gain by the lapse of another specific legacy.

Sir A. Watson, Q.C., and *P. F. Wheeler*, for the vicar and churchwardens.—*Page v. Leapingwell* (1) was a case of the overplus of a fund after its division into aliquot parts, but the effect of this gift is to create a trust of the proceeds of sale to the extent of 600*l.* in favour of the church—*Currie v. Pye* (2).

G. A. Watson, for the trustees of the will.

Romer, Q.C., replied.

CHITTY, J. [after deciding that the gift of the 600*l.* was effectual, continued :] But there is a further point raised. The executrix of the residuary legatee says that as the gift of 700*l.* out of the proceeds of sale of the diamonds has failed, this lapse has taken place for her benefit. The diamonds did not produce 1,300*l.*, but only about 900*l.*; and the residuary legatee contends that the 600*l.* legacy must abate, the legatee taking six thirteenths only of the 900*l.* It is plain that, as between the legatee of the 700*l.*, had that legacy taken effect, and the other legatee, the legacies must have abated in the proportion stated; but it does not follow, therefore, that the residuary legatee can, in the existing circumstances, claim seven thirteenths of the 900*l.* It is clear that

if a specific property be given in trust for A. and B. as tenants in common in equal shares, and B. dies in the testator's lifetime, A. takes only one half of the property. It is equally clear that the same result follows, whatever be the fractions in which the property be divisible among the specific legatees. And it is equally clear that if property be given upon trust for sale, with a direction to divide the proceeds into aliquot portions, the gift intended in each case is that of a specific portion only of the proceeds. And the argument on behalf of the residuary legatee proceeds on the assumption that, on the true construction of this will, there is a gift to these two legatees of 700*l.* and 600*l.*, of aliquot portions of the proceeds of sale. But, in my opinion, on the true construction of this will, that is plainly not the true interpretation. It is not as if the direction had been to sell the diamonds for not less than a sum of 1,300*l.*, and the testatrix had then proceeded to give thereout the legacies; that would have amounted to a gift of the fund in specific proportions. The residuary legatee's argument is founded on the well-known case of *Page v. Leapingwell* (1), where the sum of the gift, to put it quite shortly, was, "distribute 10,000*l.* in aliquot proportions among certain named legatees, with a gift over of the overplus moneys to A."; and, on the question of the construction to be put on this term "overplus," Sir W. Grant held that it meant a sum of 2,200*l.*, being the fractional remainder of the sum of 10,000*l.*; for, the testator having directed a sale for not less than 10,000*l.*, the gift was considered as being, in substance, a division of that sum in specific or aliquot portions among the legatees who were to take as tenants in common in the proportions named. It followed that if any one of them died in the lifetime of the testator, or if for any other reason the gift to any of them failed, such event did not increase the benefits intended to be given to the others. But that decision has no application to the present case. To my mind, on the construction of this will, it is not open to argue that the gifts here are of aliquot proportions of the produce of sale. The will

(1) 18 Ves. 463.

(2) 17 Ves. 462.

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contains no statement of the amount of the fund to be disposed of, nor of the sum for which the diamonds are to be sold; nor is there, in terms, any gift of the overplus in the event of their fetching more than 1,300*l.*, and it is only by the general law that such overplus, being undisposed of, would have fallen into the residue. And it is clear that, if these diamonds had sold for, say, 2,000*l.*, the persons entitled to the sum of 600*l.* would not have taken six thirteenths of the 2,000*l.* In the result, the gift here is simply equivalent to a gift by a testator of the Consols which he may be possessed of at his death, upon trust to sell and raise thereout 600*l.* to be paid to A., and 700*l.* to be paid to B., in which case, there being no priority between the two, if the Consols turn out to be insufficient, abatement would be necessary. But, in reality, such gifts amount to charges on the Consols, and as such must be paid before the residuary legatee can claim anything thereout. In the present case the residuary legatee is attempting to creep into the shoes of the legatee of the 700*l.* as if that legacy had taken effect. But this legacy is gone, and the residuary legatee is entitled to claim, not the legacy of 700*l.*, but only so much of the produce of sale as will, but for the legacies bequeathed thereout, fall into the residue. And none of it does so fall until the specific gift of the 600*l.* has been discharged. It is unnecessary for me further to consider the authorities. I hold the 600*l.* must be paid in full before the residuary legatee can take any part of the fund.

Solicitors—Francis & Johnson, for applicant;
H. B. Reynolds, for vicar and churchwardens;
Harries, Wilkinson & Raikes, for trustees.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
BOWEN, L.J.
FRY, L.J.
1890.
June 18.

In re PALMER.

Solicitor and Client—Mortgage—Agreement as to Costs—Mortgagee's Costs—Reference for Taxation—Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 1, sub-s. 3, s. 2, and s. 8, sub-ss. 1 and 4.

A mortgagor wrote to his solicitor as follows, "I hereby request and instruct you to raise, or endeavour to raise, for me the sum of 300*l.*, at ten per cent. per annum, on the security of all my estate and interests under the will and in the property of the late T. S., and I hereby undertake to pay your costs (which I agree at 20*l.*, exclusive of costs out of pocket) incurred, or to be incurred, in or about doing what is necessary in your opinion for the purpose of carrying out these instructions." The solicitor carried out the mortgage, in which he acted as solicitor for the mortgagor and mortgagees, and he retained out of the money advanced 20*l.* for costs, including the mortgagees' costs. The mortgagor subsequently took out a summons that the solicitor might be ordered to deliver to him a bill of costs and charges claimed by the solicitor to be due or paid or to have been deducted by him out of the mortgagee's money:—Held, first, that the letter constituted an agreement within the Solicitors' Remuneration Act, 1881, s. 8, sub-s. 1, and although the remuneration agreed to was with reference, so far as the mortgagee's costs were concerned, to matters in which the solicitor was not engaged as solicitor for the mortgagee, yet he was engaged to do business for him as solicitor, and therefore the relation of solicitor and client was created within the meaning of section 1, sub-section 3; secondly, that in the absence of evidence impeaching the agreement, there ought not to be a reference for taxation under section 8, sub-section 4.

Decision of NORTH, J., affirmed.

This was an appeal from a decision of North, J.

In January, 1884, one Slater was de-

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sirous of borrowing the sum of 300*l.* on the security of his reversionary interest in certain property, and he applied to Palmer, a solicitor, to obtain this loan, and on the 21st of January he wrote the following letter to Palmer, "I hereby request and instruct you to raise, or endeavour to raise, for me the sum of 300*l.*, at ten per cent. per annum, on the security of all my estate and interest under the will and on the property of the late Thomas Symons, and I hereby undertake to pay your costs (which I agree at 20*l.*, exclusive of money out of pocket), incurred and to be incurred in and about doing what is necessary in your opinion for the purpose of carrying out these instructions." This letter was signed by Slater. Palmer procured for Slater an advance of 300*l.* on mortgage of the property, and out of the money so advanced retained the 20*l.* for costs. Palmer acted as solicitor for both mortgagor and mortgagee in the matter, and the 20*l.* included the costs of both.

In 1888, the reversionary interest of Slater having fallen into possession, a transfer of the old mortgage and fresh loan of 50*l.* at a reduced rate of interest was arranged and carried through by Palmer, and Slater wrote a letter to Palmer similar to the letter of the 21st of January, 1884, agreeing to pay Palmer 15*l.* for costs. Palmer retained the sum of 15*l.* out of the money advanced, and in this matter also acted as solicitor for the mortgagor and mortgagee.

Slater subsequently took out a summons, asking that Palmer might be ordered to deliver to Slater a bill "of all such his fees, charges, or disbursements as he claims to be due or paid, or as have been deducted by him from the applicant or out of his moneys."

The summons was heard by North, J., on the 7th of May, when he held that, the agreement being on behalf of both mortgagor and proposed mortgagee, was between the solicitor and clients, and the Court could not order taxation for the purpose of giving the Taxing Master jurisdiction to enquire into whether the agreement ought to be set aside.

Slater appealed from this decision.

Farwell (Cozens-Hardy, Q.C., with him), for the appellant.—The letters by Slater agreeing to pay fixed sums for costs do not amount to agreements between a solicitor and his client within the meaning of the Solicitors' Remuneration Act, 1881, s. 8, sub-s. 1. The definition of "client" is given in section 1, sub-section 3, of the Act. Here the alleged agreement relates not only to the costs of the mortgagor, but also to the costs of the mortgagee. It is true that a mortgagor is by reason of the relation of mortgagor and mortgagee liable to pay the mortgagee's costs, but he is not the agent of the mortgagee to retain a solicitor for him, and he is not the client of the mortgagee's solicitor. Assuming the alleged agreements are agreements within the Act, they may not only be sued upon, but they may also be impeached, and it may be referred to the Taxing Master as to whether the amounts agreed to be paid are reasonable—Solicitors' Remuneration Act, 1881, s. 8, sub-s. 4, *In re Gray* (1), *In re Inderwick* (2), and *Cole v. Park* (3). The sums agreed are, it is submitted, manifestly unreasonable, and there should be a reference to the Taxing Master.

Dunham, for the respondent, was not called upon.

COTTON, L.J.—Two points have been raised and argued very ingeniously by Mr. Farwell; but, in my opinion, the appellant cannot succeed on either of them.

First, it was said that this was not an agreement within the Solicitors' Remuneration Act, 1881, on the ground that Mr. Palmer and Mr. Slater did not stand in the relation of solicitor and client. I think the construction of the 3rd sub-section of the 1st section is against that contention. According to the definition contained in that sub-section, "client" includes any person who has power, express or implied, to retain or employ, and retains and employs, a solicitor. To my mind the appellant has done that. It is very true

(1) 30 Sol. Journ. 551.

(2) 54 Law J. Rep. Chanc. 72; Law Rep. 25 Ch. D. 279, 281, 282.

(3) 58 Law J. Rep. Chanc. 527; Law Rep. 31 Ch. D. 326.

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the remuneration agreed to was with reference to matters in which the solicitor was not engaged as solicitor for the appellant; but he was engaged to do business for him as solicitor, and therefore I am of opinion that the relation of solicitor and client was created within the meaning of this clause and within the meaning of the Act.

Then it is said that this agreement ought to have been referred to the Taxing Master, having regard to the 4th sub-section of section 8 of the Act. The appellant has not filed any affidavit that this charge is unfair or unreasonable, and although the 4th sub-section does, in my opinion, give the Court power where an agreement is so impeached to refer it to the Taxing Master to consider whether it is a fair and reasonable charge, here the foundation for such an order has not been made. Counsel has said that this is a very unreasonable charge; I do not think he said it is unfair. I do not think the Court ought upon such an argument by counsel alone, unsupported by any affidavit or facts which lead to that conclusion, to refer such an agreement to the Taxing Master to exercise the power given by the 4th sub-section of section 8. In my opinion the appeal fails.

BOWEN, L.J.—I am of the same opinion, and I agree entirely with what the Lord Justice has said. I think that this appeal ought never to have been brought.

FRY, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors—G. B. Crook, for appellant; W. B. Palmer, for respondent.

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

KEKEWICH, J.
(for KAY, J.).

1890.

March 25.

COTTON, L.J.

BOWEN, L.J.

FRY, L.J.

June 13.

COOKE v. SMITH.

Debtor and Creditor—Assignment in Favour of Creditors—Surplus—Resulting Trust.

By a deed of assignment executed by a firm in favour of their creditors, after a recital of the inability of the firm to pay their debts in full, the business was assigned to trustees upon trust either to carry on or sell the same, and, after payment of costs, to pay and divide the residue of the profits and proceeds of sale unto and among all and singular the creditors in rateable proportions, according to the amount of their respective debts, subject, nevertheless, to the provisions thereafter contained, and the creditors granted a release of the debts. The deed contained a provision empowering the trustees to pay off or make arrangements with creditors under 30l. The profits of the business were more than sufficient to pay the creditors in full:—Held, that there was a resulting trust of the surplus for the assignors.

This was an appeal from a decision of Kekewich, J., upon a preliminary question of law arising upon the construction of a creditors' deed.

Prior to May, 1876, Henry Cooke, Joseph Cooke, and John Woodfindin Swinnerton carried on business as iron manufacturers at Barrow-in-Furness, under the style of Cookes & Swinnerton.

On the 15th of May, 1876, J. W. Swinnerton died, leaving Rachel Swinnerton, his widow, his legal personal representative. Shortly before his death the firm got into financial difficulties, and negotiations were commenced for the assignment of the partnership property to trustees for the benefit of their creditors. The assignment was eventually carried into effect by a deed dated the 29th of December, 1876, and made between H. Cooke and

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J. Cooke of the first part, Rachel Swinnerton of the second part, Josiah Timmis Smith, manager of the Barrow Hæmatite Steel Company (Limited), and Thomas Storey (now Sir Thomas Storey), Director of the Lancaster Banking Company, of the third part, and the several creditors whose names and seals were thereunto subscribed and set of the fourth part.

The deed recited (*inter alia*) that, the firm being unable to pay their creditors in full, an agreement was in process of arrangement at the time of the death of Swinnerton for the making of an assignment similar to that thereafter contained, and for the granting of a release to the said firm similar to that therein-after contained. And it was thereby witnessed that the said H. Cooke and J. Cooke and the said R. Swinnerton assigned unto the said J. T. Smith and T. Storey the business lately carried on by the said firm at Barrow-in-Furness, and the stock-in-trade, book debts, &c., and all other the personal estate whatsoever and wheresoever of the said firm, upon trust that they, or the survivor of them, or the executors and administrators of such survivor, should in their or his absolute discretion either carry on the business of the said firm for so long as they should in the like discretion think fit, or should immediately, or at any time after discontinuing to carry on the business, sell and dispose of and convert into money the said business and other premises, and should out of the profits of the said business if carried on, and out of the moneys to arise from such sale as aforesaid, pay the costs, charges, or expenses to be incurred in the execution of the trusts of the deed or in respect of the premises, and should "pay and divide the clear residue of the said profits and moneys unto and among all and singular the creditors in rateable proportions according to the amounts of their several and respective debts," subject nevertheless to the covenants and provisions thereafter contained. The deed contained a declaration empowering the trustees to pay in full, or make arrangements with the creditors whose debts were under 30l.; and it provided that whenever the moneys in the hands of the trustees should amount to 50l. it should be paid into the Lancaster

Bank. And it was also witnessed that, in consideration of the assignment therein-before contained, the said several persons, parties of the fourth part, respectively acquitted, released, and discharged the said H. Cooke and J. Cooke and the said R. Swinnerton from the debts of the firm.

The schedule of creditors contained eighteen names of firms and individuals, including the Barrow Hæmatite Steel Company and the Lancaster Banking Company, who were the two largest creditors.

The trustees at first elected to carry on the business of the firm under the same style as before, and they employed J. Cooke as their manager. The business was carried on at a profit, and certain payments were made to the creditors.

In December, 1883, they sold the business to the Barrow Hæmatite Steel Company, with the consent of the other creditors, in consideration of the company paying the balance then due to them in respect of their debts.

In 1889 an action was commenced by H. Cooke and Mrs. Swinnerton against the trustees of the deed, the Barrow Hæmatite Steel Company, and J. Cooke, to set aside the sale; but at the instance of the defendants a preliminary point of law was first argued—namely, whether upon the true construction of the deed of assignment the plaintiffs had any title to sue.

Renshaw, Q.C., and Farwell, for J. T. Smith and the Barrow Hæmatite Steel Company.

Millar, Q.C., and T. E. Mansfield, for the plaintiffs.

Solomon and L. Sanderson, for Sir Thomas Storey.

KEKEWICH, J.—No doubt the case has been argued by the plaintiffs on the strongest possible ground, that there was a resulting trust. I cannot find a resulting trust. As a rule, at any rate, you find a resulting trust in two classes of cases—where an express trust is declared, and that express trust does not exhaust amongst the beneficiaries interested the whole of the property subject to the trust; or where the Court, applying some rule or principle, implies a trust which is not ex-

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pressed—that is to say, implies a trust in the assignee or holder of the property, and declares that he is not entitled for his own benefit. In that case the Court, finding that there is no trust declared, is obliged to look back, and create, by the application of the doctrines of equity, a resulting trust. Neither of these events has happened here. Here you have an express trust declared, and, to my mind, that express trust exhausts everything. There is nothing left on which the doctrine of resulting trust can operate at all. I have been asked to look at what happened after the execution of the deed. I do not think that I am at liberty to do that, because the form of the order tells me only to decide whether, upon the true construction of the deed, the plaintiffs have a right to sue. Turning to the deed, I do not find that it contemplates a payment of twenty shillings in the pound, or any other sum. What it does contemplate, and what it does state in fact, and what is the root of the whole matter, is that the debtors, at the time of the arrangement, were unable to pay their creditors in full. What would happen afterwards was a matter of probability with which the parties were not concerned. Beyond that mere recital there is nothing to guide me; but the operative part comes simply to this—that the creditors say, “You, the debtors, cannot now, as you admit, pay us in full; you have certain property which is worth something, and we will take that, and give you a release. Whether we could or could not get more by forcing you into the Bankruptcy Court, we do not stop to enquire. You give us all this property, give it to trustees for us, and then we will give you an absolute release and take our chance.” That is what many a creditor has done before, and probably many a creditor will do again. The trust is, that the trustees are to “pay and divide the clear residue of the said profits and moneys,” not towards the satisfaction of the creditors named in the schedule according to the amounts set opposite their respective names, and so forth, which is a very common form, but “unto and among all and singular the creditors of the said firm in rateable proportions according to the amount of their

several and respective debts.” Before going back to that, I will deal with the concluding words, “subject, nevertheless, to the covenants and provisions herein-after contained.” There are two provisions which possibly might interfere with that distribution: the one which enables the trustees to pay creditors for under 30% in full, and the other by which they are enabled to pay the receipts, when they come to 50%, into the bank. That is to say, notwithstanding the absolute equality of distribution, they may pay the small creditors in full at once, and notwithstanding the same provision for distribution, they must pay the money into the bank named so as to prevent the creditors asserting a right to have every sovereign divided between them. But it is to be paid in that way among them, and it is quite possible that they may receive more than twenty shillings in the pound. I am told here that they may be paid forty shillings in the pound. That is not a result at which the Court would wish easily to arrive. There seems to me to be a complete answer to that. This deed was executed in December, 1876, and not until thirteen years afterwards do the plaintiffs find that it would be better for them to have the property back. A very little arithmetic would tell one that in thirteen years the interest on these sums would be considerable; and if creditors are obliged to go without their debts for thirteen years, they would not be paid very much in excess of what is due to them if they were paid forty shillings in the pound. That may probably have entered into the calculations of the parties with the possibility of the reviving of trade, and so forth. They made that bargain; they clearly expressed it; and I find no reason to go back from it. I must find on the preliminary question of law that, on the true construction of the deed, the plaintiffs have no title to maintain this action. The costs of all parties will be costs in the action.

The plaintiffs appealed from this decision.

Neville, Q.C., and T. E. Mansfield, for the plaintiffs.—The question is whether, upon the true construction of this deed,

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the surplus is to go to the creditors, or whether there is a resulting trust in favour of the assignors. This is a creditors' deed, and it is in the usual form, except that it is usual to insert an express trust of the surplus for the assignors. Unless the Court, upon looking at the whole deed, can come to the conclusion that something more was contemplated than the payment of the debts of the firm, then there will be a resulting trust for the assignors. There is nothing in the general scope of the deed to shew that anything further was intended, and the clause relating to creditors under 30% is inconsistent with the idea that the creditors are to take over the estate absolutely. If that were the true view, what is the position of the creditors under 30% who have been paid in full? It does not seem a reasonable arrangement that the right of these creditors to share in the surplus should depend upon the discretion of the trustees.

Renshaw, Q.C., and Farwell, for J. T. Smith and the Barrow Hematite Steel Company.—We submit that the bargain was that the creditors should take this property in lieu of their debts.

[*Fry, L.J.*, referred to a precedent taken from Davidson's edition of *Martin's Conveyancing*, reprinted in *Forsyth on Composition* (3rd ed. p. 230), in which there was no ultimate trust.]

This deed appears to follow that precedent. In the next precedent there is an ultimate trust. We have not been able to find any case in which a deed like this has come before the Court, but we submit that the earlier precedent contemplated an arrangement such as we are contending for in this case. A somewhat similar precedent occurs in a later edition of *Davidson* (2nd ed. vol. 5, part 2, p. 943), but there was a provision that the estate should be administered according to the law of bankruptcy. It must be borne in mind that the assignors were not parting with their whole property, but only with the partnership property. Assuming that there is no antecedent reason why a debtor should not offer to his creditors a portion of his property in accord and satisfaction of his debts, the language of this deed is apt to carry out that arrangement.

Not much reliance can be placed on the clause relating to the 30% creditors. That clause was merely inserted to avoid the inconvenience of dividing the business into very small fractions.

Solomon and L. Sanderson, for Sir Thomas Storey.

COTTON, L.J.—Even although this follows the exact terms, as far as I can see, of precedents either of Mr. Davidson, or at any rate which he inserts in his book, I cannot say that he has not missed something, and there is the question of what trusts are implied after all the debts are paid. In my opinion this is a deed intended to provide for payment either in full, or partly, as far as the estate goes, of creditors; and although the parties did not contemplate that there would be a surplus, or else I suppose they would have provided for it, yet as there is a surplus after payment of all the creditors in full, the question arises, Is there a trust for the assignors? In my opinion there is. It is very true there is no provision expressed in this deed, but when property belongs to people who are indebted, and they assign it for the purpose of paying their creditors the whole amount of their debts, or as far as property will go, if those creditors are paid, then in my opinion there is a resulting trust though not expressed for the debtors. There are trusts here which have been the subject of a good deal of argument; but if one is to look upon this as a deed for payment of creditors, as I say it is to be looked upon, then if those creditors are paid in full, although no trust is expressed, there will be a resulting trust for those who owned the property before they executed the deed. It is said that after the execution of this deed the assignors had no longer any interest in this property, that the trustees were trustees only for the creditors, and that if the assignors by a stroke of good luck got the means of paying off their creditors they could not have said, "Take all the money that is due to you, release us from it, and then you or your trustees must reassign to us the property which has been assigned." It is said that here there is a direction—a direction which was to cover everything, and therefore ex-

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cluded the Cookes from any interest—to divide all the proceeds, either by profits or sale of the property, amongst the creditors. Yes; but that, to my mind, is only a payment to the creditors so long as they are creditors, that is, so long as their debts which they now release are not paid in full; and when that is done there is no direction as to what is to be done with the surplus arising from this property. In that event it was not for the trustees to hand it to the creditors, but it must go back to those who were debtors, and who were released in consequence of the assignment which they made. Although the clause was not put in, “In trust, after payment of all the creditors in full, to hold the surplus for the assignors,” yet that is not in my opinion necessary, because I can see clearly from the intended operation of this deed that the object intended here to be provided for was payment or satisfaction of the debts due by the assignors, and when that was done any proportion remaining must go back to the persons from whom it came to the trustees for that purpose. I differ from Mr. Justice Kekewich, but I cannot myself have any doubt on the subject.

BOWEN, L.J.—I am of the same opinion. Had it not been for the judgment of Mr. Justice Kekewich, whose experience I respect also, I should have said that I had no doubt on the subject, although it must be taken that the deed here does not contain words which would have prevented the question arising. In order to construe the clause the construction of which is really the matter for our decision, one must make up one's mind as to what is the object of this deed. Is the true object of this deed to pay the debts of the assignors, and devote so much of the property of the assignors to that purpose as may be necessary—in which case, as soon as the object is satisfied, there would be a resulting trust to the assignors? or is the true object of the deed, as the respondents contend, and as the learned Judge appears to have thought, that the assignors should get rid of their property, and as a consideration should get rid at the same time of their debts? Those are

the two alternative views. We start with this, that the deed is a deed which contains a schedule of the various creditors to whom, or for the benefit of whom, the assignment is made; and when we look at the schedule we find it consists of some eighteen firms and individuals, and after deducting a certain number of them whose debts are under 30% there are still some ten or twelve creditors remaining, among whom are the Barrow Hematite Steel Company (Limited) and the Lancashire Banking Company. The first recital upon which stress ought to be laid is a recital that the firm are unable to pay their creditors in full, or, rather, that they were unable some months before at the time when the negotiations were first entered into. I think, however, although it is only a recital that the firm some months before were unable to pay their creditors in full, one can hardly read it without deriving from it the conviction that all the parties to this deed, at the date of its execution, regarded the assignors as unable to meet their engagements. Then comes the clause we have to construe. After assigning the business to the trustees, upon trust, at their discretion, either to carry on the business, or to sell immediately, or at any time afterwards, and after paying out of the profits of the business carried on, and out of the moneys to arise from the sale, if sold, the costs, charges, and expenses to be incurred or become payable in or about the execution of these trusts, there is a provision that the trustees shall pay and divide the clear residue of the profits and moneys unto and among all and singular the creditors of the said firm, in rateable proportions, according to the amount of their several and respective debts, subject nevertheless to the covenants and provisions thereafter contained. I think it is doing no violence to that clause or to the deed to allow these words to be read by the light of the previous recital of the inability of the firm to pay their debts; and I think that the language of the clause “to divide in rateable proportions according to the amount of their several and respective debts,” is to be accounted for by the fact that at that moment it was supposed that the

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property would not do more than satisfy the claims of the respective creditors in full.

Then comes a further clause, which I think is also material, which gives the trustees the power at their own discretion to pay in full or make arrangements with creditors whose claims are under 30%. If the true effect of this deed is that the entire property was to pass to and vest for ever in trustees for the benefit of the creditors whose names are scheduled, it seems to me almost incomprehensible that the deed should contain a provision which gave the trustees the power at their discretion to pay off or compromise debts under 30%. The truth is that there is nothing at all in this deed inconsistent with the idea that its object is to pay the debts, and only to divide so much of the property of the assignors as is necessary for that purpose, unless it be the absence of the express direction as to what is to be done with the surplus, and the somewhat limited language of the direction as to division, which I think is amply to be accounted for by the state of circumstances at the time the deed was made. I cannot help feeling, having regard to the fact that this deed is sealed and signed by a number of creditors, who are carrying on every kind of business, and who together constitute a multifarious group, that it is far more reasonable and businesslike to suppose that this deed was intended to protect them and devote so much of the property as was necessary to pay their debts, than to assume that they were buying a business, and intended through the medium of their trustees to embark in a new and, as far as several at all events of their businesses were concerned, heterogeneous and novel venture. I confess I should not have doubted at all, reading this deed by one's ordinary natural lights, that it was simply intended to be an assignment in payment of debts, and that there was implied in it, what equity always does imply after the object of the deed is obtained, a trust for the settlors.

FRY, L.J.—The question which we have to decide in this case is what is the true nature of this deed. Is it a deed by

which a firm agreed with their creditors upon a certain mode of satisfying their debts and nothing more, in which case there was plainly a resulting trust for the benefit of the assignors? or is it a deed by which the firm sold their business to their creditors, or a deed by which they agreed to give up their business by way of satisfaction and accord to their creditors, in either of which two cases the creditors, and they alone, are the owners of the business? Now I have no hesitation in coming to the conclusion that this is a deed of the first kind, and is what is commonly known as a creditors' deed—that is, a deed by which the creditors either extinguish or suspend certain of their rights as creditors, in consideration of certain provisions to be made for the payment of their debts. We start with this, that, throughout, the deed describes the persons who are of the fourth part as being creditors of the firm, and we find the usual recital of inability to pay which is common in deeds of that description. We find no recital indicating an intention to sell the business, we find no recital indicating any intention to give up all interest in the business by way of accord and satisfaction of the debts of the creditors, but we do find the assignment in the usual terms. Then come the words of declaration of trust, which no doubt are not very felicitous, and which would create some little doubt if they stood by themselves. The declaration is that the trustees “shall pay and divide the clear residue of the said profits and moneys unto and among all and singular the creditors of the said firm in rateable proportions according to the amount of their several and respective debts, subject nevertheless to the covenants and provisions hereinafter contained.” Now I think it is not unduly straining the language of that clause to hold that the words “according to the amount of their several and respective debts” have a double function: that they describe the ratio in which the division is to take place, and that they also determine the limit up to which the payment is to be made. In other words, you are not paid according to the amount of the debt if you exceed the debt or go beyond the

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debt. That, I think, is the meaning which may fairly be put upon those words to give effect to what, in my judgment, is the plain and obvious intention of the deed in its ordinary scope.

Then comes the clause with regard to the payment of creditors under 30%, which I think is very important. It gives the trustees an absolute right and power to pay off all the creditors under 30%. Does that leave a creditor under 30% still a *cestui que trust* under the deed? If not, it is remarkable that these creditors, being, according to the view of the respondents, purchasers of the business, may be excluded from their share in the business, even although it is turning out a flourishing concern, at the will and discretion of their own trustees. That is a possible arrangement, but it is a highly improbable one. I think, therefore, that the true meaning of the deed is that it is only one for the benefit of the creditors, and consequently there is a resulting trust, and that we must make a declaration accordingly and remit the matter to the Judge. The order of Mr. Justice Kekewich was, "This Court doth declare that upon the true construction of the said indenture dated the 29th of December, 1876, the plaintiffs have no title to maintain this action." I think it should run in this way: "According to the true construction of that deed a trust resulted for the benefit of the assignors."

Solicitors—Trass & Jarman, agents for Frank Taylor, Barrow-in-Furness, for plaintiffs; Currey, Holland & Currey, for Smith and the Barrow Hæmatite Steel Company; Redpath, Holdsworth & Marshall, agents for C. F. Preston, Barrow-in-Furness, for Storey, and Trass & Jarman, agents for James Park, Barrow-in-Furness, for defendant Joseph Cooke.

[IN THE COURT OF APPEAL.]

COTTON, L.J.	} VAN GELDER, APSIMON AND COMPANY (LIMITED) v. THE SOWERBY BRIDGE UNITED DISTRICT FLOUR SOCIETY (LIMITED).
LINDLEY, L.J.	
BOWEN, L.J.	
1890.	
May 14, 15.	

Patent — Infringement — Mortgage — Right to sue — Parties — Patents &c. Act, 1883 (46 & 47 Vict. c. 57), ss. 23, 46, and 87 — Patents &c. Act, 1888 (51 & 52 Vict. c. 50), s. 21 — Rules of Supreme Court, Order XVI. rule 11.

The mortgagor of a patent is entitled to maintain an action for infringement without making the mortgagees parties.

Where an action appears to the Court to be defective for want of parties, it is the duty of the Court, under rule 11 of Order XVI., to order the necessary parties to be added.

Decision of KEKEWICH, J., reversed.

This was an appeal from a decision of Kekewich, J., reported *ante*, p. 292.

The plaintiff company claimed an injunction and damages in respect of an alleged infringement of letters patent, 1878, No. 2,470, for "improvements in apparatus for separating substances by means of sieves, and in the mode of operating parts of the same." The plaintiffs were assignees of the patent from the original patentee, P. Van Gelder, and a mortgagee, under two deeds dated the 1st of October, 1885, and the 30th of December, 1885.

By an indenture of mortgage of the 31st of December, 1885, they mortgaged the patent to the Halifax Joint Stock Banking Company, to secure the balance due to the bank on their current account. The mortgage was in the form of an absolute assignment, subject to a proviso for redemption, and it contained a power for the banking company to grant licences and to sell the mortgaged premises, with a proviso that such powers should not be exercised until default had been made in manner therein mentioned.

The plaintiffs were on the 22nd of February, 1886, duly registered as assignees under the Patents Act, 1883 (1).

(1) The material provisions of the Patents Act, 1883, are as follows:—

Section 23: "(1) There shall be kept at the

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On the same day the mortgage to the banking company was also registered. The registration of the mortgage was in the following terms: "By request received and filed Halifax Joint Stock Banking Company Limited, Princes Street, Halifax, York, registered as mortgagees. Mortgage Van Gelder Apsimon & Co. Limited to the Halifax Joint Stock Banking Company Limited produced and copy thereof filed." A copy of the mortgage was filed at the same time.

Four other mortgages were subsequently registered, each of them being by way of assignment.

Patent Office a book called the Register of Patents, wherein shall be entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licences under patents, and of amendments, extensions, and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed.

"(2) The Register of Patents shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein.

"(3) Copies of deeds, licences, and any other documents affecting the proprietorship in any letters patent or in any licence thereunder, must be supplied to the Comptroller in the prescribed manner for filing in the Patent Office."

Section 46: "In and for the purposes of this Act, 'patentee' means the person for the time being entitled to the benefit of a patent."

Section 87: "Where a person becomes entitled by assignment, transmission, or other operation of law to a patent, or to the copyright in a registered design, or to a registered trade mark, the Comptroller shall, on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the patent, copyright in the design, or trade mark in the Register of Patents, Designs, or Trade Marks, as the case may be. The person for the time being entered in the Register of Patents, Designs, or Trade Marks as proprietor of a patent, copyright in a design, or trade mark, as the case may be, shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licences as to, or otherwise deal with the same, and to give effectual receipts for any consideration for such assignment, licence, or dealing. Provided that any equities in respect of such patent, design, or trade mark may be enforced in like manner as in respect of any other personal property."

The Patents &c. Act, 1888, provides, section 21: "In section 87 of the principal Act, after the words 'subject to' shall be added the words 'the provisions of this Act and to.'"

The first defence to the action was that the plaintiffs were not the proprietors of the patent, and were not entitled to sue in respect thereof. At the trial an officer from the Patent Office was called, who deposed that since the Patents Act of 1883 it was the practice of the office to register a mortgagee by way of assignment as mortgagee, and not as assignee.

The case came on before Kekewich, J., on the 16th and 17th January, when his Lordship held that the plaintiffs had no right to sue without joining the banking company as plaintiffs, and ordered the trial to stand over to give the plaintiffs an opportunity of applying to amend the writ by adding parties, or otherwise as they might be advised. The case again came on on the 1st of February. The plaintiffs' counsel then stated that, having failed to obtain the consent of the banking company, he had no application to make, and the action was dismissed. The order dismissing the action was prefaced by the statement that the plaintiffs, by their counsel, did not ask for leave to amend by the addition of parties or otherwise, and by an expression of the opinion of the Court that the plaintiffs were not the registered proprietors of the patent in question in the action.

The plaintiffs appealed from both orders.

Sir Horace Davey, Q.C. (Aston, Q.C., Bousfield, and W. Neill with him), for the plaintiffs.—The plaintiffs are the assignees and registered proprietors of the patent. The action was dismissed by Kekewich, J., upon the preliminary objection that the plaintiffs had no right of action, and his decision was that the mortgagees, and not the plaintiffs, were the proprietors of the patent. Apart from the Patents Act, a mortgagor is, in a Court of equity, the owner of the mortgaged property, subject only to the incumbrance. Sections 23, 46, and 87 of the Patents Act, on which the defendants rely, do not support the proposition that the plaintiffs are not entitled to sue without adding the mortgagees as co-plaintiffs. The definition of a "patentee" in section 46 is for the purposes of the Act only, and we do not admit that if the plaintiffs are not within that definition

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they have no right of suit; but, further, we submit that they are within the section, and we say that section 87 must be read subject to section 46. The Act, so far as it deals with patents, contains no provision whatever as to the right of suit; it does, however, contain an express restriction as to suing in the case of a trade mark; and it is remarkable, if the Legislature had intended any such restriction to apply to patents, that the Act should have contained no express enactment to that effect. The case must, therefore, be decided according to general law. The Judge below decided the case upon the ground that unless all the persons interested in the patent were present as co-plaintiffs, the defendants might be compelled to try the validity of the patent several times over; but an objection to the validity in an infringement action can only be taken by way of defence, and the nature of the defence cannot affect the abstract question of the right to sue. Moreover, the question of validity may be tried once for all by a petition for revocation of the patent. In *Sheehan v. The Great Eastern Railway Company* (2), it was held that one of several co-owners had a right to sue for the recovery of profits due for the use of the patent. In *Dunnicliff v. Mallet* (3) the assignee of a separate and distinct portion of a patent was declared to be competent to sue alone for an infringement of that part. The objection of Kekewich, J., would apply to both those cases, and in the latter case it is expressly dealt with by Erle, C.J. In *Speckhart v. Campbell* (4) a *cestui que trust* was held entitled to sue. The exact point in this case is decided in principle in *Fairclough v. Marshall* (5), where the Court held that a mortgagor of a public-house who was in receipt of the rents and profits was entitled to maintain an action to restrain an injury done to the mortgaged property without joining the mortgagee. Cotton, L.J., there said: "It is not the mortgagees who are

the owners, but the mortgagor. The mortgagor is the beneficial owner subject to the incumbrance." Even assuming the mortgagees could sue, they could only sue as trustees for the plaintiffs. We have no objection to the mortgagees being made defendants if necessary, but the decision of the Court below did not go upon any question as to want of parties.

The Attorney-General (Sir Richard Webster, Q.C.) and Warmington, Q.C. (Moulton, Q.C., Carmichael, and Roskill with them), for the defendants.—We submit, first, that a mortgagee by assignment who is entered on the register becomes by registration proprietor of the patent under section 87 of the Patents Act. The provisions of that section exclude the ordinary powers of a mortgagor against third persons. Under the terms of the mortgage-deed there is an absolute assignment of the patent. The mortgagees are entitled to grant licences and to sell, and there is no reservation of any proprietary rights in the mortgagors. We, therefore, submit that the proviso at the end of section 87 has no application.

The cases cited by the plaintiffs do not shew that a person who has assigned a patent by way of mortgage to a registered assignee can sue. *Fairclough v. Marshall* (5) has no bearing on the question, because there is no analogy between a mortgage of real property and a mortgage of a patent. We do not contend that the subsequent mortgages conferred any proprietorship on the mortgagees, but we say that somebody must be joined as plaintiff who has all the legal interest. Secondly, we submit that all parties who have a substantial interest in the thing assigned ought to be before the Court either as plaintiffs or defendants, and it is the duty of the plaintiffs to put their action into the right shape—*Bergmann v. Macmillan* (6).

Sir H. Davey, Q.C., in reply.—The objection to parties was not taken below, and it is inconsistent with the other objection that the plaintiffs have no right of suit. The objection ought to be taken by summons before trial, and it is too late—*Werderman v. La Société Générale d'Electricité* (7) and *Sheehan v. The Great Eastern Railway Company* (2). But the presence

(2) 50 Law J. Rep. Chanc. 68; Law Rep. 16 Ch. D. 59.

(3) 7 Com. B. Rep. N.S. 209; 29 Law J. Rep. C.P. 70.

(4) Times, March 13, 1884.

(5) 48 Law J. Rep. Exch. 146; Law Rep. 4 Ex. D. 37.

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(6) Law Rep. 17 Ch. D. 423.

(7) Law Rep. 19 Ch. D. 246, 251.

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of the mortgagees is not necessary for any purpose up to the trial. They could not assist the Court in adjudicating upon the question of validity or upon the question of infringement. No doubt their presence might be necessary on any enquiry as to profits, but it is competent for the Court under Order XVI. rule 11 to make them parties at that or any other stage of the proceedings—*Keith v. Butcher* (8).

COTTON, L.J.—This is an appeal by the plaintiffs against a judgment of Mr. Justice Kekewich, who decided that the plaintiffs, who are the assignees of a patent which they have mortgaged, had no right of suit—that is to say, no right of suit unless they joined with themselves as plaintiffs their mortgagees. An opportunity was given to the plaintiffs to make the mortgagees, by amendment, parties as plaintiffs; but the first mortgagees, who were applied to, would not consent to that, and Mr. Justice Kekewich dismissed the action. That was, in my opinion, clearly on this ground, that as there was a mortgage, the plaintiffs, as assignees of the patent, had no right of action at all against an infringer; because we must assume here for the purposes of this argument that the defendants are infringing the patent which became vested by assignment in the plaintiffs.

On what ground is this step taken? There is nothing in the Act that I can see which in any way prevents, subject to the question which I will discuss on section 87, a patentee who has granted a mortgage from suing. The Attorney-General in his argument relied on section 46 and section 87 of the Act. Now section 46, to my mind, really does not bear upon the question, because it says "patentee" means the person for the time being entitled to the benefit of a patent. Well, if we are to look to the general law, I should say that the assignee, though he has granted a mortgage, was entitled to the benefit of the patent. It is very true he has given a mortgage upon it, which may have the effect, by foreclosure or sale under the powers contained in the mortgage, of depriving him of his right to

(8) 53 Law J. Rep. Chanc. 640; Law Rep. 25 Ch. D. 750.

the patent; but in equity we look upon the mortgage as security for the debt, and, that being so, we do not say that a mortgagor, although he has mortgaged his patent, is not entitled to the benefit of his patent. He is entitled, subject to that charge which he has created, and subject to those rights which he has given to his mortgagee.

But then section 87 was very much relied on, and, as to that, we had the benefit of hearing what passed between Mr. Justice Kekewich and the officer from the Patent Office, who brought the register with him; and what we find is this, that on the register the plaintiffs are mentioned as assignees. The 22nd of February, 1886, is the date, and on that date there are three entries, and by two assignments to them, one by the original patentee and the other by a mortgagee of that patentee, they got the assignment to them which is registered here and filed. The plaintiffs are registered as the assignees. Then the date of the assignment is given; and then there is the other assignment by the mortgagee of the original proprietor. Then we find on the same date, the 22nd of February, 1886, there was a registration of the mortgage which was granted to the banking company, who were first mortgagees. I do not refer to the others, because they are all really in the same terms; but the registration of the banking company is not as assignees, though the mortgage was by assignment in the usual terms of such a mortgage, but as mortgagees. Then the contents of the mortgage are referred to, and the officer, in his evidence, told Mr. Justice Kekewich that there was an intentional difference of language—that it was not the practice of the office to register a mortgagee, even though he took by assignment, as assignee of the patent. I think that is right. If they had done so, it might have been contended that under section 87 this mortgagee, being treated as assignee, was treated as the proprietor of the patent. But here, as I understand, the officers do not register an assignee, if he is only assignee by way of mortgage, as proprietor in any way. That seems to me to be right, because we should not consider here, from our knowledge of equity, that a mortgagee was to be deemed

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to be the proprietor of the mortgaged property. Therefore it is unnecessary to consider the argument of the Attorney-General on section 87, because whatever powers are there given, they are given, independently of what the general law may be, to the person who is on the register as proprietor; and the mortgagees are not entitled, therefore, to the benefit of that section. This the Attorney-General pressed upon us very much when he did not know what was really the intention of the officers in the way in which they have entered this on the register; and we are driven back to this, that section 87 cannot be relied on. What we have is this, simply a registration of the instruments affecting the title as they do under section 23 of the Act, which does not say anything like that which is contained in section 87, but says this: "There shall be kept at the Patent Office a book called the Register of Patents, wherein shall be entered the names and addresses of grantees of patents, notifications of assignments, and of transmissions of patents, of licences under patents, and of amendments, extensions, and revocation of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed." That leaves the Court to decide what is the position under the general law of the instruments so registered. I should have very much hesitation in acceding to the Attorney-General's argument if we had to consider it. I only desire to say that it must not be supposed that I have not considered his argument in support of the proposition that section 87 puts the mortgagee in the position of proprietor as against his mortgagor. That is a tremendous alteration, and I hesitate to think he is right; but I need not consider the matter, because the bank are not registered as proprietors. It is a question of what is general law. Here I find this, that the assignees of a patent are on the register. There is no difficulty, therefore, as to any one not being on the register. But then there is on the register an assignment by way of mortgage, and there is on the register, or with the register, a copy of that deed. It was very much pressed upon us that this gave certain rights to the mortgagees which would interfere

very much with any action which might be brought by the patentees. I call them the "patentees" as a short term—the assignees of the patent. What is the general law? When a man has mortgaged his interest either in land or in personal estate, is he prevented from asserting his right to restrain some one from injuring that thing of which he is the mortgagor? Here I assume—it will have to be decided hereafter whether the defendants have infringed or not—that there has been an infringement of the patent right vested by assignment in the plaintiffs. To my mind it would be contrary to all the views which have been expressed by this Court, and contrary to all the previous decisions on the general law, to say that under these circumstances a mortgagor cannot assert and protect that interest which is vested in him as mortgagor by preventing an infringement and a violation of the right which, although he holds as mortgagor, he still has, subject, it is true, to any rights which the mortgagee may exercise under and in proper accordance with his mortgage. But if section 87 does not give a special right to the mortgagee, as in my opinion it does not under the circumstances which I have stated here, the mortgagor can and ought to be at liberty to vindicate as against a wrong-doer the right which he still has, and which the Court of equity considers as a substantial right, to the property which he has mortgaged.

It has been decided, as was stated in the argument, that the assignee of a part of a patent can bring an action. A great many arguments adduced here against allowing a mortgagor to bring an action are answered by that, because some other person who is entitled to another portion of the patent right might bring an action in respect of that, and then the person who is said to be infringing might be compelled against him to vindicate what he was doing by alleging that it was no infringement, and by alleging that the patent was bad altogether; because if it was bad in part (we do not want argument upon that) that would vitiate the whole of the grants contained in the patent. There is a case which came before the Court, of which I was a member, which I think is very per-

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tenant to the present case—*Fairclough v. Marshall* (5)—and there the plaintiff was not even in as beneficial a position as a mortgagor; but the Court justly treated him—I need not go into the facts of the case—as being in the same position as if he were the mortgagor; and the Court, consisting of Lord Justice Bramwell, Lord Justice Brett, and myself, held that he was entitled to bring his action without making the person in whom the legal estate was vested plaintiff, or bringing him before the Court in any way, because the defendant was violating rights which were vested in the plaintiff; and although there was another person in whom those rights were to a certain extent vested, we held that it did not deprive the then plaintiff of the right which he would have to prevent an infringement of those rights which he had, but had also together with the person whom he considered as his mortgagee. What has Mr. Justice Kekewich done? He has taken an entirely different view, and I cannot but see that that was the real and only point which he decided—namely, that as there were assignments by way of mortgage it must be considered that the assignees, though by way of mortgage, were the only persons who could protect the patent, the subject of the mortgages, as against an infringer. What he did was this. He dismissed the action. Now, in my opinion, if he was not right in that view, he was wrong in dismissing the action, because Order XVI. rule 11, provides that no case shall be dismissed for misjoinder, or want of joinder, of parties; and if he had not thought that the ground which I have mentioned was the ground for dismissing the action, but simply that the mortgagees ought in some way to be before the Court, he would not have dismissed it, but would have simply given a direction that those persons should be added as defendants or as parties. We disagree with the view taken by Mr. Justice Kekewich, and then we have to consider what ought to be done as regards the costs. In my opinion we ought to make the defendants, the respondents to this appeal, pay the costs of this appeal, and pay the costs of everything which has been thrown away by that decision of Mr. Justice Kekewich pre-

venting the case, when the matter came before him, from being tried on the merits as between the plaintiffs and defendants. It was said that we ought not to do that, because the order of Mr. Justice Kekewich shewed that there was full opportunity given to the plaintiffs, if they thought fit, to apply for any amendment which they thought desirable—I will consider presently whether we ought to require the mortgagees to be made defendants—but, in my opinion, that is a wrong reading of the order. It is in terms decided that the mortgagors—that is, the plaintiffs—could not bring an action; and, in my opinion, after that decision it would have been, I was going to say idle, but I would rather say useless for the plaintiffs to ask to add the mortgagees as defendants, because how can a man usefully bring before the Court as defendants any persons in an action brought by him as plaintiff where the Court has expressed its opinion and decided that he could not bring any action at all without joining such persons, not as defendants, but as plaintiffs.

What ought we to do as regards the objection of the defendants that the action cannot go on unless they are made defendants? The plaintiffs here do not in any way require the mortgagees as defendants. What they seek for in this action will in no way interfere with or be any injury at all to their mortgagees—in fact, it will be for the benefit of the mortgagees as well as of themselves; and the fact that the bank, who are the first mortgagees, have declined to allow their name to be added as plaintiffs is, to my mind, very strong evidence against there being any probability that the defendants here would suffer any injury at all by the mortgagees not being added as parties.

If any substantial difficulty or any substantial danger should arise, what ought to be done? Why, under rule 11 of Order XVI. the defendants may apply at any time for an order of the Judge that these parties should be made defendants, and if they can satisfy the Court that they have any reasonable ground for supposing that there will be any danger to themselves in consequence of the mortgagees not being defendants, the mortgagees can be made

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parties. Our order will be without prejudice to any application which may be made at any time by the defendants for an order that these mortgagees or any of them may be made parties to the action. If the matter comes to the taking of an account, then I can see that the presence of the mortgagees, or the first mortgagee at any rate, would be necessary, in order to bind them by those accounts. I do not say that the defendants will not be able to make out a case for making the mortgagees parties before that, though I cannot see how they can or how they will. I think we ought to reverse the judgment of Mr. Justice Kekewich, giving the plaintiffs the costs of appeal; and if any costs have been paid by the plaintiffs, under the order of Mr. Justice Kekewich, to the defendants, the respondents here, of course those costs must be repaid. And we ought to add to the order what I have stated, that not only do we give the plaintiffs the costs of the appeal, but we give them the costs below of any proceeding or evidence which has been thrown away by the order of Mr. Justice Kekewich. Then we add to that, liberty to the defendants to make at any stage of the action such application as they may be advised, in order to have the mortgagees, or any of them, made defendants to the action.

LINDLEY, L.J.—I agree. The proposition involved in the judgment of Mr. Justice Kekewich is so serious and so startling and so novel, that I will say a few words about it. If he is right, a mortgagor of a patent, unlike the mortgagor of any other property, can obtain no relief against anybody who is destroying the mortgaged property, unless he can induce his mortgagees to join with him, or unless he can redeem the mortgage and get rid of it. That is a very startling proposition, and is entirely new to me, and the question is, is it sound? It certainly is unsound if tried by the ordinary principles of equity. I think it would startle anybody who is acquainted with the doctrines of equity relating to mortgages to be told that a mortgagor by his mortgage so hands over the mortgaged property as to be precluded from protecting it from destruction, unless he can pay off his mortgage. Such a doc-

trine is startling and perfectly new to me, and contrary to principle, because the mortgagor does not cease, in the view of a Court of equity, to be the owner of the property mortgaged; he remains the owner subject to the security, and he has a right, available in equity, to protect the subject-matter of that security in which he is so seriously and greatly interested.

Then it is said that there is something in the Patents Act which places the mortgagor of a patent in a worse position than the mortgagor of any other property. I cannot see it. I have looked in vain through the various sections which have been referred to, and even if these mortgagees were registered as proprietors under section 87, which they are not, I should still very much hesitate to come to the conclusion that a mortgagor was incapable of getting redress unless he could make his mortgagees join, or induce them to join, with him, or unless he could redeem them. I can find nothing in the Act which warrants such a contention. It appears to me that the mistake which has been made here is an extremely serious one. It is not merely making a mistake as to the course to be pursued in consequence of the absence of proper parties; but it is holding as a proposition of law that a mortgagor in the position which I have assumed him to be is incapable of getting redress in a Court of equity. That appears to me to be utterly wrong. I will say no more. I agree with the form of order which Lord Justice Cotton has suggested.

BOWEN, L.J.—I am of the same opinion. It seems to me that nothing can be clearer than that a man does not lose his right to protect his property against wrong-doing by a stranger simply because he has mortgaged his property, and nothing that has been said as to the consequences of the opposite doctrine can be too strongly said.

In the present instance the mortgagees, who, it is said, ought to be made co-plaintiffs, are not registered as proprietors under section 87, and we have not, therefore, to decide how far section 87, as regards mortgagees whose names are registered as proprietors under it, disturbs the general law

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of this Court. We have not got to consider or decide that. We have only got in this present case to go by the general law. It is clear that a mortgagor does not lose his right to protect what is his own, because he has created a debt, and secured the debt by a mortgage; and if any authority were required to make good the decision to which we have now arrived, the reasoning of *Fairclough v. Marshall* (5) appears to me to cover the present ground.

As I understand, what Mr. Justice Kekewich intended to have held was this: He thought that the mortgagees must be made parties as co-plaintiffs or, at all events, as defendants. I am not so clear as my learned brothers that he took the first line alone. If he did, then from what we have said we obviously disagree with him; but from the offer which he made to the plaintiffs to allow them to add the mortgagees as co-defendants, it strikes me that he thought that that was a possible way of curing the defect. I do not say that it would have cured the defect; but it strikes me that he thought so. But if he had thought that the defect could be cured by adding the mortgagees as defendants, I then am strongly of opinion that it was his bounden duty to add them himself under rule 11, Order XVI., for it is of the essence of the procedure, since the Judicature Act, to secure that an action shall not be defeated by the non-joinder of right parties. That is my view, and as Mr. Justice Kekewich did not take that course, I think he was wrong there too. He was wrong in the first instance in his view of the law of this Court, and wrong also in the second instance in not curing the defect if he thought it could be cured in the way in which it strikes me he did.

With regard to the costs, it seems to me that the order which has been indicated by my learned brethren as the right order to make is the correct one.

Solicitors — Walker & Whitfield, agents for Humphreys & Hirst, Halifax, for plaintiffs; Wilson, Bristows & Carpmael, for defendants.

CHITTY, J. }
1890. } *In re SMITH, PINSENT AND COMPANY.*
March 26. }

Practice—Costs—Taxation—Attempted Sale of Real Estate—Solicitor's Charges—General Order under Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), rule 2 (c)—Schedule 1, part 1, rule 2, and schedule 2.

Where after an attempted sale by auction the sale is indefinitely postponed, the costs in respect of the attempted sale must be taxed under rule 2 (c) of the General Order under the Solicitors' Remuneration Act, 1881. If the same solicitors afterwards were employed to effect a sale they would be paid on a "quantum meruit," or otherwise the costs allowed would be deducted from scale costs.

Schedule 1, part 1, rule 2 of the same Order does not apply to such a case.

Summons by solicitors to review taxation.

The applicants were employed by trustees and executors in selling certain real estate of their testatrix, and on the 6th of August, 1886, the estate was accordingly put up for sale by public auction in fourteen lots, when one lot only was sold.

The applicants made out their bill of costs in respect of this sale, and of other matters in connection with the testatrix's estate, in accordance with schedule 2 to the General Order under the Solicitors' Remuneration Act, 1881; and having advised their clients that such bill ought to be taxed before payment, they, on the 7th of February, 1889, obtained the common order to tax the same.

The Taxing Master allowed the scale charge in respect of the lot sold, but disallowed the items connected with the attempted sale of the unsold lots.

The applicants carried in objections, from which it appeared that on the 14th of June, 1889, they had again, by their client's instructions, put up for sale the unsold lots, when again one lot only was sold, and that thereupon their clients had determined to postpone selling for an indefinite period in the hope of the property improving in value. And it appeared also

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that under an order of North, J., obtained on summons, the sum required for the purposes of the testatrix's estate had been raised by mortgage.

The Taxing Master refused to allow the objections, on grounds identical with those given in the case of *In re Dean; Ward v. Holmes* (1)—namely, that "There is provision in the Solicitors' Remuneration Act, 1881, for the allowance of scale charges, when property is not sold at the auction, but sold subsequently. To allow the items objected to according to schedule 2 might give the solicitor twice or thrice the amount he would be entitled to under the scale, if the property had been sold. It could not have been intended to give more for doing half the work than the amount would have been if the business had been completed. The solicitor will receive at a subsequent period the scale charge when the property is disposed of, and in addition the charges provided for by rule 2" (that is, schedule 1, part 1, rule 2).

R. F. Norton, in support of the summons.—There is no certainty that the applicants will be employed as the solicitors on any future sale of this property, nor are they bound to wait an indefinite time before being remunerated for their work. *In re Dean; Ward v. Holmes* (1) establishes that where the subsequent sale is carried out by different solicitors, those employed on a prior attempted sale are entitled to be paid under rule 2 (c) of the General Order.

[No one appeared to oppose the application.]

CHITTY, J.—The question is whether the applicants are bound to wait to be paid until a sale of the property is effected. I think they are not bound to wait, for this is not a case where the instructions to sell are still standing; the sale has been indefinitely postponed, and the money required has been raised by mortgage. The Taxing Master ought, therefore, to tax these items in accordance with rule 2 (c) of the General Order. If these same solicitors

are employed at any future time to effect a sale they will not be paid twice over, but only on a *quantum meruit* principle for the work they actually do; and if then they claim to be paid according to the scale charge, they will have to submit to a deduction of the sum now allowed them. The costs of this application will be costs in the taxation.

Solicitors—Field, Roscoe & Co., for Smith, Pinsent & Co., Birmingham, for applicants.

STIRLING, J. }
1890. } THE HALIFAX SUGAR REFIN-
Feb. 26, 27. } ING COMPANY (LIMITED) v
March 6. } FRANKLYN.

Company—Directors—Meeting—Validity—Notice—Absence from England.

By the articles of association of the plaintiff company it was provided that the directors should not be less than three, and that the office of a director should be vacated if he absented himself from the meetings of the directors for three calendar months without special leave, and by a resolution of the board it was determined that two directors should constitute a quorum. There being four directors, a meeting of two of the directors was held, the other two being absent in America:—Held, that it was not necessary to give notice of the meeting to the absent directors.

This was an action by the Halifax Sugar Refining Company (Limited) in liquidation against George Edward Franklyn, James Campbell Fraser, and Palgrave Simpson to set aside a deed of the 21st of May, 1886, made between the company and the defendants.

The company was incorporated on the 22nd of December, 1882, under the Companies Acts, 1862 to 1880, with a capital of 125,000*l.*, divided into 25,000 shares of 5*l.* each. The objects of the company were to purchase an estate in Nova Scotia, and to erect thereon a sugar refinery; to carry on the business of sugar manufacturers

(1) 55 Law J. Rep. Chanc. 420; Law Rep. 32 Ch. D. 209.

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and refiners; and to take measures to obtain the benefit of an Act passed in Nova Scotia to incorporate a Nova Scotia company of the same name, and certain subsidiary Acts.

By the articles of association (articles 63 and 64) the directors were empowered to borrow money on debentures. The articles also provided as follows:—

Article 100. The number of the directors shall not be less than three nor more than six.

Article 106. The continuing directors may act, notwithstanding any vacancies in their body, as long as there remain three directors qualified to act.

Article 107. The office of a director shall be vacated (e) if he shall absent himself from the meetings of the directors during a period of three calendar months without special leave of absence from the directors.

Article 121. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and may determine the quorum necessary for the transaction of business. Until otherwise determined, three directors shall be a quorum.

By a resolution of the board, dated the 16th of July, 1885, it was determined that two directors should constitute a quorum.

In November, 1884, the directors resolved to issue a series of 400 debentures of the company for 100*l.* each, and by the said debentures all the real and personal property of the company for the time being, and all the buildings, machinery, and plant attached thereto, were mortgaged to secure repayment of the principal sum and interest at eight per cent. Of these debentures 261 were taken up by persons who paid the full sum of 100*l.* for each debenture; the remainder were issued to persons who lent various sums, amounting to 11,120*l.*, as collateral security for the repayment of such loans.

At the time of this issue the principal part of the company's property consisted of the sugar refinery in Nova Scotia. It was subsequently ascertained by the company that by the law of Nova Scotia incumbrances affecting lands took priority from the date of their registration in the

local registry. This was communicated to the debenture-holders, who required that a covering deed should be executed by the company, and should be sent out to Nova Scotia for registration in order to protect their interests. A deed was accordingly prepared, and was executed on the 21st of May, 1886, and registered in Nova Scotia on the 6th of July, and it was thereby witnessed that for better securing the payment of the money mentioned in such of the debentures as might for the time being be outstanding, the company, as beneficial owner, conveyed the Nova Scotia estate to the defendants upon certain trusts for securing the repayment of the said debentures.

At the date of the execution of this deed there were, as appeared from the pleadings, four directors—the defendant Fraser, Chapman, Dudley Ryder, and Dustan. Of these, Dudley Ryder was travelling in America, and it was not known where he was to be found; he left England in March, and returned in June; Dustan was permanently resident in Halifax, Nova Scotia, and held an official position in that country.

A meeting was held of the two remaining directors, who authorised the seal of the company to be affixed to the deed. No notice of this meeting was given to Ryder or Dustan.

One of the grounds upon which the plaintiff company sought to impeach the validity of the deed was that there was no properly constituted meeting of the directors for the purpose of authorising its execution by reason of the want of notice to the absent directors. The company went into liquidation in September, 1886.

Clare and Arkle, for the plaintiffs.—Directors are bound to act as a board; or, if they cannot get a meeting, they are bound at any rate to bring their views to the notice of the absent directors. Here there was no properly constituted board meeting to authorise the execution of this deed, because no notice of the meeting was given to Dustan and Dudley Ryder, nor was there any interchange of views between the directors who attended and the absent directors. We submit, therefore, that

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there has been no valid execution of the deed—*D'Arcy v. The Tamar, Kit Hill, and Callington Railway Company* (1), which has been recognised by your Lordship in *In re The Great Northern Salt and Chemical Works*; *ex parte Kennedy* (2), *Kirk v. Bell* (3), and *In re The Portuguese Consolidated Copper Mines (Limited)* (4), where it was held that a director who was absent in Ireland was entitled to notice.

Graham Hastings, Q.C., and *Rawlins*, for the defendants.—We submit that if a director is absent in another part of the world, business requires that he should not be entitled to notice, otherwise the business of the company would be paralysed. Dustan has ceased to be a director by virtue of the provisions of article 107.

Clare, in reply.—If Dustan has ceased to be a director, so has Ryder on the same ground, and, if that is so, there was not a sufficient number of directors to conduct the business of the company.

He referred to *In re The Alma Spinning Company*; *Bottomley's Case* (5).

STIRLING, J. [after stating the facts, and dealing with certain other questions raised by the plaintiff company, which do not call for a report, continued as follows:] The only remaining question is, whether the deed is really and truly the deed of the company. I am of opinion that it is. Upon these pleadings I am to take it there were, at the date of the execution, four directors of the company, because leave to amend has not been obtained, and is not now sought. Therefore there were at that time a sufficient number of directors to conduct the affairs of the company. [His Lordship referred to article 106, and continued:] The ground on which it is said that Mr. Fraser and Mr. Chapman were not competent to affix the seal of the company and act as a board is this: that two of the directors—namely, Mr. Dustan and Mr. Dudley Ryder—had not notice of

the meeting of the directors at which this deed was executed, or is said to have been executed. Now, undoubtedly, it is clear law—and I desire in no way to infringe on it—that as a general rule every director who is within reach ought to have notice of every board meeting of the company; but it is true, and there is no question on the matter, that at this time Mr. Dustan was in Nova Scotia, and Mr. Dudley Ryder was travelling about somewhere in America. Then the question is, was it necessary under these circumstances to serve them with notice and give them notice of the directors' meeting? I am not going to lay down that mere absence from the country is sufficient to excuse notice to a director who is residing out of the country. If there was a company which had its registered office at Dover, and was in the habit of holding its directors' meetings there, I should not say that residence at Calais excused the board from summoning a director who resided at Calais to come across. I think a great deal more is wanted than that. But we must have regard to the articles of association of the company, and see whether they do not throw some light upon what is required. I cannot think that it was intended in these articles that in every case directors should be summoned, for I find a provision in the articles that the office of director shall be vacant if he shall absent himself from the meetings of the directors during a period of three calendar months without special leave of absence from the directors. Now if the directors gave leave of absence, it seems to me that it would be wholly inconsistent with that which they have done if it were to be held to be obligatory upon them to give notice during the period for which they did give leave to the absent director. That is of importance, as it seems to me, because it shews that the articles contemplated the possibility that a director might be absent, and in such case need not be served with notice of the meetings. Now what do we find as regards Mr. Dustan? Mr. Dustan was a resident, and was known to be a resident, in Nova Scotia; he was appointed as a director in order to secure his influence in that colony; and

(1) 36 Law J. Rep. Exch. 37; Law Rep. 2 Exch. 158.

(2) *Ante*, p. 288.

(3) 16 Q.B. Rep. 290.

(4) 58 Law J. Rep. Chanc. 813; Law Rep. 42 Ch. D. 160.

(5) Law Rep. 16 Ch. D. 681.

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very shortly after his appointment as director he accepted an office, for the due discharge of the duties of which it was essential, according to the evidence before me, that he should be resident in Nova Scotia. Therefore, Mr. Dustan was a director, no doubt, but was known to be a resident in Nova Scotia, and was charged with the performance of duties to be performed there. How can it be supposed that it was necessary that on each occasion on which a directors' meeting was to be held, notice should be sent to him? All that is required for the validity of the meeting is that the directors should have notice of it. It is not anywhere said that the directors shall have notice of all the business which is to be transacted; and it seems to me that there being no distinction in these articles between one class of business and another, such as was relied upon in the case of *Kirk v. Bell* (3), it was not necessary that a director, charged with duties for the performance of which residence in Canada was essential, should have, for the validity of every meeting, a formal notice sent to him of the date at which the meeting was to be held. I think, therefore, that it was not necessary that Mr. Dustan should receive notice of the meetings of the directors. Mr. Clare admitted, as regards what he termed the ordinary business of the company, that it might not be necessary to give him notice. I decline to enter into the question of ordinary and extraordinary business, a distinction which does not exist in the articles themselves. It seems to me involved and difficult. Nevertheless, as far as I can judge, this is a piece of business which might be fairly considered by the directors, and ought to be treated by the Court, as falling within the category of ordinary business. The directors were not now exercising any extraordinary powers, such as powers of borrowing and so forth. What they were asked to do by the debenture-holders, and what it seems to me as honest men they were bound to do, was to perfect the security which had been already given, which was assumed to be valid, and which was found to be defective, or which might be defective by reason of non-registration. I think, there-

fore, that this might be treated as ordinary business. I am of opinion, therefore, that in each point of view there was no necessity to go through the form of giving Mr. Dustan notice of a meeting which it was perfectly well known he would not attend. He never gave any intimation of his intention to come to England, and he never did, in point of fact, come to England, in which case a totally different set of circumstances would have arisen; and it would have been certainly proper, and I think also necessary, that he should be summoned to attend directors' meetings.

So much as regards Mr. Dustan. The other director is Mr. Dudley Ryder. The evidence is that he was out of the country and in America, that he was travelling about, and that it was not known where he was. It was almost impossible to give him notice of the meeting, and therefore it seems to me, on the ground that the business of the company cannot be stopped by a director choosing to go away to America, or travelling about, that notice to him was unnecessary. I come to the conclusion, therefore, under these circumstances that the two directors were entitled to act as a board to bind the company during the absence of Mr. Ryder, and during the absence of Mr. Dustan in Canada performing the duties with which he was charged. It seems to me, on these grounds, that the action fails, and that it must be dismissed, with the usual consequences.

Solicitors—J. & R. Gole, agents for Evans, Lockett & Co., Liverpool, for plaintiffs; Clarke, Rawlins & Co., agents for Simpson, North & Johnson, Liverpool, for defendants.

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

NORTH, J.	} <i>In re</i> PORTER. PORTER v. DE QUETTEVILLE.
1890.	
March 23, 24.	
COTTON, L.J.	
LINDLEY, L.J.	
FRY, L.J.	
July 12.	

Power of Appointment — Execution — Real Estate—Power to appoint among Children in Tail—Appointment to a Child for Life with Remainder to Grandchildren—Validity—Absence of express Reference to Power—General Reference.

By a deed of the 5th of September, 1837, real estate was conveyed to such uses as Mr. and Mrs. P., should by deed appoint. By a deed of the 9th of September, 1837, Mr. and Mrs. P., in exercise of the power conferred by the deed of the 5th of September, appointed the property to the use of themselves successively for life, with remainder to the use of such of their children in tail as they should jointly by deed appoint, with remainder to such children as tenants in common in tail. By a deed of the 10th of March, 1855, Mr. and Mrs. P., in exercise of the power conferred by the deed of the 5th of September, and of every power and authority enabling them in that behalf, appointed the property successively to themselves for life, and after the death of the survivor to the use of their son E. for life, with remainder to his children and remoter issue as he should appoint, and with a power of jointuring, with remainder to his children as tenants in common in fee:—Held, affirming the decision of NORTH, J., that, assuming the power conferred by the deed of the 9th of September authorised an appointment to E. for life, there was no intention on the face of the deed of the 10th of March, 1855, to exercise the power, and that the appointment was wholly bad.

Per LINDLEY, L.J.—A power to appoint in tail does not authorise an appointment for life.

By a deed of partition dated the 5th of September, 1837, certain real estates in Wiltshire were partitioned, part of them being conveyed, after the limitation of a life estate in favour of Susanna Ludlow,

widow, since deceased, to the use of John Gibbs, his heirs and assigns, upon trust by deed to convey the same to and for such uses as William Porter and Elizabeth Gibbs Porter, his wife, should by deed direct or appoint, and in default of and subject to such direction and appointment upon trust for the said Elizabeth Gibbs Porter, her heirs and assigns.

By a deed of settlement dated the 9th of September, 1837, to which William Porter and Elizabeth Gibbs Porter were parties, and which was duly acknowledged by the latter, W. Porter and E. G. Porter, in exercise of the power given to them by the deed of the 5th of September, 1837, directed and appointed that the said remainders and remainder in fee-simple immediately expectant on the decease of the said Susanna Ludlow in the hereditaments then subject to the said power should be thereby conveyed by the said John Gibbs to Robert Haynes and Thomas White (parties thereto), their heirs and assigns, to the uses and upon the trusts thereafter declared, and the said remainders and remainder in fee-simple in the said hereditaments were thereby granted by the said John Gibbs, William Porter, and Elizabeth Gibbs Porter unto the said R. Haynes and T. White, their heirs and assigns, to the uses and upon the trusts thereafter declared. And it was thereby agreed and declared that the said R. Haynes and T. White, their heirs and assigns, should stand seized of the said remainders and remainder and hereditaments thereby appointed, to the use of the said Elizabeth Gibbs Porter and William Porter successively for life, with remainder to the use of such one or more exclusively of "the others or other if any of the children of the body of the said Elizabeth Gibbs Porter by the said William Porter lawfully begotten, and the heirs of the body or of the several and respective bodies of such child or children respectively lawfully issuing, with such directions for maintenance, education, and advancement, and to be vested at such age or respective ages, or day or respective days, and upon such contingencies and under and subject to such conditions and restrictions, and generally in such manner and form as the said William Porter and Elizabeth Gibbs, his

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wife, shall at any time or times or from time to time jointly during their joint lives by any deed or deeds, instrument or instruments, in writing, either absolutely or conditionally, and with or without power of revocation and new appointment direct, limit, and appoint; and in default of such direction, limitation, and appointment by the said William Porter and Elizabeth Gibbs, his wife, jointly as aforesaid, then as the survivor of them shall at any time or times after the decease of the other of them, and as to the said Elizabeth Gibbs Porter, notwithstanding her coverture by any future husband, by any deed or deeds, instrument or instruments in writing, either absolutely or conditionally, and with or without power of revocation and new appointment, or by his or her last will and testament direct, limit, and appoint, and in default of and subject to any such appointment, to the use of the child if only one, or if more than one, then all and every the children of the body of the said Elizabeth Gibbs Porter lawfully begotten, equally to be divided between them if more than one share and share alike, as tenants in common and not as joint tenants, and the heirs of the body or several and respective bodies of the same child or children respectively lawfully issuing."

By a deed-poll dated the 10th of March, 1855, under the hand and seal of William Porter and Elizabeth Gibbs Porter, after reciting the partition deed of the 5th of September, 1837, and the power of appointment therein contained over the hereditaments described in that deed, and the death of Susanna Ludlow, the tenant for life under that deed, it was recited as follows: "And whereas the said William Porter and Elizabeth Gibbs, his wife, are respectively desirous and have respectively determined in pursuance of their aforesaid power to limit and appoint the said hereditaments to the uses and in manner hereinafter expressed." Then it was witnessed that "the said William Porter and Elizabeth Gibbs, his wife, in pursuance of and in exercise and execution of the aforesaid power or authority for this purpose given to or vested in them by the hereinbefore mentioned indenture of the 5th of

September, 1837, and of every power and authority whatsoever enabling them in this behalf, do and each of them doth by this present deed. . . . direct and appoint" that the said hereditaments should thenceforth go, remain, and be to the use of the said Elizabeth Gibbs Porter and William Porter successively for life, and after the death of the survivor to the use of Edward Endymion Porter for his life without impeachment of waste, and from and immediately after the determination of the several life estates thereinbefore limited, and in the meantime subject thereto, and to the power of jointuring thereafter given to the said Edward Endymion Porter, to such uses for the benefit of all or any one or more of the children and more remote issue of the said E. E. Porter (such more remote to be born within the period the law required as to perpetuity), and if more than one in such shares as the said E. E. Porter should by deed or will appoint; and in default of and subject to any such appointment, to the use of the children of the said E. E. Porter as tenants in common in fee. And power was thereby given to the said E. E. Porter of appointing a jointure to any wife of his during her life.

Elizabeth Gibbs Porter died in 1876, and William Porter in 1887, leaving several children, including Edward Endymion Porter, surviving them.

Edward Endymion Porter married in 1871, and had several children infants.

This was an originating summons taken out by Edward Endymion Porter and his children against his surviving brothers and sisters to have it determined what was the effect of the appointment of the 10th of March, 1855, and whether or to what extent it was a valid appointment under the settlement of the 9th of September, 1837.

It was stated at the bar that the solicitor who prepared the deed of 1855 was not the solicitor who prepared the deed of the 9th of September, 1837, and that he did not know of its existence.

Cozens-Hardy, Q.C., and *Morshead*, for the plaintiffs.

Everitt, Q.C., and *W. D. Rawlins*, for the defendants.

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NORTH, J. [after referring to the deeds of the 5th of September and 9th of September, 1837, continued:] The effect of the latter deed was this: There were two estates for life to Mr. and Mrs. Porter, with remainder to the children as tenants in common in tail, subject to a power in the parents or the surviving parent to select among those tenants in common in tail, and appoint a person or persons so selected to take the entirety, instead of all the children taking as tenants in common in tail, as they would do in default of appointment. That was the scope of the deed. There is nothing whatever pointing in terms to any limitation of estates other than such estates as were pointed out by the deed—namely, the limitations to children either under the power or otherwise as tenants in common in tail. I do not see how under that deed there possibly could have been any appointment to a child in fee. The power did not extend beyond the tenancy in tail. I take it the tenancy in tail was the maximum interest that could be given. Then it is suggested that a tenancy for life might be given. I am not sure that it could; but I am not going to decide that it could not, because my decision does not turn on that point; but it must be borne in mind that that seems to be the point which presses. The settlors had a liking apparently for tenancies in tail, and they determined that their children should have the property as tenants in common in tail, subject to the power of selection, so as to enable the parents to select certain particular tenants in tail to the exclusion possibly of other children who otherwise would be tenants in tail.

Then we come to the deed of appointment of the 10th of March, 1855. It is a deed by Mr. and Mrs. Porter, who were both of them alive, and it recites the deed of the 5th of September, 1837, that is to say, the deed of partition. Then, after a recital of the death of Mrs. Ludlow, the only other recital is this, "And whereas William Porter and Elizabeth Gibbs, his wife, are respectively desirous and have respectively determined in pursuance of their aforesaid power to limit and appoint the said hereditaments to the uses and in the manner hereinafter expressed." Then

it is witnessed that they, "in pursuance and in exercise and execution of the aforesaid power or authority for this purpose given to or vested in them by the hereinbefore mentioned indenture of the 5th of September, 1837," followed by certain words which I omit for the moment, appoint the property to the use of Elizabeth Gibbs Porter for her life. Now, pausing there, she had got that life estate already under the deed of the 9th of September, 1837, and why that should be repeated is not very clear. Then it goes on to limit a life estate to Mr. Porter. To that the same remark exactly applies. He already had an estate for life under the previous deed. And after the death of the survivor of them the property is limited to Edward Endymion Porter, who is one of the plaintiffs in the action, and who is a son of Mr. and Mrs. Porter, for his life, without impeachment of waste. As to that, the power to give to him for life certainly was not expressly given by the previous deed. Then from and immediately after the determination of the said several life estates, and in the meantime subject thereto, and to the power of jointuring thereafter given to Edward Endymion Porter, the deed goes on to appoint to his issue. The power of jointuring is subsequently given, but I may as well say here, as later, that that clearly was not in any way authorised by the previous deed. There was no power of allowing Edward Endymion Porter, if he could be made tenant for life, to confer a jointure upon a person who was not within the power. As to the appointment in favour of the issue of Edward Endymion Porter, it was conceded that it was beyond the limits of the power and could not have any effect given to it. It was obviously beyond the limits of the power for two reasons. In the first place the persons in whose favour it is to be exercised are a class that is too large; it goes beyond children, it includes issue also, and further also it is a delegation of the power of selection which the persons exercising the power in this way had no right to confer upon another person, whatever power they might have had to make such a selection themselves. Looking at that settlement, if it contained nothing but the words I have read, it

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would be perfectly clear that it could not be in any way an exercise of the power contained in the deed of the 9th of September. Every indication would be against it, and there would not be any indication whatever that it was being exercised. Above all things, the power in the deed of the 5th of September is very fully recited, and no reference whatever is made to the deed of the 9th of September or the power contained in it. I say "or the power contained in it," because there are some words in this deed that I have not yet referred to. They are to be found in the witnessing part, which says that Mr. and Mrs. Porter, "in pursuance and in exercise and execution of the aforesaid power or authority for this purpose given to or vested in them by the hereinbefore mentioned indenture of the 5th of September, 1837, and of every other power and authority whatsoever enabling them in this behalf," appoint, and so on. It is said the insertion of those general words operates upon the power in the deed of the 9th of September, because it is an indirect reference to that deed, and that under that deed there was power to give a life estate. I have very grave doubts whether there was power to give a life estate only under that deed, looking at the express direction that the estates to be given are estates in tail; but, independently of that, I find in the deed of appointment of 1855 a great deal that cannot possibly be done under the deed of the 9th of September, 1837. The power to give a life estate is not expressly or impliedly given by the latter deed, not given at all indeed, unless the power to give an estate tail included in it the power to give any lesser estate. There is a great deal in the deed of 1855 that could not possibly be contemplated by the earlier deed of the 9th of September, 1837, and there is also the omission of any reference whatever to the power in the deed of the 9th of September which I am satisfied would have been recited if there had been any intention of exercising that power. The conclusion I come to is that, notwithstanding the insertion of the words "every other power enabling them in this behalf," it was not intended—it is a question of intention—to make the execution of the

deed of 1855 an execution of the power contained in the deed of the 9th of September, 1837. It looks rather as if the deed of 1855 had been prepared deliberately with a view of leaving out of sight the deed of the 9th of September, 1837. I am told it was prepared by a solicitor who knew nothing whatever about the deed of the 9th of September, and therefore, so far as he is concerned, the deed of 1855 could never have been intended to operate as an exercise of the power in the earlier deed. Of course, the solicitor's intention does not settle the matter; but, looking at the circumstances under which the deed of 1855 was executed and its contents, and above all the clear full reference to the power in the deed of the 5th of September, and the entire omission of all reference to any power in the deed of the 9th of September, I am satisfied it was not the intention to exercise the power in the deed of the 9th of September by this deed. Accordingly there must be a declaration that the deed of 1855 did not operate as an execution of the power in the deed of the 9th of September, 1837.

From this decision the plaintiff, Edward Endymion Porter, appealed.

Cozens-Hardy, Q.C., and *Morshead*, for the appellant.—The general words in the deed of 1855 operate as an execution of the power contained in the deed of the 9th of September, 1837, and the appointment is good so far as it does not transgress the limits of the power. A power of appointment among children may be validly exercised by an appointment for life—*Alexander v. Alexander* (1) and *Thorn-ton v. Bright* (2). A power to appoint in tail includes a power to appoint for life. The intention of the appointors was to exercise all the powers they had, and the Court will give effect to that intention, if possible.

Sir Horace Davey, Q.C., *Everitt, Q.C.*, and *W. D. Rawlins*, for the respondents, were not called upon.

COTTON, L.J.—The question we have to decide is whether there was a good appoint-

(1) 2 Ves. sen. 640.

(2) 2 Myl. & Cr. 230; 6 Law J. Rep. Chanc. 121.

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ment by the deed of 1855, and I think the learned Judge was right in saying there was not. How does the case stand? By the deed of the 5th of September, 1837, a general power of appointment was given. Then the deed of the 9th of September exercised that general power by giving a power of appointing the property in a particular way; but the power of appointment contained in that deed did not authorise what was desired to be done by the deed of the 10th of March, 1855. In my opinion we ought not to come to the conclusion that there was any intention at all to exercise the power contained in the deed of the 9th of September. The appointment purporting to be made by the deed of 1855 is in pursuance and in exercise and execution of the aforesaid power or authority for this purpose given to or vested in the appointors by the thereinbefore mentioned indenture of the 5th of September, 1837, and of every other power and authority whatsoever enabling them in that behalf. By some mistake or other—one does not know how it was—the appointors do not on the face of this deed of 1855 profess to execute the power of appointment given by the deed of the 9th of September, 1837, but only the power given by the deed of the 5th of September. Therefore we ought not to come to the conclusion, having regard to what was purported to be done by the deed of 1855, that they intended by the words I have read to exercise the power contained in the deed of the 9th of September. Consequently we cannot hold that there was even a life estate given to the appellant in this case. The appeal fails.

LINDLEY, L.J.—I am very sorry I have to come to the same conclusion. I say sorry, because it looks as if there was a blunder, and if one could correct it properly one would be disposed to do so. In addition to the observations made by Lord Justice Cotton, with which I entirely agree, it appears to me that no one of the appointments in the deed of 1855 is warranted by the power contained in the deed of the 9th of September, 1837. I do not think it is right or possible to hold that the appointment of the life estate is warranted by the power. As I under-

stand that power, it is a power to appoint in tail, neither more nor less, among such children, of course children only, as the appointors may select. I do not think that power of appointment warrants the power to appoint for life. The real truth is that the power contained in the deed of the 9th of September was omitted to be exercised by an oversight, but unfortunately the blunder cannot be put right. I think that the decision of the learned Judge was right, and that the appeal must be dismissed.

FRY, L.J.—I agree.

Solicitors—Tylee & Co., for plaintiff; Robbins, Billing & Co., agents for Jones & Forrester, Malmesbury, for defendants.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
BOWEN, L.J.
FRY, L.J.
1890.
June 20, 21.

In re RAWLINS.

Will — Construction — Gift for Life — Gift over on Death without leaving Issue — Implied Gift.

Testator devised three houses in trust to pay the rents to his niece for life for her separate use; and after her death, she leaving no child, he devised one house to A. and the others to B., and he gave his residuary estate to A. and B. equally. The niece died leaving children:—Held, that there was no implied gift in favour of the children.

This was an appeal from a decision of Kay, J.

William Waller Rawlins, by his will dated the 11th of May, 1844, after directing the payment of his debts, funeral and testamentary expenses, gave the use of his household goods and furniture to his wife during her life, and after her decease gave the same to his nephew William Waller Rawlins. The testator then devised and bequeathed his real estate and the residue of his personal estate to his wife, his

In re Rawlins, App.

nephew Samuel George Rawlins, and his said nephew William Waller Rawlins, upon trust to permit his wife to receive the rents, issues, dividends, and profits thereof during her life, and after her decease, in the events which happened, he devised and bequeathed certain houses and a mortgage debt of 850*l.* to his nephew Samuel George Rawlins, and certain other houses and a debt of 360*l.* 5*s.* to his nephew William Waller Rawlins. And the testator proceeded as follows: "I give, devise, and bequeath my freehold house in Stamford Street, Blackfriars Road, my freehold house, No. 85 Cannon Street, in the city of London, and my freehold house, No. 19 Coppice Row, Clerkenwell, unto the said Samuel George Rawlins and William Waller Rawlins, upon trust to pay the rents and interest thereof unto my niece Harriet Rawlins, for and during her natural life, for her sole, separate, and peculiar use and benefit, and without being in anywise subject or liable to the debts, control, or interference of any husband with whom she may intermarry, and her receipts, whether she shall be single or married, shall be good and effectual releases and discharges for the same. And after the decease of my said niece Harriet Rawlins, she leaving no child or children, I give, devise, and bequeath my freehold house in Stamford Street, Blackfriars, to my nephew Samuel George Rawlins, and I give, devise, and bequeath my freehold house, No. 85 Cannon Street, City, to my nephew William Waller Rawlins, and my freehold house, 19 Coppice Row, Clerkenwell." And after certain other bequests the testator devised and bequeathed his residuary real and personal estate to Samuel George Rawlins and William Waller Rawlins in equal shares, and he appointed the said Samuel George Rawlins and William Waller Rawlins his executors.

The testator died on the 4th of December, 1845, leaving a widow, who died on the 12th of February, 1853.

The testator's niece, Harriet Rawlins, married Joseph Read Spencer, by whom she had two children, a daughter, Julia Josephine, who married Bernard Scalé, and a son, Aubrey Spencer.

Under an order made in 1866 in the above matters the freehold house, No. 85

Cannon Street, was sold, and the purchase-money, 8,250*l.*, was paid into Court, and was now represented by 9,088*l.* 8*s.* 7*d.* new consols. By another order made in 1876 the dividends on the fund in Court were ordered to be paid to the mortgagees of Harriet Spencer's life-interest. Harriet Spencer died on the 17th of December, 1889, leaving her two children surviving, of whom Aubrey Spencer was her heir-at-law. She left two wills, one made in 1883, and the other in 1884, but neither had yet been admitted to probate. By the will of 1883 she purported to dispose of her property for the benefit of the two children, but under the will of 1884 the daughter was to take nothing.

Samuel George Rawlins, one of the testator's nephews, died in 1867, having by his will devised all his real and personal estate to trustees.

William Waller Rawlins, the testator's other nephew, died in 1881, having by his will devised and bequeathed all his real and personal estate to trustees upon the trusts therein mentioned.

This was a petition by the trustees of W. W. Rawlins, the nephew, praying, *inter alia*, a declaration that, according to the true construction of the will of William Waller Rawlins, the elder, the fund in Court representing the house No. 85 Cannon Street passed by the residuary devise.

Harriet Spencer's two children claimed that in the events which had happened of her dying leaving children surviving her, they, as such children, had become absolutely entitled to the three freehold houses devised by the will of W. W. Rawlins, the elder, upon trust for H. Spencer for life, and were, therefore, entitled to the whole of the funds in Court representing No. 85 Cannon Street. Kay, J., held that Harriet Spencer took an absolute interest. He considered that the direction to pay the rents and profits gave the beneficial property to the *cestui que trust* absolutely, and that the words "for and during her natural life" were to be read as part of the clause directing the estate to be held for her separate use.

An appeal was brought against this decision by the surviving trustee of the will of Samuel George Rawlins.

In re Rawlins, App.

Robinson, Q.C., and *Rolt*, for the appeal.—The construction adopted by the Judge below is not supported by the language of the will. On the question whether there is an implied gift to the children of Harriet Spencer, we submit that the rule is well established, that a gift to a parent for life, followed by a gift over on the death of the parent leaving no issue, does not raise an implication of a gift to the issue on the death of the parent leaving issue—*Dowling v. Dowling* (1), *Ranelagh v. Ranelagh* (2), and *Lee v. Busk* (3).

Marten, Q.C., and *Warrington*, for Aubrey Spencer.—We submit, first, that Harriet Spencer took absolutely in the events which have happened—*Newland v. Shephard* (4), *Blann v. Bell* (5), and *Cropton v. Davies* (6). Secondly, that there is an implied gift over to the children. There is no difficulty in implying a gift over where such intention can be found on the will. The residuary gift makes that intention clear. It is impossible to suppose that the testator intended to leave one house to one nephew, and the other houses to the other, in the event of his niece dying without issue, and to leave the three houses to his nephews as tenants in common in the event of her dying leaving issue. Where two interpretations are possible, the Court will adopt that which avoids imputing to the testator a capricious intention—*Abbott v. Middleton* (7) and *Ex parte Rogers* (8).

Renshaw, Q.C., and *Dunning*, for Mrs. Scalé, referred to 1 *Jarman*, 540 and 563.

Cutler, Q.C., and *K. G. Metcalfe*, for the executors and trustees of the first will of Mrs. Spencer, contended that she was entitled in fee, and referred to *Watkins v. Weston* (9) and *Wilks v. Williams* (10).

(1) Law Rep. 1 Chanc. 612.

(2) 12 Beav. 200; 19 Law J. Rep. Chanc. 39.

(3) 2 De Gex, M. & G. 810; 22 Law J. Rep. Chanc. 97.

(4) 2 P. Wms. 194;

(5) 2 De Gex, M. & G. 775, 780; 22 Law J. Rep. Chanc. 236, 238.

(6) 38 Law J. Rep. C.P. 159, 161; Law Rep. 4 C.P. 159, 167.

(7) 7 H.L. Cas. 68, 89; 28 Law J. Rep. Chanc. 110, 112.

(8) 2 Madd. 449.

(9) 3 De Gex, J. & S. 434; 32 Law J. Rep. Chanc. 609.

(10) 2 Jo. & H. 125.

VOL. 59.—CHANC.

R. F. Norton, for the trustees of the second will of Mrs. Spencer.

Horace E. Miller, for an incumbrancer.

Upjohn, for the trustees of W. W. Rawlins, jun.

COTTON, L.J.—This is an appeal from a decision of Mr. Justice Kay as to the proper construction to be put upon a gift contained in the will of W. W. Rawlins.

The appellant is met by two parties, not only those who simply rely on the judgment of Mr. Justice Kay, but those who say that, even if that judgment was wrong, there is an implied gift to the children, and that, therefore, the appellant cannot take under the residuary gift. [His Lordship then dealt with the question decided by Mr. Justice Kay, and came to the conclusion that Harriet Spencer took a life interest only, and he continued, as follows:] Then we come to the question, is there an implied gift to the children arising from these words, "and after the decease of my said niece Harriet Rawlins, she leaving no child or children"? It is said that those words will imply a gift to the children. I think the law seems to be this: that where there is a life interest given to a parent, and a gift in the event of the parent leaving no children, that alone will not give the children any interest whatever. I quite agree that the rule of law is, that the Court will take into consideration the circumstances that occur in the will shewing that there ought to be an implied gift to the children from such words. But the rule is well established by numerous decisions, that where those words occur alone they will not imply or justify the Court in implying any gift to the children. In this case I can see nothing from which we can imply from other parts of the will a gift to the children, or which would justify us in implying from those words a gift to the children.

It is said you ought to imply it from this: that the property in question is dealt with in the residuary gift in a way somewhat different from the way in which the testator deals with the property in the event of his niece leaving no children. To my mind that is not sufficient. I do not think that we ought to regard the testator

(11) 11 Ir. Chanc. Rep. 154, 162.

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in making a residuary gift as contemplating all the events which have happened in order to bring the property into the residuary gift. The residuary gift is put in the will by the testator in order to catch up everything, and prevent an intestacy occurring as regards anything that may not have been effectually disposed of by the will, and we ought not to say that in the events which have happened there is such an absurdity here, having regard to the residuary gift and the other gifts in the will, as that we cannot give the true construction to the words which have been used by the testator. In my opinion, therefore, the children take no interest at all. That being so, the appellant must succeed, because the residuary legatees will take this property.

Then it is said that only one of the residuary legatees is appealing. Probably the other residuary legatee was a little afraid of the costs, and did not take so bold a view of the law as the residuary legatee who has appealed. But, in construing this will, we cannot put a different construction upon that portion of the will as regards the residuary legatee who has appealed. In my opinion, we ought to declare that, in the events which have happened, this property has fallen into the residuary bequest.

BOWEN, L.J., after dealing with the first question, continued: The second point is as to the children. The question is, is it possible to imply a gift to the children from these words, "and after the decease of my said niece Harriet Rawlins, she leaving no child or children, I give, devise, and bequeath my freehold house," and so on? It is said that you are to read into the words in the will, "after the decease of my said niece Harriet Rawlins, she leaving no child or children," the words, "I give and devise, in the event of her having a child or children, a bequest to such child or children." Now the rule of construction to be adopted is clear. Many cases may approach the line on the one side or the other, and it is clearly immaterial on the present occasion and unnecessary to go into all the cases in order to measure the distance by which each is divided from

the central line of interpretation. The rule or canon of interpretation is all that we have to do with. That rule is laid down in the case of *Kinsella v. Caffery* (11). I take it from that case, because it seems to be admitted that it states correctly the effect of the authorities as far as the principle of construction is concerned. The Master of the Rolls there says: "I apprehend, therefore, that the authorities may be classed under three heads—first, where there is an indefinite bequest to the parent, and, if he die without having or leaving children, to B. In that case, it is clear that the children do not take any interest by implication. Secondly, if there is a bequest to the parent for life, and if he die without having or leaving children, to B.; if the parent dies leaving children, they are not entitled by implication. Thirdly, if, however, in a case such as I have last mentioned, there are matters on the face of the will to raise an inference in favour of the children, the Court is at liberty to consider these circumstances in connection with the bequest over in the event of the parent dying without having or leaving children, although such bequest over, by itself, is not sufficient to justify the Court in inferring a gift in favour of the children." Taking that to be the rule, and neglecting all the discussion of the various authorities with the view of seeing whether they have been correctly decided as falling on one side of the line or the other, it seems to me we have only to consider whether on this will there are other matters disclosed upon the face of it which ought to lead us to infer a gift to the children from words which, in themselves, and without such matters of contextual importance, would not be sufficient to justify us in assuming that such a gift was intended. Like the Lord Justice, I have scanned this will carefully, with a desire, if possible, to do justice to the argument which has been presented to us, but it seems to me that the indications afforded by the rest of the will are not sufficient to enable us to say that there is an implied gift in favour of the children without departing from the field of reasoning and entering on the field of conjecture and speculation.

That is the point at which one must

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pause, because one has no right to make a will for the testator by conjecture. I therefore pause there. I do not think it is true to say that the testator must always be assumed to contemplate all the events upon which the residuary clause in the will will come into operation. All he does is to provide the clause in order that it may gather up all the property in case of any contingencies which he has enumerated, or any contingencies which he may have overlooked. Nor would it be true to say, as Mr. Marten contended, that it is to be presumed that the testator knew what the true construction of his will was. He, no doubt, knew what he intended; but what he has said is a matter for construction by the Court. The true construction to be put upon the will by the Court depends on whether he has used language which is adequate to express his intentions, and that is a matter on which the testator is not necessarily the best judge.

On the whole, with some regret, because one always regrets a decision on the construction of a will which is based on the ground that the testator's meaning is not sufficiently expressed, although the Court may well surmise that he intended that which the Court says it cannot assume, I think the learned Judge below went too far in his attempt to carry out what he presumed, without, as far as I can see, sufficient justification by the will, to be the intention of the testator.

Fry, L. J.—I also find myself unable to agree with the conclusion which has been arrived at by the learned Judge. The scheme of the testator's will is shortly this: After certain specific bequests, he leaves the whole of his real and personal property to his wife for life. Then he proceeds to deal with it in specific proportions. He does not deal with it in shares, but he gives specific portions of his property to different persons. He gives a small gift of real and personal property to his nephew Samuel George Rawlins, and another gift to his nephew William Waller Rawlins; and then he gives to his two nephews three houses, which he declares to be "Upon trust to pay the rents and interest thereof unto my niece Har-

riet Rawlins, for and during her natural life, for her own sole, separate, and peculiar use and benefit, and without being in anywise subject or liable to the debts, control, or interference of any husband with whom she may intermarry, and her receipts, whether she shall be single or married, shall be good and effectual releases and discharges for the same." Pausing there, I must say I have no doubt at all that that is in itself a gift of the life interest to the niece, and nothing more, and that the testator has expressly limited the duration of the benefit to be taken by his niece to her life.

Then the testator goes on, in words that seem to me to shew that what he gives is a remainder and not a defeasance: "And after the decease of my said niece Harriet Rawlins, she leaving no child or children, I give, devise, and bequeath . . ." Then he gives two houses, one to one nephew and one to the other. Now, be it observed that that gift over, such as I take it to be, follows the general line of the previous dispositions. The testator is not giving his property in shares between the nephews, but he is giving a specific property to the one and another specific property to the other. Then comes the general gift of the residue between these two nephews as tenants in common. I have already said that I cannot find in the terms of the disposition any indication of anything more than a life interest in Harriet. But then, when I look at the other portions of the will, I find myself equally unable to find anything from which I ought to enlarge the express life interest into an estate in fee. I cannot find anything which ought, in my mind, to lead me to that conclusion.

Then arises the second question, whether the Court can infer a gift to the child or children of Harriet by reason of the gift over being in the event of her dying leaving no child or children. The rule of law appears to me to be plainly stated, and I adopt the statement of it which has been read from the judgment of the Master of the Rolls in Ireland. Then the enquiry comes to be this: Is there anything in the will beyond the mere fact of the gift over being in the event of the niece leaving no child or

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children which shews an intention that the child or children shall take? The only thing which has or can be relied upon is this: It is said that the gifts over are so inconsistent and absurd that it is impossible for the Court to allow them to take effect. It is said that the gifts over go in this way—first, in the event of the niece dying leaving no child or children, one house to one nephew and the other houses to the other nephew, and in the event of the niece leaving children, then to them equally as tenants in common. That, no doubt, seems to be a somewhat eccentric disposition, but I think it is explained by the general scope of the will to which I have referred. The testator is anxious, whenever he contemplates a particular gift taking effect, to determine which house or which mortgage is to be taken by one nephew and which by the other, and it is only as a last resource, when he is sweeping up everything into the residuary bequest, that he divides his property equally between them as tenants in common. That may be an unwise or silly mode of proceeding, but it is one which is intelligible as long as the testator's mind is directed to a particular contingency. He likes the idea of disposing of his property in particular proportions, and not in reference to shares; and it is only when he has exhausted the whole of that series of dispositions that he gives the residue. Therefore I am unable to find in that anything which ought to lead me to infer that the children are to take in the event of there being such an apportionment. I will only make one further observation with regard to the authorities, and that is this: that it appears to me that the authorities clearly shew that the mere fact that there is a gift over on the death of a parent leaving no child cannot raise by itself any implication that the children are to take, and that that line of authorities goes back earlier than any case to which our attention was called. In the case of *Greene v. Ward* (12), decided by the Master of the Rolls in the year 1826, he states the proposition of law to be this: "If a sum of money is bequeathed to A. B. for life, and if he

(12) 1 Russ. 262; 4 Law J. Rep. (O.S.) Chanc. 99.

dies leaving no issue, then to another, that does not raise any implication in favour of the issue of A. B., although if he does leave issue, the gift over does not take effect." That case was affirmed by Lord Lyndhurst on appeal. Whether that particular proposition was affirmed or not I know not, but the case has been cited for that purpose, and has been considered as an authority from the year 1826 down to the present time. Therefore, as to the general proposition of law, no question can be raised, and has not been raised, in this case. I have looked to see whether there are any circumstances from which I can infer that the children are to take, beyond the mere gift over, and I can find none.

Solicitors—Moon & Gilks, for appellant and trustees of W. W. Rawlins, jun.; Law & Worssam, for Julia Josephine Scalé and B. A. T. Scalé; A. Scott Lawson, for Aubrey Spencer; Gasquet & Metcalfe, for executors and trustees of Mrs. Spencer's first will; A. Scott Lawson, for executors and trustees of Mrs. Spencer's second will; Dangerfield & Blythe, for A. Pyke, incumbrancer; F. A. J. Oliver, for F. H. Rawlins, other trustee, and executors of W. W. Rawlins the younger.

[IN THE COURT OF APPEAL.]

COTTON, L.J.

FRY, L.J.

LOPES, L.J.

1890.

June 30.

July 1.

In re HEAD'S TRUSTEES, AND
MACDONALD'S CONTRACT.

Will—Charge of Debts on Real Estate—Devise of Real Estate to Trustees—Authority to Trustees to adjust and pay all Claims upon Testator's Estate—Power of Sale, 22 & 23 Vict. c. 35. s. 14—Vendor and Purchaser—Sale by Trustees with no Immediate Power of Sale—Offer to make Title with Concurrence of Beneficiaries.

Testator, who died on the 7th of November, 1889, by his will, gave certain real estate, and also the residue of his estate of whatever nature to two persons upon certain trusts, and he authorised his said trustees or trustee to release or compound

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any debts owing to him or his estate, or to give time, or take security for payment, "and to adjust and pay all claims made upon my estate." The two trustees were appointed executors of the will:—Held, that the will did not create a charge of debts upon the real estate.

Trustees and executors entered into a contract for the sale of part of their testator's real estate, under the belief, which proved to be erroneous, that they had an immediate power of sale. The purchaser objected to the title; and after the time fixed for completion had passed, the vendors offered to obtain the concurrence of the beneficiaries, and make a title in that way:—Held, that the purchaser could not, after the time for completion was passed, be compelled to take a title which was different from that which he had agreed to take, and which required investigation; and that the vendors must repay to him the deposit that he had paid, with interest, and pay his costs of investigating the title.

Decision of CHITTY, J., affirmed.

This was an appeal from the decision of Chitty, J., upon a summons taken out under the Vendor and Purchaser Act, 1874, by James Macdonald, who had agreed to purchase certain real estate from the trustees of the will of the late W. H. Head, asking for a declaration that a good title to the property had not been shewn in accordance with the contract and the particulars and conditions of sale; and that the vendors might be ordered to repay to the applicant his deposit money, with interest at five per cent., and to pay the costs of investigating the title and consequent thereon, and the costs of the application.

The testator, who died on the 7th of November, 1889, by his will dated the 19th of August, 1871, gave and devised all his real estate at Egham and Sunningdale, and all the rest, residue, and remainder of his estate and effects, of whatever nature or kind the same might be, to Philip Head and John Walker, their heirs, executors, and administrators, upon trust as to his real estate to pay the rents thereof, together with the income of his personal estate, unto his wife during her life; and after her decease, upon trust to

sell his said real estate, and such part of his personal estate as should not consist of money, and invest the money arising therefrom, and hold the resulting income thereof in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares. And he thereby authorised his said trustees or trustee to release or compound any debts owing to him or to his estate, or to give time for payment, or to take such security for payment, "and to adjust and pay all claims made upon my estate," and generally to act in the premises as his said trustees or trustee should in their or his discretion think fit. And he appointed the said Philip Head and John Walker to be executors of his will.

In December, 1889, the trustees put up the property for sale by public auction, it being stated on the particulars that the sale was by order of the executors of the late Mr. W. Head. The day fixed for completion was the 24th of January, 1890.

On the 17th of December, Macdonald signed the agreement for the purchase, and paid his deposit. After receiving the abstract, the purchaser's solicitors objected that the vendors could not then make a title, as the testator's widow was still living, and their trust for sale did not arise under the will until after her death. To this the vendors' solicitors replied that Mrs. Head would concur in the sale, and surrender her life interest. They stated that the estate was insolvent, and that, therefore, neither the tenant for life nor the remaindermen had any beneficial interest in the property.

On the 7th of January, 1890, the purchaser's solicitors declined the title, on the ground that the trustees could not, with Mrs. Head's concurrence, anticipate the time for sale, and asked for an authority to the auctioneers to repay the deposit; and again on the 21st they asked for a cheque for the deposit, and their charges in the matter. On the 29th of January, the vendors' solicitors offered to obtain the concurrence of all the beneficiaries, who were alleged to be *sui juris*; but the purchaser declined to take such a title, as not being that which was offered by

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the particulars and conditions of sale, and, the deposit not being returned, he took out the summons.

On the 24th of March, 1890, Chitty, J., in chambers, made an order as asked by the summons. The vendors, on the 18th of April, 1890, moved in Court to discharge that order; but the Judge declined to make any order, but that the vendors should pay the costs of the motion. The vendors appealed.

Cozens-Hardy, Q.C., and *O. L. Clare*, for the appellants.—The estate is insolvent, and the realty is being sold for the purpose of paying debts. The will creates a charge of debts upon the real estate, so that the trustees have power to sell it under section 14 of 22 & 23 Vict. c. 35, and they can make a title in that way. The words giving the trustees authority to adjust and pay all claims upon the estate are equivalent to a direction to pay debts, which clearly creates a charge of debts upon real estate. There is no actual decision that words such as these create a charge of debts upon real estate, but we submit that they do, as much as a direction to pay debts. The trustees cannot act under the authority given to them unless they have a power of sale. An immediate power of sale for payment of debts is not inconsistent with the power to sell after the widow's death.

Even if the trustees cannot make a title in this way, as all the beneficiaries will concur, they can now give a good title in that way.

Romer, Q.C., and *Strickland*, for the respondent.—These words do not create a charge of debts on the real estate. They are a mere common form to give the trustees power to do what all trustees are now empowered to do by section 37 of the Conveyancing Act, 1881. The testator has given the trustees an express power of sale, not to arise until after the death of his widow; he clearly did not intend that they should sell before that. As to the second point, we cannot be made to take a title from the beneficiaries, when we have contracted to take a different one—that is, one from the vendors—*Farrer v. Nash* (1),

Brewer v. Broadwood (2), and *In re Bryant and Barningham's Contract* (3).

It was not until the 29th of January, after the time fixed for completion was passed, that they told us that they would get the concurrence of the beneficiaries, and then they only said that they would get it, not that they had got it. They cannot make a fresh title in that way.

Cozens-Hardy, Q.C., in reply.—The trustees took under the will both real and personal property blended together as one fund, and they were to pay all claims made upon "my estate." The words "authorise and empower" have been held to create a trust—*Brown v. Higgs* (4).

COTTON, L.J.—It is said that the vendors can make a good title to this property, as they have power to sell the testator's real estate, by reason of there being a charge of debts upon it made by the will. Does the will create such a charge? It contains no direction or trust to pay debts, but only an authority to adjust and pay all claims made upon the testator's estate. No case has been cited in which it has been held that a mere authority to pay debts amounts to a charge of debts upon real estate; and, on the true construction of this will, I do not think that it creates any such charge. All that it does is to give to the trustees power to decide what are to be recognised as debts—that is, if there should be any doubt whether any particular claim ought to be recognised as a debt, they can determine that under the authority which the testator gives to them; but that does not enable them to make any property liable for debts which would not otherwise be liable.

I do not think, on the view which I take of this will, that I need go into the authorities which have been cited. If there were any cases exactly like this, we might perhaps be bound by them; but it seems, though somewhat remarkable that it should be so, that the point has not before been raised. Where a testator directs his debts to be paid, that im-

(2) 52 Law J. Rep. Chanc. 136; Law Rep. 22 Ch. D. 105.

(3) Law Rep. 44 Ch. D. 218.

(4) 4 Ves. 708.

(1) 35 Beav. 167.

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poses upon his executors or trustees a duty to pay them, which enables them to sell the real estate for that purpose; but the words here do not, I think, create any such charge so as to enable the trustees to sell the real estate; they only give them power to settle what are debts, which they can pay out of any funds in their hands liable for payment of them. As to the second point, after objection has been made, the vendors say they can make a good title if the beneficiaries concur. They are the remaindermen, the children of the tenant for life, and it is not even now, it seems, ascertained for certain whether they will concur; and even if they would, the title offered would not be the title of the vendors, but of the remaindermen, which would have to be investigated before it was accepted. A case was cited which was somewhat in point, *In re Bryant and Barningham's Contract* (3), where vendors who had agreed to sell land as trustees for sale, upon the purchaser objecting to the title on the ground that they had no power of sale until the death of an existing tenant for life, offered to procure a conveyance from the tenant for life under the powers of the Settled Land Act. The purchaser declined to enter into any fresh arrangement, and it was held by this Court that he could not be compelled to take a title different from that which he had agreed to take. In the present case, even if all the remaindermen were able and willing to concur, the purchaser would get a different title from that which he had contracted for. In my opinion he is not obliged to take such a title, and the appeal fails.

FRY, L.J.—The clause of the will upon which the first point arises is, with regard to the general scope of it, what is sometimes called a mandatory clause. The general object of it is to facilitate the winding-up of the estate. The question is whether the words amount to a charge of debts upon the real estate, and I have come to the conclusion that they do not. Their true object is to give the trustees authority to determine what claims are to be paid, and enable them to pay what they determine ought to be paid out of

any funds that they may have applicable for that purpose, so that they could pay any claims that there might be against the real estate out of that estate, and any claims that there might be against the personal estate out of that. I cannot find anything in the will which enlarges the fund out of which debts are to be paid. I think it is worthy of observation, considering the number of cases of this description that there has been, that there is no case where words of this kind have been held to create a charge upon real estate.

As to the second point, the vendors say that they can obtain the concurrence of all the beneficiaries and so make a good title. I am by no means clear that if that had been done at an early stage of the negotiations, and the beneficiaries had in fact agreed to concur, and the purchaser had had an opportunity of investigating their title, the vendors could not have enforced the contract, but it is not necessary to decide that. The time fixed for the completion of the contract was the 24th of January, and on the 7th the purchaser's solicitor put an end to it, and demanded repayment of the deposit, on the ground that no good title to the property had been shewn. After that, nothing was done for some time, and it was not until the 29th of January that the vendors told the purchaser that they would obtain the concurrence of the beneficiaries; but they produced no evidence that the consent of the beneficiaries to such a course had been obtained, and it now turns out that, by reason of the absence of one of them in Australia, they were unable at that time to obtain it. It is said that they have since been able to obtain it; but that is too late. The vendors cannot force upon the purchaser a title which requires investigation, when the purchaser has, before the time fixed for completion, put an end to the contract so far as he was able to do so.

LOPES, L.J.—In my opinion this will creates no charge of debts upon the real estate, but merely gives the trustees authority to pay the debts out of any fund which they may have liable for that purpose, without in any way enlarging that

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fund. Upon the first point the appellants fail. As regards the second point, they say they can make a good title by the concurrence of the beneficiaries; but it is not clear that the beneficiaries have not incumbered their interests, nor that the vendors had obtained their consent to make the proposal. The vendors have not shewn a good title, and the decision appealed from was right. The appeal must be dismissed, with costs.

Solicitors—Burton, Yeates, Hart & Burton, agents for Horne & Engall, Staines, for trustee of Head; Roy, and Cartwright, for Macdonald.

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

STIRLING, J.	} THE WINDHILL LOCAL BOARD v. VINT.
1890.	
March 11, 12.	
May 13.	
COTTON, L.J.	
FRY, L.J.	
LOPES, L.J.	
July 17.	

Agreement — Validity — Illegal Consideration — Public Offence — Compromise — Stifling a Prosecution.

At the trial of the defendants on the prosecution of the plaintiffs for obstructing a highway, an agreement was entered into between the parties, with the approval of the Court, that the defendants should restore the highway, and that in the meantime the indictment should lie in the office, and that on the fulfilment of the agreement the plaintiffs should consent to an acquittal. In pursuance of this agreement the defendants covenanted to restore the highway:—Held (affirming the decision of STIRLING, J.), that the covenant was founded on an illegal consideration, and was void.

Keir v. Leeman (9 Q.B. Rep. 371; 15 Law J. Rep. Q.B. 360) followed and approved.

Dictum of JAMES, L.J., in Fisher v. The Apollinaris Company (44 Law J. Rep. Chanc. 500, 502; Law Rep. 10 Chanc. 297, 302) not followed.

This was an action by the Windhill Local Board against William Horsfall Vint and Samuel Walter Vint for specific performance of a covenant contained in an indenture dated the 9th of November, 1880; or, in the alternative, for damages for breach of the covenant. The defence was that the covenant was entered into for an illegal consideration. At the Leeds Summer Assizes in 1880 the defendants were indicted on the prosecution of the plaintiffs for obstructing a highway called Gaisby Lane, within the district of Windhill, in the county of York, and a certain footpath leading into Gaisby Lane, by digging and excavating a stone quarry to a great depth for the whole width of the said highway. The defendants pleaded "not guilty." By a memorandum in writing, signed by the solicitors for the plaintiffs and defendants respectively, and initialled by their respective counsel, and dated the 4th of August, 1880, it was agreed (subject to the approval of the Court) between the plaintiff board and the defendants—1. That the defendants should, within the term of seven years from the date of the memorandum, restore Gaisby Lane between certain points, and make such road at least ten yards in width. 4. That on the foregoing conditions the board would concur in any necessary steps for stopping up a certain footpath (being the footpath referred to in the indictment); and 5. That the said indictment should lie in the office as a security for the observance of the terms of the agreement now in statement, which should also, if required by either party, be embodied in a deed between the board and the defendants and George Vint, the father of the defendants, and that when the said terms were fulfilled a verdict of "not guilty" should be consented to by the plaintiff board. At the trial the Court approved of the terms contained in the memorandum, and ordered that the indictment should lie in the office accordingly.

The provisions of this memorandum were embodied in an indenture of the 9th of November, 1880, which contained a covenant by the defendants to restore Gaisby Lane within the term of seven years, to be computed from the 4th of

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August, 1880, and to make such road of the uniform width of ten yards at the least. The seven years elapsed without the defendants having restored the highway, and accordingly this action was commenced.

From the evidence adduced by the defendants at the trial, it appeared that George Vint, the father of the defendants, formerly carried on business in partnership with his brothers under the firm of George Vint & Brothers; and that in 1861 the firm began to work two quarries on the east and west sides of the highway in question. The quarry on the west side of the road was held under a lease for thirty years from April, 1860; the quarry on the east side was originally also held under a lease, but in 1864 or 1865 the firm acquired the freehold. Some time about 1861 an arrangement was made between the then highway board for the district (of which George Vint was a member) and the firm that the latter should divert the highway in question, and should be at liberty to work the stone under the highway. A diverted road was accordingly constructed at the expense of the firm; but the diversion was never legally carried into effect, and Gaisby Lane continued to be a public highway. In 1873 George Vint's partners retired, and he thereupon became sole owner of the quarries, and continued to carry on business without a partner until 1878, when he also retired, being succeeded by his two sons, the present defendants, to whom he agreed to give a lease of the quarry on the east side of the road for ten years. It was admitted by the defendant Samuel Walker Vint, in answer to questions put by his own counsel, that in 1880 he and his brother were working the quarry on the site of the road.

Graham Hastings, Q.C., and Bardswell, for the plaintiffs.

Fischer, Q.C., and R. Cunningham Glen, for the defendants.—We submit, first, that the agreement is founded on an illegal consideration, and void; secondly, that it is not an agreement capable of specific performance; thirdly, that the plaintiffs have suffered no damage. Upon

the first point we say that this is an agreement to compromise an offence of a public nature, and is, consequently, illegal; and it is not made legal by the approval of the Court. The object of the agreement is to stifle a prosecution—*Keir v. Leeman* (1), *Johnson v. Ogilby* (2), and *Williams v. Bayley* (3).

[STIRLING, J., referred to *Fallowes v. Taylor* (4).]

That case is overruled by *Keir v. Leeman* (1).

[STIRLING, J., referred to the dictum of James, L.J., in *Fisher v. The Apollinaris Company* (5), to the effect that the compromise of an indictment for the non-repair of a highway was good.]

That dictum cannot overrule the express decision of the Court of Exchequer Chamber, and it is met by the observations of the same learned Judge in *Whitmore v. Farley* (6), where *Keir v. Leeman* (1) is referred to with approval.

The compromise of the prosecution must be considered as complete at the moment when the agreement is made—*The Queen v. Burgess* (7).

Hastings, Q.C., in reply.—The decision of *Keir v. Leeman* (1) has no bearing on this case. Here there has been no acquittal, and no forbearance on the part of the plaintiffs, except that the trial has been adjourned with the consent of the Judge. No case has been cited impeaching the validity of an agreement where the indictment is ordered to remain in the office to see whether the defendant is going to purge his offence. The only object of the indictment was to have the law obeyed, and that was the object of the agreement. This is not a case of stifling a prosecution. *Fallowes v. Taylor* (4) is still a binding authority. So is the dictum of James, L.J., in *Fisher v. The Apollinaris Company* (5). There is no contradiction be-

(1) 6 Q.B. Rep. 308; 9 ibid. 371; 13 Law J. Rep. Q.B. 359; 15 ibid. 360.

(2) 3 P. Wms. 277.

(3) 35 Law J. Rep. Chanc. 717; Law Rep. 1 E. & I. App. 200, 213.

(4) 7 Term Rep. 475.

(5) 44 Law J. Rep. Chanc. 500, 502; Law Rep. 10 Chanc. 297, 302.

(6) 29 W. R. 825.

(7) Law Rep. 16 Q.B. D. 141, 141.

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tween that case and *Whitmore v. Farley* (6), which was a case of compounding a felony.

The following authorities were cited on the other questions in the case—*Gervais v. Edwards* (8), *Blackett v. Bates* (9), *The South Wales Railway Company v. Wythes* (10), *Rolls v. The Vestry of St. George the Martyr, Southwark* (11), *Mosely v. Virgin* (12), and *Davies v. Underwood* (13).

Cur. adv. vult.

STIRLING, J. [after stating the facts, continued :]—It appears from the evidence of Samuel Walker Vint that there was no real defence to the indictment; and if the defendants had either pleaded guilty or been found guilty, different courses might have been taken which would substantially have had the effect of securing that which the plaintiffs have attempted to secure by means of the deed. It appears from the case of *The King v. Incedon* (14) that when a defendant upon such an indictment has been found guilty, judgment may be postponed, and if it appears to the Court by whom the judgment is about to be given that the defendant has, when the judgment comes on, sufficiently repaired the highway in the meantime so as to abate the nuisance, the Court may give judgment that it is satisfied that the nuisance has been abated, and may inflict a nominal fine in discharge of the defendant. That is one of the courses that may be taken. Another course may be taken under the 5th & 6th Will. 4. c. 50. s. 96, which provides that no fine, issue, penalty, or forfeiture for not repairing the highway, or not appearing to any indictment for not repairing the same, shall hereafter be returned into the Court of Exchequer or other Court, but shall be levied by and paid into the hands of such person residing in or near the parish where the road

shall lie, as the Justices or Court imposing such fines, issues, penalties, or forfeitures, shall order and direct, to be applied towards the repair and amendment of such highway. So that it would have been possible to inflict a fine of sufficient amount to secure the repair and amendment of the highway, and it might have been effectually so applied. Of course, a third course was open—namely, that the Court might have considered that the case was one in which a fine ought not to be inflicted, but that a sterner penalty ought to be applied.

I cannot think that there is any ground for supposing that it was intended by the agreement of the 4th of August, 1880, to do anything that was unlawful. I believe that that agreement was come to solely in order to avoid the appearance of harsh conduct on the part of the public body which instituted the proceedings. I have no doubt that the facts were fully brought to the knowledge of the presiding Judge, and I think that his approval, given under such circumstances, was strong evidence of the good faith of the parties. Nevertheless, neither the good intentions of the prosecutor and defendant, nor the approval of the Judge, can avail if, in fact, the consideration for the agreement is illegal. See *Keir v. Leeman* (1).

Now, part of the consideration for the promise of the defendants was the agreement of the plaintiffs (the prosecutors in the indictment) that when and so soon as the stipulations thereinbefore contained had been fulfilled, they would consent to a verdict of "Not guilty" being entered on the indictment. It was alleged that this was not a lawful promise. In the case of *Fallowes v. Taylor* (4), a bond was given to an individual conditioned to be void, if the obligor (on the obligee's agreeing not to prosecute him) should remove certain public nuisances, and not erect any others of the same kind. The plaintiff, to whom the bond was given, was a clerk of the peace for the county of Hereford, who had been directed by the magistrate to prosecute all persons who erected, kept, or maintained certain walls, cribs, and other nuisances in and upon the river Wye, in order to preserve the navigation, and, in pursuance of such

(8) 2 Dr. & W. 80.

(9) 35 Law J. Rep. Chanc. 324; Law Rep. 1 Chanc. 117.

(10) 1 Kay & J. 186; 5 De Gex, M. & G. 880; 24 Law J. Rep. Chanc. 1; *ibid.* 87.

(11) 49 Law J. Rep. Chanc. 691; Law Rep. 14 Ch. D. 785.

(12) 3 Ves. 184.

(13) 2 Hurl. & N. 570; 27 Law J. Rep. Exch. 113.

(14) 13 East, 164.

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orders, he had prepared bills of indictment against the defendant, the obligor, who, in order to avoid the expense of the indictment, had applied to the plaintiff not to prefer the same, upon condition that he, the defendant, should enter into a bond to remove the nuisance. The defendant did not fulfil the condition of the bond, and an action was brought at the Hereford Assizes, before Lord Kenyon, when the plaintiff obtained a verdict. The defendant moved in arrest of judgment, on the ground that the contract disclosed in the condition of the bond was an illegal contract, and could not be enforced in a Court of justice. The Court held that they could not arrest the judgment. Lord Kenyon says: "The want of a consideration to a bond affords no ground of objection; and if there were anything illegal in this consideration, the defendant should have pleaded it." I am not quite sure that that is in accordance with the law as it now stands. Mr. Justice Lawrence says: "The defendant might have given a bond without any consideration at all; and why may he not give a bond for a consideration that is legal?" So that it is clear, at all events, that the opinion of Mr. Justice Lawrence was that the consideration was legal. That case came to be considered by the Court of Exchequer Chamber in the case of *Keir v. Leeman* (1), which is the leading authority on the subject; and Chief Justice Tindal, in giving the considered judgment of the Court, says this: "It seems clear from the various authorities brought before us on the argument, that some misdemeanours are of such a nature that a contract to withdraw a prosecution in respect of them, and to consent to give no evidence against the parties accused, is founded on an illegal consideration." Then, after referring to various cases, he says: "In *Drage v. Ibberson* (15), however, Lord Kenyon adverted to, and stated that he should adhere to, the class of cases which held that the consideration for an agreement being the settling of a misdemeanour might be good in law. Thus a settlement of an indictment preferred by a public body was held a lawful consideration for a bond binding

the defendant to remove the nuisance—we presume on the ground (which, however, is not very satisfactory) that the main object of the prosecution, the removal of the nuisance, was thereby effected. But the Court seems to have overlooked the consideration that a defendant who had infringed a public right was thereby freed from the punishment due to a violation of public law. In *Edgcombe v. Rodd* (16) Mr. Justice Le Blanc assigns this as a reason for the consideration being illegal—that there the prosecution was for a public misdemeanour, and not a private injury to the prosecutor. It is difficult to reconcile this principle, which we think a just one, with the decision in *Fallowes v. Taylor* (4); nor can *Pool v. Bousfield* (17) be reconciled with it. There an agreement to stifle a motion against the defendant that he should answer the matters of an affidavit was held illegal." Then he goes on to distinguish the class of cases which do not break in upon sound principles, and says: "These are cases where the private rights of the injured party are made the subject of agreement, and where, by the previous conviction of the defendant, the rights of the public are also preserved inviolate"; and later on he says: "Indeed, it is very remarkable what very little authority there is to be found, rather consisting of *dicta* than decisions, for the principle that any compromise of a misdemeanour, or, indeed, of any public offence, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were *res integra* we should have no doubt on this point. We have no doubt that in all offences which involve damage to an injured party, for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so; but we are not disposed to extend this any further."

There is a third case to which it is right

(15) 2 Esp. 643.

(16) 5 East, 291.

(17) 1 Campb. 55.

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that I should refer—*Fisher v. The Apollinaris Company* (5). That was a case arising out of the infringement of a trade mark, where the owners had prosecuted the alleged infringer criminally. The prosecutors offered no evidence against the offender, who was acquitted upon giving to the prosecutors a letter of apology with authority to make such use of it as they might think necessary. The prosecutors published this letter by advertisements, and continued to do so for nearly two months. It was held that the arrangement as to the apology was not void as made under duress, and that the prosecutors could not be restrained from publishing the letter. In the course of his judgment, Lord Justice James says: "This is one of those misdemeanours where the person injured has the choice between a civil and a criminal remedy. It was no more a violation of the law to accept an apology in such a case, than it would be to compromise an indictment for a nuisance, or for not repairing a highway, on the terms of the defendants agreeing to remove the nuisance or repair the highway. Offences of this kind are indictable, but it is not against the policy of our law to allow the injured party to enter into a compromise with regard to them." No one can feel a greater respect than I do for anything that fell from that learned Lord Justice, but it appears to me that there are two circumstances in the case which render his *dictum* less weighty than it otherwise would be. In the first place, the remark with reference to the compromise of the indictment was made incidentally, and not after a consideration of the cases to which I have referred. The case of *Keir v. Leeman* (1) was not cited at all. And, secondly, it is to be observed that Lord Justice Mellish did not express his concurrence in what was thus laid down. Lord Justice Mellish says: "Previously to the Trade Marks Act (25 & 26 Vict. c. 88) the sole remedy for the wrong complained of by the company would have been by action at law or suit in equity, but under this Act the wrong became also the subject of a criminal prosecution. There was no authority for saying that it was wrong in the prosecutors to withdraw from such a charge of this kind. The

prosecutors allowed him to say that his offence was not wilful, and accepted an apology. Such compromises are constantly made before criminal Courts in cases of assault and libel." He says nothing about the indictment as to the highway. Notwithstanding, therefore, the weight due to the observations of Lord Justice James, I consider myself bound to follow the principle laid down by Chief Justice Tindal, "that any compromise of a misdemeanour, or, in fact, of any public offence, is illegal." That principle his Lordship evidently considered extended to the compromise of a nuisance when the public law was violated. In the present case the compromise was not of the subject-matter of a private right, but of a public right. The prosecutors were a public body, seeking to enforce the rights of the public in respect of a highway. The subject-matter of the prosecution was a misdemeanour and a public offence. The stipulation which constituted the consideration for the promise of the defendants was one to consent to a verdict of "not guilty," being—whatever may be thought of its form—in substance an engagement having a tendency to affect the administration of public justice, and this—as was laid down by Lord Lyndhurst in *Egerton v. Brownlow* (18)—is illegal and void. I come, therefore, with great reluctance, to the conclusion that the contention of the defendants is well founded; but such is my opinion of their conduct that though I feel compelled to dismiss the action, I do so without costs.

The plaintiffs appealed from this decision.

Graham Hastings, Q.C., and *R. S. Wright* (*Bardswell* with them), for the plaintiffs.—The question is whether this is an agreement to stifle a prosecution. There is no decision that a public body prosecuting a man for obstructing a highway cannot compromise on the terms of the highway being repaired. The *dictum* of James, L.J., in *Fisher v. The Apollinaris Company* (5), and *Fallowes v. Taylor* (4), are in our favour.

(18) 4 H.L. Cas. 1, 163; 23 Law J. Rep. Chanc. 348.

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[FRY, L.J.—That case appears to be mainly a decision on pleading.]

It was treated in *Keir v. Leeman* (1) as deciding the question raised in this case. *Keir v. Leeman* (1) is not a decision on the point; it merely decides that where a public offence has been committed, the prosecutor may not accept a sum of money by way of compromise. Where a prosecutor obtains some personal benefit, that makes the agreement illegal; but it is not illegal for a public body to compromise an offence on the terms of securing some benefit for the public. In *Ex parte Dodson* (19) the Court sanctioned an agreement for dropping a prosecution under the Bankruptcy Act, where the agreement appeared to be for the general advantage of the creditors of the bankrupt. In determining the legality of the agreement the Court must look at the object of the prosecution. Here the object is not the punishment of the offenders, but the repair of the highway—*Chitty on Criminal Law* (vol. i. p. 489).

An agreement is illegal if the purpose of it or, possibly, if the effect of it is to prevent the law from attaining its proper object, whatever that object may be; but not otherwise. An indictment for obstructing a highway is in substance a civil proceeding, although in form criminal—*The Queen v. Train* (20).

This is an agreement to ask the Court for a stay of proceedings in order that the object of the prosecution may be effected in a reasonable way. No doubt the usual course is to take the verdict first, and then to exact an undertaking from the defendant to repair; but here there is no substantial departure from the ordinary course. It is not illegal to compromise every criminal offence, for it is well settled that a compromise of an indictment for assault or libel is unobjectionable, as is admitted in *Keir v. Leeman* (1). The prosecutor, when once the case is opened, is not *dominus litis*, and there is nothing in the agreement to prevent the Court from insisting that the prosecution shall go on if it sees fit, nor to stop other people prosecuting these defendants. It is therefore not an agreement to stop the course

of the law. The approval of the Court cannot make an illegal agreement legal; but it is most material on the question whether the agreement had any illegal intent. The language used throughout the cases shows that in order to make an agreement of this kind illegal there must be an intention to do something wrong. The usual phrase is "stifling a prosecution"—*Collins v. Blantern* (21), *Edgcombe v. Rodd* (16), *Wallace v. Hardacre* (22), *Beeley v. Wingfield* (23), *Coppock v. Bower* (24), *Keir v. Leeman* (1), *Williams v. Bayley* (3), *The Queen v. Hardey* (25), and *Flower v. Sadler* (26).

Fischer, Q.C., Sir Horace Davey, Q.C., and R. Cunningham Glen, for the defendants, were not called upon.

COTTON, L.J.—This is an appeal from the decision of Mr. Justice Stirling that the action be dismissed, on the ground that the agreement sued upon was an illegal one, and that it was an agreement to stifle (to use the word that is so commonly used) a prosecution. I do not intend to enter at all into the question whether an agreement to stifle any prosecution is illegal or not. That does not arise here, because this was a prosecution on a public matter—a matter which concerned the public. There was an interference with the public highway in a very serious manner; and this agreement was made to postpone the prosecution for a considerable time, and that could only, of course, be done with the consent of the Judge. There was an agreement that upon certain acts being done by the defendants who were being prosecuted, the prosecutors would not object to a verdict of not guilty. Now, how was that course defended by the counsel for the appellants? As I understood Mr. Graham Hastings's argument, he said that, provided there was no money received for the private benefit of the prosecutor, such an agreement was not illegal. It was said, on the

(21) 1 Sm. L. Cas. 398, 403.

(22) 1 Campb. 45.

(23) 11 East, 46.

(24) 4 Mee. & W. 361; 8 Law J. Rep. Exch. 9.

(25) 14 Q.B. Rep. 529; 19 Law J. Rep. Q.B. 196.

(26) Law Rep. 10 Q.B. D. 572.

(19) 32 Law J. Rep. Bankr. 1.

(20) 3 Foster & Fin. 22.

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other hand, by Mr. R. S. Wright (and I think that that was the more reasonable argument), that such an agreement would not be illegal unless it had for its aim to prevent effect being given to, or the object being attained by, the prosecution. It is impossible to accede to Mr. Graham Hastings's argument. To my mind, what he contends for comes within the mischief of the principle which governs the cases on this subject. But neither can I accede to the argument addressed to us by Mr. Wright. I put it to him whether he could find any authority in support of his proposition, and he very fairly admitted that he could not. But he said that that must be the reason of the thing. I think the reason of the thing goes deeper than that. It is this: that the Court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution when the offence is an injury to the public. It would be a case of persons taking into their own hands the determination of what ought to be done; and that ought not to be taken into the hands of any individuals, even if they are a *quasi* public body like the plaintiffs here, but ought to be left to the due administration of the law, and to the Judges, who can best determine what ought to be done in each particular case. I think it goes beyond saying that in the particular case there may or may not be any evil to the public. The principle is that the administration of the law must not be taken out of the hands of the Judge and put into the hands of a private individual. That, to my mind, is illegal. I agree the authorities do not definitely lay down that proposition, but that must be the principle upon which they are decided.

I need hardly refer to the case of *Keir v. Leeman* (1); but it is laid down there that stifling a prosecution for a public object is illegal; and that must be upon the principle I have mentioned. Here it was also argued that there was not a stifling of the prosecution; but I think that stifling (one need not go into the words) means this—preventing a prosecution which has been instituted from being conducted in the ordinary course.

This agreement certainly does that, be-

cause not only does it postpone it, but it provides that if certain things are done by the defendants the prosecutors will consent to a verdict of not guilty.

In my opinion the decision of Mr. Justice Stirling was right, and the appeal must be dismissed.

FRY, L.J.—In this case the contract provided that the indictment which was pending should lie in the office for the term of seven years, and that when the terms of the agreement were fulfilled, a verdict of not guilty should be consented to by the local board. In my judgment that is an agreement to stifle the prosecution—that is to say, an agreement to put an end to it in a manner which does not depend upon the ordinary course of law. It is to put an end to it on a certain contingency by consent.

Now, I confess it appears to me that the law upon this point is determined by the case of *Keir v. Leeman* (1). That lays down this principle (which I take to be one of general application), that where the matters of indictment are matters of public concern, they are not the subject of compromise. To use the language of the learned Judge in the Court of Queen's Bench: "These are matters of public concern, and therefore not legally the subject of compromise." The same view was held when the case was before the Court of Exchequer Chamber. Chief Justice Tindall, who delivered the judgment of the Court, says, referring to the nature of the offence in that case, "The offence is an assault, coupled with riot, and the obstruction of a public officer. No case has said that it is lawful to compromise such an offence."

I think, therefore, the whole enquiry is this, whether the subject of the indictment in the present instance is a matter of general public concern. That question, it appears to me, must be answered in the affirmative. Therefore, upon the principle of that case, it appears to me that the decision of Mr. Justice Stirling was correct.

But then two arguments are addressed to us. It is said that that principle does not apply where the benefit secured by the agreement is a benefit not to some

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private individual, but to the public. I am of opinion that no such exception can be made. If that exception were valid, it would seem to follow that a prosecution for manslaughter, or, for aught I know, for murder, could be validly compromised with the prosecutor by an agreement that the defendant should pay 1,000*l.* to the Chancellor of the Exchequer, because that would be a consideration for the public benefit; but I do not think that a prosecutor is at liberty to weigh the advantage to the public in continuing the prosecution against the advantage of some sum of money being paid to the public or of something else being done for the public benefit. He has no right to put those two things into the balance, and determine in favour of the one as against the other.

Then it is argued by Mr. Wright that there is another exception to the rule, and it is this, that if the stipulation in the contract is to the same effect as the object of the prosecution—or, in other words, if the object of the prosecution is carried into effect by the terms of the contract—the contract is valid, and the compromise is good.

It must be admitted that no case can be produced in support of that contention; nor does it appear to me in principle to be sound, because the result of it is to remove from the ordinary administration of law the decision of a question which was pending before it.

Now to illustrate it by the present case, if this case had taken the ordinary course, it would have been for the learned Judge, before whom the defendants might be brought, to pass sentence—to determine what was to be done with them; and if he thought a serious outrage had been done to public rights, he might have shewn his sense of the impropriety and wrongfulness of the defendants' conduct by inflicting a fine or a term of imprisonment. Now, that whole power which would be vested in the Judge before whom, after the adjournment, the case might come, is taken away from that Judge, so far as the contracting parties could take it away, by one of the contracting parties consenting that a verdict of not guilty should be entered. We have, therefore, a case in

which a contract is entered into for the purpose of diverting—I may say perverting—the course of justice; and although I agree that the contract was entered into with perfect good faith, and with all the security which could possibly be given to such an agreement, I nevertheless think that the general principle applies, and that we cannot give effect to this agreement, the consideration of which is the diverting the course of public justice. For these reasons, I think the appeal fails.

LOPES, L.J.—I entirely agree with the judgments which have been delivered, and have but a very few words to add. As a general principle it may be stated that it is the duty of every prosecutor, where the public are interested, to prosecute either to conviction or to acquittal. Again, it may be stated as a general principle that it is inexpedient to stop the course of the law in a criminal matter where a public right is involved—that it is inexpedient to take out of the hands of the law, and commit to an individual, the determining of what is to be done in a particular case.

Now, those being the general principles with regard to the present case, I have only to state that, in my opinion, it falls well within the decision of *Keir v. Leeman* (1), and I shall satisfy myself by merely citing the words at the end of Lord Denman's judgment. He says, "But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." There can be no doubt that in the present case the offence was of a public nature, and, in my opinion, the consideration for the agreement which was entered into was the consent to an acquittal in the future, which seems to me in effect to be a stifling of a prosecution.

I think that the agreement in question was against public policy, and illegal, and that, therefore, the appeal should be dismissed.

Solicitors—Jaques & Co., agents for Lancaster & Wright, Bradford, for plaintiffs; Flower & Nussey, agents for Killick, Hutton & Vint, Bradford, for defendants.

KEKEWICH, J.
1890.
April 15, 16, 17, 18,
19, 21, 22, 23, 24, 25,
26, 28, 29, 30.
May 23.

In re THE LIVERPOOL
HOUSEHOLD STORES
ASSOCIATION (LIM-
ITED).

*Company — Winding-up — Director —
Misfeasance — Breach of Trust — Companies
Act, 1862 (25 & 26 Vict. c. 89), s. 165 —
Committee of Directors.*

Section 165 of the Companies Act, 1862, enables a creditor of a company to obtain by summary process any relief to which he is entitled in respect of damages incurred through the misfeasance of an officer of the company, but the remedy afforded by the section is only for the recovery of damages for losses incurred. The misfeasance to which the section is directed is not restricted to acts of commission, but extends to all breaches of trust in relation to a company through which loss is incurred. Misfeasance is not to be imputed to a director unless he has dishonestly acted, or abstained from acting, in conflict with his plain duty, and the burden of proof lies on the party making the charge; but in considering the question of the director's liability, there must be imputed to him a special knowledge of the business which he has undertaken. Directors are liable for losses occasioned through acts done by them as directors in matters which are ultra vires the company, and this liability is not dependent upon any question of honesty of intention.

Where a board of directors delegate their powers to a committee, without any provision as to the committee acting by a quorum, all acts of the committee must be done in the presence of all the members of the committee; and, Semble, the committee have not, under their delegated authority, power to add to their number or supply a vacancy.

The official liquidator of the company claimed to make certain former directors liable under section 165 of the Companies Act, 1862, upon the ground that they had been guilty of misfeasance in the following particulars:—

- (a) The invalid and improper allotment of shares.
- (b) The allotment of shares to appli-

cants without communicating facts which it was their duty to communicate.

(c) Entering into a contract for the purchase of certain land and buildings, and payment of moneys under the contract, before any valid allotment of shares had been made.

(d) Entering into a contract for alterations to the buildings and payment of moneys under the contract before any valid allotment of shares had been made.

(e) Improperly defending and opposing certain legal proceedings, and payment of the costs thereof.

(f) The improper institution of actions for calls, and payment of costs thereof.

(g) Payment of the costs of certain actions to which some of the directors were parties.

(h) Improperly and negligently instituting and prosecuting an action for an injunction against a newspaper proprietor.

(i) Payment of a salary to one of the directors as manager.

(j) Allowing calls due from certain persons connected with the company to remain unpaid, and paying salaries to such persons meanwhile.

(k) Payment to one of the directors of a sum of 500*l.* in excess of actual expenditure for preliminary expenses.

The case involved a long enquiry into details of fact, the results of which are stated in the judgment. The cases cited in argument were also dealt with in the judgment, which is reported as containing a statement of the general effect of the authorities bearing upon section 165 of the Companies Act, 1862.

That section is as follows: "Where, in the course of the winding up of any company under this Act, it appears that any past or present director, manager, official, or other liquidator, or any officer of such company, has misapplied or retained in his own hands, or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager,

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or other officer, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the Court thinks just."

Warmington, Q.C., and *T. R. Hughes*, for the official liquidator.

Henn Collins, Q.C., and *P. O. Lawrence*, for Messrs. Shallock and Weld Blundell, two of the directors.

Neville, Q.C., and *Jenkins*, for Dr. Clarke, another director.

Mr. Shorrock, another director, appeared in person.

Cur. adv. vult.

May 23.—*KEKEWICH, J.*—This being an application under the 165th section of the Companies Act, 1862, it is necessary to enquire into the purview of that section, and the limits of the jurisdiction thereby conferred. Not that the enquiry has not been made and answered many times before, or that I hope to add one ounce to the weight of learning to be found in the authorities, but as my conclusions necessarily depend on my apprehension of the duty and power of the Court under the statute, those conclusions cannot well be stated even intelligibly without some exposition. Taking the section as read, the first and obvious enquiry is whether it in any way alters the law, and, if so, what is the character and extent of the alteration. It has been stated by Judges of all grades, including the highest Court of appeal, that while giving a new remedy, that remedy is only in respect of old rights. This is a paraphrase, but I think a sufficiently fair and accurate one, of judicial opinions, including that of Lord Macnaghten in *Cavendish-Bentinck v. Fenn* (1), whose expression is that the section "creates no new offence." But, as pointed out by Mr. Warmington, there is at least an apparent inaccuracy in this view of the statute, because it authorises proceedings

by a creditor who, in some cases which have occurred, and in others conceivable, is allowed to recover that which he could not otherwise have recovered at law or in equity. Possibly the language of Lord Justice Lindley, in the last edition of his work on Company Law, p. 695, is intended to meet this by saying that the clause does not create any new liability; but even this, I venture to say, is not perfect without some such gloss as I have suggested, for, although there is no new liability, it is by the statute made enforceable by a new person. Treating the section as subject to this remark, creating no new offence, no new right, no new liability, it seems right as a matter of construction to say, and the decided cases authorise me to say, that there may be recovered by the summary process anything which might before have been recovered by action, and that such process must not be limited to acts partaking of a criminal character, or otherwise, as I was invited to limit it by the respondents here. It applies, I think, to every case in which a misfeasance can be established. It was urged that a misfeasance does not include nonfeasance, and that no complaint can be made under the statute of a sin of omission, as distinguished from one of commission, and in support of this reference was made to a decision of Lord Justice Fry in *In re The Wedgwood Coal and Iron Company* (2). It will be seen, however, that the language of the Lord Justice falls far short of so strange a proposition. He says "that the Legislature plainly did not refer to cases of mere nonfeasance, except, of course, where there has in fact been a breach of trust." The whole point lies in the exception which recognises all breaches of trust as coming, which they expressly do, within the purview of the statute. What neglect, what omission, constitutes a breach of trust is another question; and the respondents are entitled to the benefit of the remark that the Lord Justice did not treat as of that character the neglect of directors to recover money which, he says, it is plain that they ought to have at once taken steps to recover; but beyond this the case does not support their argument. As

(1) 57 Law J. Rep. Chanc. 552; Law Rep. 12 App. Cas. 689.

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(2) 47 Law Times, N.S. 612.

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regards many of the items of complaint in the case before me, the distinction just noticed is immaterial. There may be culpable negligence in omitting to consider whether a proposed act is *ultra vires* or not, but there cannot be such a thing as negligence *ultra vires*. The nearest approach to it would be the omission to perform a positive command; but even thus directors could not properly be said to have exceeded their powers in omitting to fulfil them. Charges of negligence, therefore, do not fall within the ambit of an enquiry what acts are *intra* and what are *ultra vires*, or what is the liability in respect of breach of duty in this particular. I therefore propose to consider the nature and consequences of negligence and acts *ultra vires* separately. On behalf of the respondents here it was argued, and, having regard to the principles applicable and the authorities cited, I think successfully argued, that liability for negligence cannot properly be imputed to directors unless the Court is satisfied that such negligence was "crass." The Latin word is more often used, but I prefer the vulgar tongue, and there is classical authority for it. What is crass negligence? In the first place, I apprehend, there must be a plain duty to do, or abstain from doing, a particular thing; and next, there must be such abstention from action, or such action as the Court would be justified in holding to be mischievous or reckless. Before determining it to be either, the Court is bound to narrowly examine all the surrounding circumstances, and, I think, ought not so to determine unless satisfied that there was an absence of what is frequently styled *bona fides*, but what I again prefer to call honesty. One must credit directors of a commercial company with reasonable intelligence and acquaintance with the ordinary habits and rules of business by which fairly prudent men are guided in the conduct of their own affairs; and I do not hesitate to say that the omission to use that intelligence, or the disregard, without good cause capable of statement and explanation, of those habits and rules, is, in my opinion, inconsistent with honesty. On the other hand, one must be careful not to judge them by the easy but fallacious standard of subsequent events; and

apart from the distinction which has often been insisted on, and which I certainly recognise, between the conduct of commercial business and that of the more ordinary affairs of life, one must also remember that in a strange and difficult situation different men are apt to come to conclusions as wide as the poles asunder, and yet without any suspicion of dishonesty. This, be it observed, is especially the case when it is not so much a particular step, as the policy by which steps are to be guided that falls to be considered. Masterly inactivity may be prudence to one man, desperate rashness to another, and to shew a bold front may approve itself to a competent judge, notwithstanding that it involves large expenditure, as the only rational course when another not less competent deems all the dictates of reason plainly opposed to it. Fortunately, it is not for the Court to decide, or even to consider, which, if either, was right, or whether, as haply may be, both were not in error. The tests of liability are whether the exercise of intelligence and discretion might reasonably have induced the actual conclusion, and whether intelligence and discretion were in truth, that is honestly, exercised. This is the position, expressed in my own language, deducible from many judgments; but reference shall be made to one only, that of Sir George Jessel, Master of the Rolls, in *In re The Forest of Dean Coal Mining Company* (3). In connection with these tests there occurs an observation which may as well be made here because it bears on many points under consideration. Given a case of a duty not performed, on whom lies the burden of proving that the non-performance is equivalent to crass negligence? Clearly, I think, on those who allege this conclusion. But suppose that the admitted or proved facts and circumstances justify the Court in holding that there was negligence of this character, but at the same time point to an absence of perfect knowledge of all that occurred, so as to make it possible or even likely that a satisfactory explanation ought to be forthcoming, on whom is the blame for the want of that information and the consequent re-

(3) Law Rep. 10 Ch. D. 450.

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sult to fall? Here, I think, the burden is shifted, and those who seek to exculpate themselves are bound to justify the verdict which they ask the Court to find. I hold that the directors ought to place on record, either in formal minutes or otherwise, the purport and effect of their deliberations and conclusions, and that if they do this insufficiently, or inaccurately, they cannot reasonably complain of inferences different from those which they allege to be right. I am far from saying that, as against directors, the Court ought to make any hostile presumption of conduct or action; but I think that it may, and ought to make fair inferences from the proved facts, albeit there is suggested a supplemental and probable statement unsupported by evidence. Passing to the acts done *ultra vires*, I must premise that for the purpose of the single question arising on this class of acts only, it is immaterial to enquire whether they were beyond the powers of the directors or were beyond the powers of the company also. Acts beyond the powers of the directors, but within the powers of the company, may be confirmed by the company, and if there be evidence to shew that any particular act complained of was thus confirmed, no liability can ensue therefrom. The point to be determined is whether the rule applicable to acts of negligence is likewise applicable to acts of this character—or, in other words, whether directors who have transgressed their powers can be acquitted of liability on the ground that they considered the position in which they were placed, and the instrument of their charter, and honestly concluded that they had authority to do what was proposed and done. It was admitted on the part of the respondents that liability would or might follow transgression not thus excused; but it was urged that an excuse of this kind supported by facts is sufficient, or, in other words, that here, as in the other class of cases, crass negligence must be proved or the indictment will fail. There being no room for denial that this excuse has not availed trustees of wills and settlements, it was attempted to rely on the distinction often noticed between such trustees and directors, who, it has been broadly stated, are not trus-

tees. It is a pity to confuse argument by a battle of words. What matters it that directors cannot properly be styled trustees in the generally accepted sense of the term, if, as undoubtedly is the case, they are entrusted with powers exercisable on behalf of others, and for the exercise of which they are therefore accountable to those others? There is a dark shade of responsibility attaching to trustees by reason of judicial decisions and propositions of text-writers from which directors naturally wish to escape; but the responsibility rests for its ultimate sanction on the broad basis of the law respecting principal and agent, and no one has yet had the courage to argue that directors are not agents, or that the limit of their agency is not the mandate of their principals. Why, if they transgress this limit and purport to exercise powers not thereby conferred, should they not be held, as other agents, liable for loss occasioned by their improper conduct? No answer was attempted to the question beyond that which has again and again been treated as futile. It was directly raised in *The Joint-Stock Discount Company v. Brown* (4), and, after an argument in support of the directors' view equal in power to any to which I ever listened at the bar, was decided adversely to them. I am not aware that there ever has been any substantial departure from the judgment of Lord Justice James. Sir George Jessel, as Master of the Rolls, referred to it with approval in *The Railway and General Light Improvement Company; Marzetti's Case* (5), when he noticed, but only to reject, the argument that a director was not liable because he was an honest man, and also mentioned, what has perhaps been sometimes overlooked, that there must be imputed to him special knowledge of the business which he has undertaken. In the Court of Appeal Marzetti's fault was, I think, regarded rather as failure to exercise discretion than as an excess of authority, but the decision was affirmed. An equally strong and perhaps even more pointed statement of the law on this subject by the same authority (Sir G. Jessel, Master of the

(4) Law Rep. 8 Eq. 376.

(5) 28 W. R. 541.

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Rolls) is to be found in *In re The National Funds Assurance Company* (6). It is in a passage, which was quoted and relied on by Mr. Justice Kay, in *In re The Oxford Benefit Building and Investment Society* (7); and to these authorities may be added many others of the same character. There are undoubtedly to be found in other decisions, and there may even be extracted from those above quoted, words and sentences indicating a lenient view towards those who, while intending to do what is right, are, through no moral fault of their own, induced, by misconception of their position, misconstruction of language, or other like error, to do what is wrong. An illustrative instance of this may be taken from the judgment of Vice-Chancellor Bacon in *The London Financial Association v. Kell* (8). I do not think that any one of these Judges intended in any wise to controvert the general proposition that directors, like other agents, are liable for loss occasioned by acts in excess of authority. Probably they all intended to recognise, as, from his comments on *The Joint-Stock Discount Company v. Brown* (4) and *Flietcroft's Case* (9), and his comparison of those cases with the one before him, it is clear that the Vice-Chancellor recognised degrees of culpability and of consequent relief. *Pickering v. Stephenson* (10) is a good example of the practical application of that view. I have no doubt that the refusal of the Vice-Chancellor Wickens to order repayment of the money there in question was justified to his mind by the combination of good faith on the part of the directors attacked, and the small possible benefit accruing to those attacking them, and in this I am supported by the judgment of Mr. Justice Kay in *In re The Faure Electric Accumulator Company* (11), where he declined to exercise a like discretion, be-

cause there was a substantial fund, notwithstanding that he had before followed it in a case of closer similarity—*Studdert v. Grosvenor* (12). But if *Pickering v. Stephenson* (10) is an example of the departure by the Court from the strict application under special circumstances of legal principles, it also contains a clear and valuable exposition of them by a master-hand. There is one other general remark to make before dealing with the detailed claims. The remedy given by the 165th section of the Companies Act, 1862, is strictly one for the recovery of damages. It is impossible to read the section without seeing that the Legislature never contemplated proceedings under it merely for the purpose of establishing the misconduct of directors, or for any other purpose, except that of making directors or other officers repay for the benefit of creditors or contributories moneys which those creditors or contributories had lost by reason of their misfeasance. As said by Lord Herschell in *Cavendish Bentinck v. Fenn* (1), there cannot be nominal damages for breach of duty under the 165th section, as there may be in a common law action. It follows that the complainant is bound to prove loss occasioned by the acts complained of, loss to himself if he be a creditor or a contributory, loss to the company, and, through the company, to the creditors or contributories if he be the liquidator. It is, therefore, necessary at every stage of such proceedings as these to bear in mind that it is not sufficient to enquire whether the directors have acted with crass negligence or in excess of their powers, but one must see further that this negligence or excessive act has resulted in loss, or the first enquiry becomes useless. And, of course, in determining what, if any, loss has resulted, the Court must be guided by the ordinary rule that loss to be recoverable as damages must be the proximate and not remote effect of the cause to which it is traced. Having now stated what in my opinion are the principles and rules by which the Court ought to be guided in considering charges of misfeasance against directors under the 165th

(6) 48 Law J. Rep. Chanc. 163; Law Rep. 10 Ch. D. 118.

(7) Law Rep. 35 Ch. D. 502.

(8) 53 Law J. Rep. Chanc. 1025; Law Rep. 26 Ch. D. 107.

(9) 52 Law J. Rep. Chanc. 217; Law Rep. 21 Ch. D. 519.

(10) 41 Law J. Rep. Chanc. 493; Law Rep. 14 Eq. 322.

(11) 58 Law J. Rep. Chanc. 48; Law Rep. 40 Ch. D. 141.

(12) 55 Law J. Rep. Chanc. 689; Law Rep. 33 Ch. D. 528.

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section of the Companies Act, 1862, and having commented, so far as it has seemed necessary to do so, on some of the cases bearing on the subject which may be taken as fair illustrations of the class, I proceed to deal with the particular points raised by the summons before me. Having regard to the long preface, I may safely do this without attempting to give elaborate reasons for my decision on each point as it occurs, and it must be understood that whatever is said has reference to the preface. With one exception I will deal with the several points in the order of the summons.

1. The invalid and improper allotment of shares in the company. Under this head there arise many questions of importance and interest, on some of which it is necessary or convenient for me to express an opinion. Others, however, may be avoided, and especially the question whether the allotment was valid in point of law, or, in other words, whether it was *ultra vires* those by whom it was made or purported to be made. I shall assume, without deciding, that the persons who purported to make the allotment were directors assembled at a board meeting properly convened for the purpose, and that the resolution approving it was passed in the presence of a quorum of directors qualified to take part in the business. It will presently appear why I make this assumption instead of discussing any of the points involved in it. Are the directors who made the allotment liable for making it on the ground of crass negligence? Applying the principles above-mentioned to the circumstances of the case, I have no doubt that this question ought to be answered in the negative. The applications fell short of expectation, the company was practically committed to purchase property the price of which with necessary repairs exceeded all the subscribed shares would produce, and any amount which could reasonably be hoped to be raised on mortgage, and two directors, whose services were accounted of special value, had resigned their seats on the board. Under these circumstances it required a vast amount of confidence in the concern to justify so important a

step in advance as the allotment of shares, and ordinary prudence would have dictated delay. But without repeating what I have already said, or what is to be found in the utterances of other Judges, I cannot hold these considerations conclusive. I know that there was some discussion—and if it were not so deliberate as it ought to have been, and if the reasons urged against allotment were not the best possible, or were not put forward in the most forcible manner, yet I cannot hold that there was not an honest wish and intention to proceed on commercial principles and with a view to commercial success. There were cited to me, in addition to others not so directly bearing on the point, two cases which it was urged justified a conclusion of crass negligence and consequent liability. These were *The Howbeach Coal Company v. Teague* (13) and *Elder v. The New Zealand Land Improvement Company* (14). In the first, Baron Martin expressed himself in language which I take to mean that if a substantial proportion of the nominal capital of a company be not subscribed for, the directors cannot properly continue the business; and in the second, Vice-Chancellor Malins held that directors were not justified in going through the farce of allotting only 900 shares of the value of 18,000*l.* in a company which required on their own estimate at least 250,000*l.* If Baron Martin's opinion means more than I have construed it to mean, I should hesitate to adopt it; but, thus construed, it seems to me to be sound alike in common sense and law. I can conceive a case in which the allotment of a ridiculously small proportion of shares might be cogent and practically conclusive evidence of recklessness; but, short of such a circumstance, which excludes discretion, I think that the Court ought not to do more than take the proportion of shares subscribed for into consideration, together with the other circumstances of the case, in determining whether the directors have or not discharged their duty. The case before Vice-

(13) 2 Hurl. & N. 151; 29 Law J. Rep. Exch. 137.

(14) 30 Law Times Rep. N.S. 285.

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Chancellor Malins may be supported as an illustration of such an extreme instance as above suggested, and also on the ground that by their published estimate the directors had prejudged the question what amount of capital was required, and could not afterwards be heard to say that the small amount subscribed for was sufficient. Irrespective of all this, the allotment of shares cannot be made a subject of complaint under the 165th section. Even assuming the allotment to have been both invalid and improper, what was the loss to the company? It is difficult to say that any loss was occasioned to the company by contracts the only direct result of which was that money was paid to the credit of the company's banking account. True it is that the allotment would never have been made except with a view of incurring liability in the purchase of property, and the expenditure which may be taken to have ultimately resulted in loss, and true also that it may be taken to have provoked litigation which proved costly; but any such loss is too remote for recovery as damages consequent on allotment.

2. The allotment of shares in the company to the applicants for shares therein, without communicating to such applicants facts which it was the duty of the directors to communicate. What I have said under the preceding head disposes of this claim. I wish, however, to add that, apart from that, I do not see how it could succeed. The retirement of Messrs. Cullen and Wrigley from the board was likely to shake, as it indeed did shake, the credit of the company, and was likely to be, as it in fact was, an objection on the part of some subscribers to the allotment of shares; but I cannot see that these notions ought necessarily to have occurred to the directors, or that, if they had occurred (which they apparently did not) to their mind, they ought to have prevailed against other reasons deemed sufficient for an immediate allotment.

3. Entering into a contract for the purchase of a piece of land and the building thereon known as the Royal Hotel, Dale Street, in the city of Liverpool, before any valid allotment of shares had been made, and payment of part of the pur-

chase-money due under such contract and interest on the amount remaining unpaid. What I have already said really disposes of this point also. It must not be forgotten that the purchase of this particular property was mentioned in the prospectus, and that it was practically impossible for the directors to go on with the business of the company at all unless they determined to purchase that property. That, of course, did not absolve them from the duty of exercising honest discretion on the question whether they should purchase the property or not, but it really made that question, and the other, parts of the same question. I think that both parts were considered, and that I must take their conclusion to have been that it was worth while to go on with the business of the company. Here there certainly was loss occasioned by what is now admitted to have been an important error of judgment, but for loss so occasioned the directors cannot be held liable.

4. Entering into a contract for alterations to the said building before any valid allotment of shares had been made, and payment of part of the moneys due under such contract. This is entirely covered by the preceding remarks. Having determined to go on with the business of the company, and with a view to that business to purchase the building, they cannot be said to have been wrong in doing what is here complained of. If the initial step had been held wrong so as to impose liability, this also would have been held wrong with the same consequences. The rule must hold good in favour of the directors.

5. Improperly and negligently defending and opposing proceedings for rectification of the register of the company, instituted by persons whose names were entered on the register, but who were entitled to have their names removed therefrom, and appealing to the Court of Appeal and to the House of Lords in such proceedings, and payment of the costs of such proceedings out of the moneys of the company, and

7. The improper institution of actions for calls against persons who had taken proceedings for rectification of the register

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while such proceedings were pending, and payment of the costs of such actions out of the moneys of the company.

Not without hesitation have I come to the conclusion that the directors cannot be ordered to pay these costs. I thus express myself because the costs must be the measure of loss to the company occasioned by the proceedings here mentioned. They may have done the company harm in other respects, but as regards loss ascertainable in pounds, shillings, and pence, this is necessarily the limit. What has made me hesitate is the doubt whether the directors ought to be credited in this matter with discretion deliberately exercised for the benefit of the company. That they thought that the company was unduly attacked, and that in somewhat hasty temper they determined on measures of reprisal, I have no doubt, and their conduct strikes me as bordering on the reckless; but they may well have considered, and, on the whole, I must give them credit for having considered, that only in this way could the company be maintained, if at all. The alternative was to summon the shareholders and to ask them whether, under the circumstances, it would not be better to wind up the company, and, judging their conduct by the event, it is reasonably clear that this is what they ought to have done, and it is difficult to discover any cogent reason against it. But I must not judge of their conduct by the event, and I must not guess reasons not apparent or properly inferred from the evidence. The rule laid down by Lord Herschell in *Cavendish Bentinck v. Fenn* (1) must be my guide. He is considering a case where the alleged misfeasance by a director was his entering into a transaction in which he was interested without communicating to his co-directors the fact that he had such an interest, and Lord Herschell says: "It seems to me that it must rest with those who allege the misfeasance to prove that element which is an essential element to make out misfeasance at all." I was asked to find evidence of recklessness, if not in the institution of proceedings, at least in their prosecution through different Courts, and under circumstances which

gave but little hope of success; but it is extremely difficult to draw a line beyond which litigation, until then justifiable, becomes reckless, and I do not find the means of drawing that line here.

(6) Payment out of the moneys of the company of the costs of two actions in the High Court of Justice, Queen's Bench Division, entitled *Shorrock v. Yates and Griffiths v. Yates*, and an action in the Chancery of the County Palatine of Lancaster intituled *Hime v. Pullen*. As regards the last of these cases, *Hime v. Pullen*, there is no evidence that any money was paid by the company for costs, and no more need be said about it. As regards the other two actions, *Shorrock v. Yates and Griffiths v. Yates*, I have hesitated as under claims 5 and 7, and for similar reasons. My conclusion, however, is different. It was urged that the actions against Messrs. Shorrock and Griffiths, and which were said to have been maintained by Messrs. Yates, were actions against them as officers of the company, and that they were entitled to be indemnified against the costs thereof. That is undoubtedly true, and if it had been necessary or reasonably expedient for Messrs. Shorrock and Griffiths to sue Messrs. Yates in order to recover those costs, no fault could have been found with the directors for undertaking the burden of their suit to the exoneration of the nominal plaintiffs. This, however, was not what really occurred. The actions against Messrs. Shorrock and Griffiths were at an end, and the indemnity of the company was sufficient for them. There was no occasion for them to proceed against Messrs. Yates, and the most favourable mode of viewing the directors' conduct is to regard them as having determined to recover through Messrs. Shorrock and Griffiths costs which they had, as they thought, improperly been ordered to pay. I find no evidence that this was, in truth, what was done. My inference from the facts is that the directors thought themselves, or, if you will, the company, wronged by Messrs. Yates, and thought that by these proceedings they could make those gentlemen suffer for the wrong done. It is no more than an inference,

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but to my mind it is the irresistible inference from the facts, and I hold the conduct of the directors to have been reckless and without excuse. If that be a correct conclusion, it follows that the moneys expended on the cost of those two actions were improperly expended in breach of the duty of the directors to the shareholders, and that the directors were guilty of a misfeasance, for which they must be held liable.

(8) Improperly and negligently instituting an action against the proprietors of the *Liverpool Mercury* to restrain the publication of certain proceedings of the company, and appealing from the refusal of the Judge to grant an injunction in the action, and payment of the costs of that action out of the money of the company. A motion for injunction in this action was heard by me. After much consideration, I came to the conclusion that it was not a case in which an order restraining an alleged libel could be made, and the Court of Appeal were of the same opinion. There were, however, facts which made the contention of the plaintiff company at least plausible, and having now been told that the newspaper editor afterwards behaved properly in that respect, I may mention his refusal to give the reasonable undertaking asked of him as to a great extent justifying the proceedings of the company. Perhaps those proceedings may be described as bold, but I thought then, and I think still, that the directors were in a position of embarrassment, and I can scarcely blame them for having thought a bold course prudent. At any rate, I cannot hold them liable in damages.

9. Payment to the said Marcus Percy Shorrock of salary or remuneration at the rate of 750*l.* per annum from the 1st of November, 1887, upon which day the said Marcus Percy Shorrock resigned the office of director, until the 27th of July, 1888, when a provisional official liquidator was appointed. The precise language of this claim as regards the alleged date of commencement of liabilities precludes the necessity of enquiring into the first appointment of Mr. Shorrock as managing director, and I am relieved from the examination of proceedings of the directors, which,

to say the least, do not appear to have been in strict accordance with the articles of association. I assume that on the 10th of October, 1887, Mr. Shorrock was an ordinary director of the company, properly elected. On that day the directors, at his suggestion, appointed a committee of management, and it is worth while to notice the precise terms of the resolution. It runs thus: "Resolved, that all and every of the powers of the directors (other than the power to make calls) be and are hereby delegated to Mr. Shorrock, Mr. Shallcross, and Mr. Griffiths as a committee entrusted with the exercise of such powers under clause 82 of the articles of association of this company." It was not argued that, although the directors thus delegated all their powers with one exception to the committee, such delegation exceeded their authority, and it must be assumed that it did not. But it is to be observed that they did not purport to appoint a quorum, and they must therefore, I think, be taken to have intended that whatever the committee did should be done in the presence of all three members. I do not intend to say that unanimity would be required to make their acts valid, but that a meeting from which any one was absent would not in point of law be a meeting of the committee. I further think—though perhaps it is not necessary to decide this point—that the powers delegated, notwithstanding their universality, did not include the appointment of other members of the committee, either in addition to the original members or to fill a vacancy. I doubt whether they authorised the election of a director. At a meeting of the committee held on the 1st of November, 1887, Mr. Shorrock tendered his resignation as a director, which was accepted. From that time forward he necessarily ceased to be a member of the committee. He was appointed a member thereof as a director, and because he was a director, and when he ceased to fill one character it follows as a matter of course that he also ceased to fill the other. The committee, however, continued to act, and I regard its acts as wholly without authority. It is immaterial to enquire whether Mr. Shorrock took part in them or not. He was a

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stranger whose presence at the meetings of the committee might excite suspicion, but could not be of any assistance in point of authority. At the meeting of the 1st of November it was purported to elect Mr. Broadbridge a director of the company, and on the following day it was purported to add him to the committee. From what I have said it follows that he also was a stranger, but apparently the resolution on which this claim depends was passed at the meeting of the 2nd of November, 1887, before this addition to the committee was made, and that point, therefore, is of less importance than might otherwise have been the case. At the meeting of the 2nd of November, 1887, there appear from the minute-book to have been present Messrs. Shallcross, Griffiths, Shorrock, and Broadbridge, or, in other words, the two remaining members of the committee and two strangers. In my judgment they were powerless, but they purported to pass a resolution appointing Mr. Shorrock managing director of the company at a salary of 750*l.* per annum subject to three months' notice on either side, and it is on this resolution and the payments made by virtue thereof to Mr. Shorrock that the present claim is founded. There was an interesting argument on the point, and reference was made not only to the articles of association, which, of course, require to be examined, but to some decisions in which the powers of directors have been discussed, and to instances, other than joint-stock companies, of governing bodies and committees. I am far from saying that the argument was not unique, but I do not find it necessary or advantageous to depart from the broad lines which I have above laid down. My conclusion from them is that although this committee might have appointed a managing director, and it is even possible, notwithstanding the general rule against a director taking part in a matter in which he is personally interested, might have appointed one of their own body managing director and fixed his remuneration; yet two members out of three could not do it, and that when the committee was reduced to two the authority was gone. It follows that the appointment

was bad, and all payments of the salary made thereunder were unauthorised. It follows also, in my judgment, that all directors who concurred in making such payments were guilty of misfeasance and are liable in damages, the measure of which, subject to a set-off to be hereafter noticed, is the amount of salary paid.

10. Allowing calls due from the said Herbert Weld-Blundell and from William Henry Parkinson, H. J. Hime, and Alfred Robinson, to remain unpaid, and making payments to the three last-named persons for salary while such calls were still unpaid, without setting off the amount due in respect of such calls, or otherwise obtaining payment of the same. I will say no more on this point than that, applying to the circumstances, in addition to more general rules, those directly applicable from the judgment of Sir George Jessel in *The Forest of Dean Coal Mining Company's Case* (3), which I have already cited, and which is one of great value on this branch of the law, I cannot fix the directors with liability for the loss (for there appears to have been loss) incurred.

11. Payment to the said M. P. Shorrock of so much of the sum of 1,443*l.* paid to him for preliminary expenses as did not represent moneys properly expended by him in the formation of the company (including commission or brokerage paid for placing shares in the company). Whether Mr. Shorrock was originally a promoter of the company, and what part, if any, he took in its affairs before the 2nd of September, 1887, does not appear; but on that day, with the assistance of the irregular proceedings already noticed, he intervened therein, and from that time forward he exercised a controlling influence not intended, I think, to be otherwise than for his own advantage. He must be taken to have incurred some expenses of a preliminary character as the agent of the directors and on behalf of the company so as to establish a right to be reimbursed the same by the company. What expenses were properly incurred, and to what amount, must be the subject of enquiry, and it is better for me to avoid prejudging any question of detail which can possibly arise on such enquiry, and therefore I in-

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tend here to treat the sum of 1,443*l.* as a whole, without attempting to distinguish or lay down any rule concerning payments for commission, brokerage, or the like. What happened about this 1,443*l.* was, shortly, this: Mr. Shorrock made a claim for that amount as paid by him for preliminary expenses, and he produced some papers which may have been more or less formal vouchers for some of the payments. It cannot be suggested on the evidence that there was anything like a complete account, nor were such papers as Mr. Shorrock produced seen by all the members of the board or referred to a committee. They were looked over, with Mr. Shorrock's assistance, by Mr. Weld-Blundell, one of the directors, who, I am told, was a capable man of business, and who appears to have been satisfied. How he was satisfied, what care he took to investigate the items, to challenge their accuracy, or to test their propriety, I do not know, for unfortunately, though represented by counsel, he has not been here in person to give his own account of the matter. Mr. Weld-Blundell made some verbal report to the board meeting, during the progress of which he had made this examination of Mr. Shorrock's claim, and, according to the entry in the minutes, there was then passed the following resolution: "That a statement of the expenses in the formation of the company having been considered, the same be allowed at the sum of 1,943*l.*, and that a cheque in favour of Mr. Shorrock be drawn for this amount." It appears from evidence, and is an unquestionable fact, that this resolution is inaccurate and misleading. The expenses were not allowed at the sum of 1,943*l.*; but the directors, not without Mr. Shorrock's influence, thought his charges so moderate and his services so valuable that they made him a present of 500*l.* in addition to the 1,443*l.* actually claimed for expenses. Mr. Shallcross was no party to the resolution, and through his intervention this last error, when it came to his knowledge, was repaired, and the 500*l.* was restored to the company. Taking all the circumstances into consideration, ought I to conclude that the balance, 1,443*l.*, was properly paid to Mr. Shorrock? I think not. If an account

had been produced to the directors, and had been examined by them or a committee, and there was evidence to shew that they had exercised discretion thereon, it would not be part of my duty closely to examine the details, or to say that particular items ought not to have been allowed or ought to have been reduced. I will go further, and add that I should not have thought it right to expunge small items from a regular and otherwise proper account, fairly examined, by reason of doubt whether from a legal point of view they had a place therein. But it seems to me that the directors accepted Mr. Shorrock's total as moderate, and took no pains even to assure themselves on that fact, still less to ascertain how it was made up. It is possible that on enquiry Mr. Shorrock may prove to have been entitled to the whole sum; but, in the meantime, the directors must be held liable for the sum improperly paid out of the assets of the company.

In the above remarks I have treated all the directors as equally liable or free from liability; but it was admitted at the outset that Dr. Clarke, who was absent from England till the 15th of March, 1888, could not be made liable for payments made before his return, and therefore not for the 1,443*l.* The declarations of liability, and the enquiries to be directed in consequence thereof, must be so framed as to protect him to this extent. Those declarations will be that the directors are liable to make good (i.) the payment of costs in the two actions of *Shorrock v. Yates* and *Griffiths v. Yates*; (ii.) the payment of Mr. Shorrock's salary as managing director; and (iii.) the payment of the 1,443*l.*—and there must be enquiries what sums were paid out of the moneys of the company under each of these three heads. There will be further enquiries what, if anything, ought to be allowed to Mr. Shorrock for his services in the management of the company's business over and above his remuneration as a director, and what sum was disbursed by him in preliminary expenses which ought to have been paid by the company. Whatever is certified in answer to these two enquiries will be set off—one against the liability for salary, and the other against the liability

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for the 1,443*l.*; and the directors will ultimately be liable only for the balance and the costs of the two actions.

[His Lordship ordered the respondents to pay the costs of the three issues which were decided against them. The official liquidator was allowed his costs of the other parts of the case out of the assets of the company, and the costs of the enquiries were reserved.]

Solicitors—Richard Englefield & Co., agents for Barrell, Rodway & Co., Liverpool, for plaintiff; Ingle, Cooper & Holmes, agents for Tyrer, Kenion & Co., Liverpool, for Dr. Clarke.

NORTH, J. }
1890. }
May 14. }

In re ROBSON.

Solicitor—Bill of Costs—Taxation—General Order under the Solicitors' Remuneration Act, 1881—Schedule I., Part II., rules 1 and 5—Lease partly in Consideration of a Premium, and partly of a Rent.

*A lease was granted for a term of ninety years from September, 1883, in consideration of a rent of 50*l.* and a premium of 4,400*l.* No title was deduced. The lessor's solicitor, in his bill of costs, charged a scale fee of 14*l.* in respect of the rent, and a scale fee of 42*l.* in respect of the premium. The Taxing-Master disallowed the 42*l.* On a summons to review taxation,—Held, that the direction in rule 5, that (in addition to the scale fee for the rent) "there shall be paid a further sum equal to the remuneration on a purchase at a price equal to" the premium, was not meant to narrow the application of the rule only to a case in which, if the transaction had been a purchase at the price of the premium, the solicitor could have claimed the scale fee; and, consequently, that the 42*l.* must be allowed.*

Adjourned summons.

This was an application to review the taxation of a bill of costs for work done by Mr. Robson, the lessor's solicitor, in respect of a lease to the respondents of

some property at Chelsea. The lease was for a term of ninety years from September, 1883, and the consideration for it was an annual rent of 50*l.* and a premium of 4,400*l.*, payable by the lessee to the lessor. No title was deduced by the lessor. Mr. Robson delivered a bill for 59*l.* 10*s.*, consisting of 3*l.* 10*s.* for disbursements, and 56*l.* for professional charges, calculated according to scale, made up of 14*l.* in respect of the rent, and 42*l.* in respect of the premium.

The Taxing Master disallowed the 42*l.*, and gave the following reasons for so doing.

"The solicitor's bill consisted of an item of 56*l.* for professional charges, and three items of disbursements.

"On the taxation, objection was made on the part of the applicants to the item of 56*l.*, on the ground that it included remuneration in respect of the premium; and they claimed that the solicitor was entitled only to the remuneration prescribed by the Solicitors' Remuneration Act, 1881, in respect of the rent reserved by the lease.

"The solicitor claimed that rule 5 of the rules applicable to part 2 of schedule 1, entitled him to charge, in addition to the remuneration in respect of the rent, a further sum equal to the remuneration on a purchase at a price equal to the premium.

"The applicants replied that the only remuneration by scale prescribed by the Act on a purchase is given in schedule 1, part 1—namely, remuneration to the vendor's solicitor, first, for negotiating a sale by private contract; secondly, for conducting a sale by auction; thirdly, for deducing title, and perusing and completing conveyance; that the solicitor had in this case neither negotiated a business, nor conducted a sale by auction, nor deduced title, and therefore the scale did not apply.

"I was of opinion that the solicitor was not entitled to a fee according to scale on the premium, and that the remuneration to which he was entitled was the remuneration prescribed by the Act in respect of business, the remuneration for which is not prescribed in schedule 1—namely, remuneration regulated according to sch-

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dule 2; and I gave the solicitor opportunity of bringing in a detail of items of costs incurred, which I would tax according to that schedule.

"He has not brought in any bill of such items, but has brought in objections to my taxation."

Vernon R. Smith, in support of the summons.—The business has been completed. The question arises under rule 2 (b) of the General Order, and rule 5 of the rules applicable to part 2 of schedule 1. Rule 5 is exactly in point, and clearly contemplates that, in addition to the scale fee in respect of the rent, there shall be paid "a further sum equal to the remuneration on a purchase at a price equal to" the premium of 4,400*l.*—that is, 42*l.*

[He was then stopped.]

Swinfen Eady, contra.—The solicitor is not entitled to be paid for work which he has not done. He cannot charge the scale fee, under part 1, "for deducing title to property and perusing and completing conveyance," because he has not deduced any title. The other side wish to read rule 5 as if it had said that (in addition to the scale fee in respect of rent) "there shall be paid a further sum equal to the scale remuneration on a purchase" for 4,400*l.*

[NORTH, J.—Suppose the lessor's solicitor had been required to furnish an abstract of title, would he not be entitled to charge for so doing under rule 1?]

No, because he must not be paid twice over for the same work.

Vernon R. Smith, in reply.—It has been decided that negotiations for a lease under part 2 of schedule 1 are covered by the scale fee—*In re Field* (1)—and cannot be charged for separately. The Taxing Master has allowed the scale fee in respect of the rent, and nothing whatever in respect of the premium.

NORTH, J. (on May 14).—The appellant in this case is Mr. Robson, a solicitor, who complains of the reduction by the Taxing Master of his bill of costs for work done by him, as solicitor for the lessor, in

respect of a lease to the respondents of some property in Chelsea; the burden of the costs has to be borne by the lessee. The lease is for a term of ninety years from September, 1883, and the consideration for it is an annual rent of 50*l.* and a premium of 4,400*l.* payable by the lessee to the lessor.

The solicitor delivered a bill for 59*l.* 10*s.*, consisting of 3*l.* 10*s.* for disbursements, and 56*l.* for professional charges calculated according to scale, made up of 14*l.* in respect of the rent, and 42*l.* in respect of the premium; and the Taxing Master has allowed the 14*l.*, and disallowed the 42*l.*

The Taxing Master has arrived at this conclusion as the result of the provisions in the 2nd part of schedule 1 to the General Order under the Solicitors' Remuneration Act, 1881, which gives two scales of charges: the first being that of charges payable to the lessor's solicitor for preparing, settling, and completing lease and counterpart in case of a lease, or agreement for a lease, at rack-rent (not including a mining or building lease); and the second, that of charges payable to a vendor's or lessor's solicitor for preparing, settling, and completing conveyance and duplicate, or lease and counterpart, in cases of conveyances in fee, . . . or other long leases not at rack-rent (except mining leases); and it is the latter scale, if either, which applies in the present case. Then the 5th of the rules applicable to part 2 provides that "Where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase, at a price equal to such money payment or premium." The Taxing Master has allowed the sum of 14*l.* as the fee, according to the scale, on the rent; but has disallowed the 42*l.*, the scale fee claimed upon the premium. His view is that any such scale fee must be a sum equal to the remuneration on a purchase at a price equal to this premium—namely, in the present case, 4,400*l.*; but that, as the solicitor would not, if this were a purchase at that sum, be entitled to any scale fee, because he has not negotiated or conducted

(1) 54 Law J. Rep. Chanc. 661 Law Rep. 29 Ch. D. 608.

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the sale, nor deduced any title to the property, he, therefore, does not come within the provisions of part 1 of the 1st schedule, and there is no scale fee applicable to the case. He has held, however, that although the solicitor is not entitled to any scale fee on the premium, he is entitled, in addition to a scale fee on the rent, to the remuneration prescribed by the Act in respect of business the remuneration for which is not prescribed in schedule 1—namely, remuneration according to the old system, as altered by the 2nd schedule; and he gave the solicitor an opportunity of bringing in a bill of costs to be taxed upon that footing. The solicitor has not, however, adopted that course, but insists that he is entitled to be allowed the 42%, the scale fee on the premium.

In giving this option of bringing in a bill to the solicitor, the Taxing Master was, in my opinion, clearly wrong. Supposing the solicitor had, as he was invited to do, brought in a proper bill under the old system, it would have contained full charges for all the work done, and the Master must have allowed the whole of it; for he would have had no option under the new or old or any system to have allowed such sum only in respect of that bill as bore to the total amount of that bill the same proportion that 4,400% bore to the whole consideration for the lease—that is, the premium *plus* the rent. In this case, therefore, the solicitor would have got his full bill of costs under the old system, as altered by schedule 2; and would have received, in addition, a scale fee calculated on the rent.

This view of the case seems to me clearly inadmissible. A solicitor must, in my opinion, be paid according to the scale; or, independently of the scale, according to the old system as altered by schedule 2; and cannot, in respect of one and the same piece of business, be entitled to receive a compound remuneration, made up in part of a scale charge, and in part of a bill of costs in addition for professional work as distinguished from disbursements. This is not authorised by the Act, or Order, or Rules, except expressly in one particular case hereafter referred to and it would be to some

extent giving double remuneration for the same work. This was also, I think, the view which Mr. Justice Chitty took in *In re Hickley and Steward* (2).

The question then is whether the solicitor is to be paid (a) by a scale charge on the rent and on the premium; or (b) by a bill of costs according to the old system, as altered by schedule 2. The case falls exactly within rule 5 of part 2 of the schedule—namely, the lease is partly in consideration of a rent and partly of a money payment or premium. That rule provides that, "in addition to the remuneration hereby prescribed in respect of the rent," there shall be paid—not a bill of costs, but—"a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium." It does not say that the vendor's or lessor's solicitor is to be remunerated as if, to this extent, the transaction were a purchase; but that he is to be remunerated, in the case of a lease or a conveyance reserving rent, by a sum equal to the remuneration on a purchase, a sum to be ascertained by reference to something else in the Act, to which reference effect must be given if possible. As we are dealing with the case of a vendor's or lessor's solicitor, the rule would have been more happily expressed, and more accurate, if it had referred to remuneration on a sale instead of on a purchase; but the meaning is obvious. Now to what is reference here made? The remuneration on sales is given by part 1 of schedule 1 to a vendor's solicitor for three things—first, for negotiating a sale by private contract; secondly, for conducting a sale by public auction; and thirdly, for deducing title to property and completing conveyance. The first of these cannot be intended; for it is settled by *In re Field* (1) and later cases that no charge can be allowed for negotiations in respect of business coming within part 2 of schedule 1. Nor can the second be meant, for there is very little connection between sales by auction and the matters dealt with in part 2. The reference must, therefore, be to the remuneration payable to a vendor's solicitor for deducing title and perusing

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and completing conveyance. But it is said that as the scale fee on a purchase (or sale) is not payable unless the title is deduced as well as the conveyance completed—see *In re Lacey* (3) and *Newbould v. Bailward* (4)—so it cannot be allowed on a lease, where the business is completed without deducing title. But it is clear that the two cases are not assimilated for all purposes. For instance, on a sale under part 1, a solicitor who negotiates a sale and deduces title and prepares conveyance receives separate fees for each; while a solicitor who negotiates a conveyance or lease coming under part 2 receives no fee for negotiating. Again, the law is established that a lessee is not, in the absence of express contract to that effect, entitled to call for his lessor's title; and such title, notoriously, is scarcely ever required; and it would be rather absurd, I think, to hold that the reference in rule 5 to remuneration in respect of the premium had reference only to the very rare cases of leases for which the lessor had, by special contract, to deduce his title; and that far the larger number of cases, in which leases are granted in consideration in part of a premium, without any title being deduced, are unprovided for by the rule. In fact, it is clear that the framers of the rules applicable to part 2 of schedule 1 had in mind that title is not ordinarily deduced on grants of leases; and that those rules are not confined to leases, on the grant of which title is not deduced; for the first rule, applicable to part 2, provides that if "the vendor or lessor furnishes an abstract of title, it is to be charged for according to the present system, as altered by schedule 2"; and this is the one case in which the Order allows remuneration by a bill of costs in addition to scale fees. It is obvious that this charge is in addition to, and not in lieu of a scale fee; for the rule merely allows a separate charge for what is but a small part of the deducing of title; and it could not be intended that, in cases where title is deduced, the solicitor should

not receive any remuneration for deducing title, except the charge for the abstract. The provision of rules 5 and 1 that the solicitor is to have a scale fee on the premium, and if an abstract is furnished (which is part of the deduction of title) is to have something more, is, in my opinion, quite inconsistent with the contention that if title is not deduced (that is, if an abstract is not furnished) he is not to have even any scale fee on the premium, or other remuneration in respect thereof. If that were so, in the not uncommon case of a lease at a nominal or small rent and a large premium (no title being deduced), a solicitor would receive only a very moderate and possibly inadequate remuneration for his work—a state of things scarcely contemplated by the framers of the Act, Order, and Rules.

In my opinion, the language of rule 5, referring to a further sum equal to the remuneration on a purchase at a price equal to the premium, was intended to avoid the repetition of the table shewing the rate or scale of remuneration, as though there had been a reference to it *mutatis mutandis*; and was not meant to narrow its application to cases precisely identical, or to exclude almost all leases at a premium from its operation.

Under these circumstances I have come to the conclusion that the solicitor is entitled to the 56*l.* he claims for remuneration; and the matter must go back to the Taxing Master to revise his taxation; and the solicitor must have his costs of this application.

Solicitors—J. E. Robson, for summons; Hasties, for respondents.

(3) 53 Law J. Rep. Chanc. 287; Law Rep. 25 Ch. D. 301.

(4) 58 Law J. Rep. Q.B. 209; Law Rep. 14 App. Cas. 1.

STIRLING, J. }
 1890. }
 March 28. }
 April 2. }

TUSSAUD v. TUSSAUD.

Company—Name—Registration—Similarity to Name of Company already on Register — Injunction — Companies Act, 1862, s. 20.

*The plaintiffs were a registered company carrying on the business of a wax-work exhibition in London under the name of "Madame Tussaud & Sons, Limited." Their exhibition was a very old-established one. The defendant, Louis Tussaud, was a wax-modeller, who had formerly been employed by the plaintiff company, but had never carried on any business on his own account. He promoted a company, of which he was to be manager, to carry on an exhibition similar to that of the plaintiffs, but in another part of London. It was proposed to register the new company under the name of "Louis Tussaud, Limited." The plaintiffs moved for an injunction to restrain the defendant from proceeding with the registration of the new company under the proposed name or any other name so nearly resembling that of the plaintiff company as to be calculated to deceive:—Held, that an injunction ought to be granted in similar terms to the order in *Hendriks v. Montagu* (50 Law J. Rep. Chanc. 456; Law Rep. 17 Ch. D. 638).*

Semble, that if the defendant had previously carried on an exhibition in his own name, and had sold it with the goodwill to third parties, who had transferred it to the company, registration under the proposed name might have been allowed.

Motion.

By this motion the plaintiffs, Madame Tussaud & Sons, Limited, sought to restrain the defendant, Louis J. Tussaud, from applying or proceeding with any application to the Registrar of Joint Stock Companies in England for registration under the Companies Acts of any company to be incorporated under the name of "Louis Tussaud, Limited," or any other name so nearly resembling the name of the plaintiff company as to be calculated or likely to mislead or deceive the public into the belief that the company being so

incorporated was the same as the plaintiff company, and from issuing or publishing advertisements, circulars, or prospectuses representing that a company was to be incorporated pursuant to the Companies Acts under the name of Louis Tussaud, Limited, or any such other name as aforesaid, and from carrying on or commencing any business similar to the business of the plaintiff company under the name of "Louis Tussaud, Limited," or any such other name as aforesaid. The business of the plaintiff company consisted in carrying on an exhibition of waxworks, founded many years ago by Madame Tussaud, and continued by lineal descendants of hers down to 1889, when it was acquired by the plaintiff company. According to the view of the evidence taken by the Court, the plaintiff's exhibition, though often referred to as "Madame Tussaud's," was still not unfrequently spoken of as "Tussaud's" only. The defendant Louis Tussaud, a young man in his twenty-third year, was the son of Joseph Randle Tussaud, who with his two brothers formerly carried on the exhibition now belonging to the plaintiffs. According to his evidence, he had studied under his father in his business of a wax-modeller, and assisted him in modelling ever since he was thirteen years of age down to 1889, when the business was sold to the plaintiffs. While he was employed assisting his father he himself modelled a number of figures at present exhibited in the plaintiffs' exhibition. He had never learned any other trade or business, and was dependent upon his profession of wax-modeller for earning his living, having no other means of subsistence. In the early part of 1890 he had succeeded in negotiating and arranging for a company to erect a building to open an exhibition of waxworks, to be called "Louis Tussaud, Limited," of which he was to have the management. He averred that neither he nor the directors of the proposed company had any intention of endeavouring to mislead the public into supposing that the proposed company of Louis Tussaud, Limited, had any connection with the business and exhibition of "Madame Tussaud & Sons, Limited," and he had so caused it to be stated in the prospectus, and had also written to the press stating the fact;

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and he submitted that he was fully entitled to carry on a wax-work exhibition in his own name of Louis Tussaud without interference by the present proprietors of Madame Tussaud & Sons, Limited. The prospectus, dated the 12th of March, 1890, stated that the company was formed for the purpose of introducing to the West End of London a new exhibition similar in many respects to, but having no connection with, the one so long and successfully carried on in Baker Street and Marylebone Road. The freehold site acquired was one of the most valuable and central in the Metropolis, situate in Shaftesbury Avenue. The memorandum of association, also dated the 12th of March, 1890, included amongst its objects: "To undertake and carry on the business of a wax-work exhibition, and with a view thereto to adopt an agreement expressed to be made between Louis J. Tussaud of the one part and Mr. W. S. Austin, on behalf of the company, of the other part, either with or without modifications." The capital of the company was 100,000*l.*, in 100,000 ordinary shares of 1*l.* each. The memorandum of association was signed by seven persons for one share each, amongst them being the defendant Louis Joseph Tussaud. A contract had been entered into between Louis Tussaud and a trustee for the company, under which the latter was to sell to the company the benefit of an agreement which he had entered into for the purchase of the site in Shaftesbury Avenue. The consideration for this contract was to be 7,500*l.*—5,000*l.* in cash and 2,500*l.* in fully paid shares. The contract further provided that the vendor was to act as manager of the business of the company for a term of seven years from the opening of the said exhibition, and that during the like period of seven years from the opening of the said exhibition he was to act as a modeller in wax to the company, and to execute and prepare, and at his own expense supply and set up all wax figures required by the company from time to time for the purpose of their exhibition; and by way of salary and remuneration for the services aforesaid the company was to pay to the vendor a yearly sum of 200*l.* and a commission of five per cent. upon the actual

net profits which should be earned by the said company. In addition to the said salary and commission the company was to pay to the vendor 30*l.* for every wax figure modelled, finished, and set up by him for the company. For the consideration aforesaid the vendor covenanted with the company that he would not during the said period of seven years model any wax figure for any person other than the company, or directly or indirectly, and either alone or in partnership with, or as agent, clerk, or servant of any other person or persons, or otherwise howsoever, set up or carry on, or be interested in the trade or business of a wax-modeller otherwise than for and on account of the company.

Sir Horace Davey, Q.C., Buckley, Q.C., and Wace, for the plaintiff company.—If the defendant is allowed to register a company under the name of "Louis Tussaud, Limited," the result will be that people visiting London will be led to believe that the two exhibitions are the same, and the plaintiffs will thereby suffer loss. The name of "Louis Tussaud, Limited," so nearly resembles that under which the plaintiff company is already registered as to be "calculated to deceive" within the meaning of section 20 of the Companies Act, 1862—*Massam v. Thorley's Food for Cattle Company* (1) and *Hendriks v. Montagu* (2).

It is true that in *Turton v. Turton* (3) the Court of Appeal dissolved an injunction, which had been granted by North, J., because the defendants were carrying on business in their own names; but that case is distinguishable on many grounds from the present. The defendant is not entitled to register a company of which he is merely a shareholder under a name and for purposes which so nearly resemble the name and the business of the plaintiff company as to be calculated to deceive the public. The proposed company is not that of the defendant at all, but of his friends, and they desire to use his name

(1) Law Rep. 14 Ch. D. 748.

(2) 50 Law J. Rep. Chanc. 456; Law Rep. 17 Ch. D. 638.

(3) 58 Law J. Rep. Chanc. 677; Law Rep. 42 Ch. D. 128.

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because it is similar to that of the plaintiff company. The company can have no right in the name of Tussaud, because the defendant never carried on business and had nothing to sell to the company in connection with an exhibition of waxworks.

They also referred to *Hoby v. The Grosvenor Library Company* (4) and *The Merchant Banking Company of London v. The Merchants' Joint Stock Bank* (5).

Graham Hastings, Q.C., A. & B. Terrell, and H. P. Wilkinson, for the defendant.—The name of the defendant's proposed company is so different from that of the plaintiffs' that there can be no deception. There is nothing dishonest in a man carrying on business under his own name, even though mistakes may occur. There is no evidence that the new company's exhibition will be passed off as that of the plaintiff company. The names are not so similar as to be mistaken. The defendant has been engaged in the business all his life, and ought to be allowed to register the company in his own name.

They also referred to *Burgess v. Burgess* (6).

Sir H. Davey, in reply.

STIRLING, J. [after stating the facts]—It therefore appears from this agreement that the interest of the defendant in the company is twofold—first, as vendor of the benefit of the agreement of the 6th of March, 1890, he is to be the recipient, by himself or by his nominees, of 2,500 fully paid-up shares of the company, with which, of course, he may deal in any way he sees fit; and, secondly, he is to act as the manager and modeller to the company, being in that respect simply the paid servant of the directors of the company, whose orders he is bound to obey. Up to the present time, so far as appears, he has not carried on any exhibition on his own account; nor is it stated that he has modelled any figures whatever except those which are at present exhibited in the plaintiffs' exhibition; and he does

not purport to sell to the company any wax figures of his own modelling.

Now it cannot be doubted, as it seems to me, that the name of Tussaud is well known and of high repute in connection with waxworks, and that if another exhibition of a similar nature to the plaintiffs' were to be started in London under the defendant's name, the one would, "in the ordinary course of human affairs" (I am adapting to this case the words of Lord Justice James in *Hendriks v. Montagu* (2)), "be likely to be confounded with the other," and visitors from the country who had heard of the plaintiffs' exhibition would be likely to be misled into going to the other. If persons not bearing the name of Tussaud, and deriving no title from any one bearing that name, were to seek to establish, under the name of Louis Tussaud, a company such as is promoted by the defendant, I think the natural result of their carrying on business under that name would be to mislead people who were desirous of visiting the plaintiffs' exhibition into going to theirs; and that the persons so doing could, under the principles laid down in *Hendriks v. Montagu* (2), be restrained by injunction similar to that granted in that case. The question which I have to decide is whether the defendant, bearing as he does the name of Tussaud, is equally liable to be so restrained. Now, the principles on which the Court acts are laid down in the well-known case of *Burgess v. Burgess* (6); and I refer more particularly—as has been done in several cases in the Court of Appeal—to the judgment of Lord Justice Turner. He says: "No man can have any right to represent his goods as the goods of another person; but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another." That is the general proposition, and then he proceeds to specify the two cases: "Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not

(4) 28 W. R. 386.

(5) 47 Law J. Rep. Chanc. 828; Law Rep. 9 Ch. D. 560.

(6) 3 De Gex, M. & G. 896; 22 Law J. Rep. Chanc. 675.

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follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is false representation or not." That statement of the law was cited and approved of in the recent case, before the Court of Appeal, of *Turton v. Turton* (3). It follows from the statement of the law in *Burgess v. Burgess* (6), and also from the decision in *Turton v. Turton* (3) in the Court of Appeal, that the defendant is at perfect liberty to open on his own account, and to carry on in his own name, an exhibition of waxworks; further, he may take partners into his business and carry on the business under the name of "Louis Tussaud and Company"—that seems to me to be expressly decided by *Turton v. Turton* (3). Having commenced business on his own account, I apprehend that he might sell it, with the benefit of the goodwill, to third parties, and that these third parties might, if they thought fit, certainly carry on the business in the same name—namely, that of the defendant. That, it seems to me, would follow from this, that they are entitled to the full benefit of the goodwill which they have honestly and legitimately purchased from the defendant. Again, these third parties might transfer the business and goodwill to a joint-stock company, and without expressing a final opinion on the point, I am not at the present moment prepared to say that that company under these circumstances might not be registered under the same name as had been previously used in connection with the business. That, however, is not the present case; I conceive it to be clear that the defendant could not either for valuable consideration or otherwise confer on another person the right to use the name of Tussaud in connection with a business which the defendant had never carried on, and in which he had no interest whatever. Then comes the question, Can he confer this right on a person or company towards which he stands simply in the position of a paid servant? He can no doubt confer the right of saying that the business is under his management, but could he go to a Mr. Brown and say to him, "I will become your servant; I will act as manager and wax-modeller

under you for seven years, and you shall carry on the business, which is not to be mine but yours, under my name?" Does it make any difference that instead of going to a private individual he invites the public to become proprietors of the business upon the like terms? Now on this point there is, I do not say actual decision, but some authority. In the case of *Masam v. Thorley's Cattle Food Company* (1) a person named Thorley manufactured cattle food according to a recipe which he had obtained, and sold it under the name of "Thorley's Food for Cattle." Upon his death the plaintiff succeeded to his business and continued it, and shortly afterwards the defendant company was registered as a limited company with a capital of 200*l.* divided into 4,000 shares of 1*s.* each. The articles provided that the directors might enter into an arrangement with the brother of the plaintiff's predecessor in title, who had become acquainted with the secret, for the purchase of that secret and for his employment in the service of the company. Now the decision in the case to which I am referring did not turn on that simple state of facts, but it is commented on by Lord Justice James in a manner which appears to me to be very significant. He says this, at p. 756, "We have had nothing like a satisfactory explanation of how J. W. Thorley's company came into existence, unless it was that the promoters thought that Thorley's food was a very profitable thing, and had got a great reputation, and that they should like to steal the reputation which it had acquired. In order to do that, they somehow or other got into communication with a brother of the late Joseph Thorley, who for some years had been in the service of Joseph Thorley, and during those years, according to his own account, which I take to be true, had acquired a knowledge of the recipe and of the manufacture, but who for several years previous to the existence of this company had never had anything to do with the manufacture of food for cattle. Having the name of Thorley, which was the distinguishing mark of the food for cattle, he either tendered himself for sale, or was found for purchase by some persons in order that his name might be got into a

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joint-stock company formed for the sake of selling these goods. Why was that name got in there except for the purpose of inducing the world to believe that it was the same concern, or that it was the Thorley, that it was the same Thorley, or a continuation of the same Thorley, whose name was the principal characteristic of the name of the article." Now this is very material. "The name of the company is, to my mind, a fiction. The meaning which the name of J. W. Thorley & Co., Limited, would convey to any person's mind is that there had been a partnership of J. W. Thorley & Co., a real partnership which had been carrying on business in the manufacture of this food for cattle, and that for some reason or other, such as we have seen constantly in our experience in this Court, the partnership had been minded to convert itself into a limited company for the more convenient transaction of its business. But here J. W. Thorley was not a partner. J. W. Thorley was employed as an agent, as the manager, and J. W. Thorley's only connection with the company *qua* company is that he had a 1s. share in this company." Of course there is a much larger interest here in the defendant; but the Lord Justice continues: "To my mind that is the same thing as if somebody were to get up a brewery at Burton, finding somebody of the name of Bass, or somebody who would take the name of Bass (for there is no law to prevent a man assuming any name he likes), and then get a company registered under the name of 'J. Bass & Co., Limited,' or 'W. Bass & Co., Limited,' and advertise 'Bass & Co.'s Pale Ale.' I really can see no distinction between Bass & Co.'s Pale Ale as advertised by such a company and 'Thorley's Food for Cattle' advertised by the company now before us, which has procured a person of the name of Thorley to be connected with their company. That of itself, to my mind, is a very strong thing to begin with, and then next we have to look at the advertisement," and so forth. I do not rely on that as a decision of the point which is now before me. I simply refer to these observations of the Lord Justice as indicating the view which he took of such a set of circumstances. Now with that may well be contrasted

the case of *Turton v. Turton* (3), which was very much relied on for the defendant. In that case, a man carried on business under the name of Turton & Sons; there was also Jno. Turton in the same town who had for many years carried on a similar business under the name of first John Turton, then John Turton & Co., and finally, taking two sons into partnership, he assumed the name of John Turton & Sons, and it was held that he was perfectly entitled to carry on business under that name. What is the ground of the decision? I take it from Lord Justice Cotton: "Here, in my opinion, what has been done by the defendants is simply in the ordinary mercantile way to indicate to the world and to the customers of the firm that the sons have been taken into the business and are carrying on the business with their father"; and at the close of his judgment he says, "In my opinion it would be wrong to come to the conclusion here that there was any passing off of the goods of the defendants as the goods of the plaintiffs. It must be a question of fact, as indicated by Lord Justice Turner in the case of *Burgess v. Burgess* (6). The mere fact that the name used by the defendants is the same as that of another person, in my opinion will not justify the Court in assuming that the defendants are passing off their goods as the goods of that other person. It may lead to the conclusion that there will be some difficulty occasioned by the fact, as undoubtedly there will be; but, in my opinion, when a man fairly states the business which is carried on in his own name or in the names of his partners, it is not that his goods may be passed off as the goods of some other person, it is only a representation that they are made by himself." So that the basis of the decision in *Turton v. Turton* (2) was this, that the defendant could not be restrained from making a perfectly true representation as to the business which he carried on. Now I turn to the present case, and I ask myself, Is the representation which the defendants are making by the name of this company in accordance with fact, or is it not? They propose to call the name of the company "Louis Tussaud, Limited," and the natural meaning of that—I refer again to the words of the Lord Justice—

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would be, to convey to the public that there had been a business carried on under the name of Louis Tussaud & Co., and that, for some reason or other, the business so carried on had been handed over to a public company. But in point of fact there never has been any business carried on by Louis Tussaud, either under his own name or under any name in which he had any property, and I think, in accordance with the first of the two propositions laid down by Lord Justice Turner in the passage which I have cited, it ought to be presumed *prima facie* that the object of the defendant in promoting the proposed company is to induce the world to believe that the business proposed to be carried on is that of the plaintiffs, or a branch of it. It is said, however, that the prospectus plainly states on the face of it that the new exhibition has no connection with the plaintiffs. That is true, and the statement would be a complete answer to a person who complained that he had been misled into taking shares in the new company on the faith that it was connected with the plaintiffs. But that is not what the present plaintiffs allege. They allege that the natural result of the intended acts of the defendants will be to induce the public at large to suppose that their business is that of the plaintiffs. Now on that Lord Justice Cotton says in *Turton v. Turton* (3), at p. 144, "I do not in any way say that fraud is necessary to induce the Court to interfere, except this, as I said before—when a man knows that the natural consequence of what he is doing is to represent his goods as the goods of somebody else, then it is wrong on his part to continue that act." In my opinion that applies here, and I am therefore of opinion that an injunction ought to be granted in similar terms to that which was granted in *Hendriks v. Montagu* (2).

Solicitors—E. F. & H. Landon, for plaintiff;
Terrell, Atkinson & Winstanley, for defendant.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
LINDLEY, L.J.
LOPES, L.J.
1890.
March 11. } *In re* BRYANT AND BARN-
INGHAM'S CONTRACT.

Vendor and Purchaser—Failure to shew Title according to Contract—Substitution of New Contract.

Although a vendor who has no title to a property at the date of the contract can enforce the contract against the purchaser, if he is able to shew a good title in himself at the time fixed for completion, he cannot impose on the purchaser a different vendor, or compel him to accept a different contract in substitution for that into which he has entered.

Trustees under a trust for sale, which arose on the death of B., contracted to sell a property as trustees for sale during the life of B.:—Held, that they could not compel the purchaser to accept a title from B. as tenant for life selling under the powers of the Settled Land Act.

Summons under the Vendor and Purchaser Act, 1879.

By a contract dated the 22nd of October, 1889, Messrs. Bryant & Cullingford agreed to sell a freehold property called Highwoods to Mr. Barningham, who paid a deposit of 1,125*l*. The date fixed for completion was the 2nd of December, 1889.

The vendors purported to sell as trustees for sale under the will of a Mr. Walter Bryant, but on investigation of the title the purchaser objected that the trust for sale did not arise till after the death of the testator's widow, who was authorised to reside in the house during her life, and required evidence of her death.

The vendors replied that she was still living, and would make a title as tenant for life under the Settled Land Acts.

The purchaser's solicitor, on the 25th of November, wrote to the vendors declining to purchase the property from the tenant for life, and requiring them to return the deposit with interest, and pay the purchaser's costs of investigating the title.

On the 28th of November, 1889, the vendors were, by order of the Court,

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appointed trustees for the purposes of the Settled Land Acts, and as such trustees waived the statutory notice of the sale, and consented to it, and on the 29th of November they wrote informing the purchaser of these facts and insisting on completion of the contract by him.

The contract provided (*inter alia*) that on payment of the balance of the purchase-money, the vendors and other necessary parties (if any) should convey the property to the purchaser; and that the conveyance and every assurance, act, matter, and thing (if any) required by the purchaser for tracing, getting in, or releasing any outstanding estate, right, or interest, or for completing or perfecting the vendors' title, or for any other purpose, should be prepared, made, and done by and at the expense of the purchaser; and that the vendors, being trustees for sale, should not be required to enter into any covenant except the ordinary implied statutory covenant against incumbrances.

On the 2nd of December the vendors produced to the purchaser's solicitors the consent of Mrs. Bryant to the sale, and later on the same day the purchaser took out the present summons, asking for a declaration that a good title to the property had not been shewn in accordance with the contract, and for repayment of the deposit with interest, and costs of investigating the title.

The summons was heard before Kay, J., on the 19th of December, 1889, when he held that the contract could not be enforced, that the trustees had no power to make the purchaser accept one contract in substitution for another which they were unable to carry out—and accordingly allowed the summons, with costs.

The vendors appealed.

Renshaw, Q.C., and F. Thompson, for the appellants.—The usual form of decree in a specific performance action is not whether the vendors had a good title at the time of the contract, but whether they could make a good title, and when it was first made—and it is sufficient if it be made at the time fixed for completion of the contract, or even before the date of the chief clerk's certificate—*Langford v.*

Pitt (1), *Hibblewhite v. Mellorine* (2), and *Mortimer v. McCallan* (3).

The purchaser repudiated on the 25th of November, but the purchaser had no right to repudiate before the day fixed for completion of the contract, because *non constat* that before that day the vendors would not be able to make a good title. Here, if the widow had died before the 2nd of December, the trust for sale would have arisen. The vendors had at the date of repudiation obtained the consent of the tenant for life, and the contract itself contemplated the concurrence of other necessary parties.

They referred to *Sidebotham v. Barrington* (4), *The Duke of Marlborough v. Sartoris* (5), *Hatten v. Russell* (6), *Wynn v. Morgan* (7), *Murrell v. Goodyear* (8), and *North v. Newman*, cited in *Darby's Vendors and Purchasers*, vol. ii. p. 1179, and the Settled Land Act, 1882, ss. 3 and 31.

Marten, Q.C., and *J. G. Wood* were not called upon.

COTTON, L.J.—I think the appeal fails. I do not doubt that if a vendor makes a good title to himself before the day fixed for completion of the contract, the contract can be enforced. But that is not the case here. The vendors in the present case cannot even now shew a good title in themselves. They cannot convey, because their power does not arise till after the death of the tenant for life who is still living. But they say, although we cannot convey, the tenant for life can, under the powers of the Settled Land Act. If the tenant for life were a person who could concur and make a good title to the trustees the case would be within the authority. But the title of the trustees is not made good by joining with them the tenant

(1) 2 P. Wms. 629.

(2) 5 Mee. & W. 462; 8 Law J. Rep. Exch. 271.

(3) 6 Mee. & W. 58; 9 Law J. Rep. Exch. 73.

(4) 4 Beav. 110.

(5) 56 Law J. Rep. Chanc. 70; Law Rep. 32 Ch. D. 616.

(6) 57 Law J. Rep. Chanc. 425; Law Rep. 38 Ch. D. 334.

(7) 7 Ves. 202.

(8) 1 De Gex, F. & J. 432; 2 Giff. 51; 29 Law J. Rep. 425.

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for life. If the purchaser likes to take a conveyance from the tenant for life under the Settled Land Act, I see no reason why he should not; but he declines to do so. He has contracted with the vendors that they shall sell as trustees under the will. The appeal must be dismissed.

LINDLEY, L.J.—I agree. I do not see how the contract can be enforced. The trustees' estate is still reversionary. They and the tenant for life together cannot make a good title to sell, although no doubt the tenant for life could sell by herself under the Act.

LOPES, L.J.—I agree. The contract with the purchaser was that a good title should be made by the trustees as vendors, and it is now proposed to substitute a new vendor in the person of the tenant for life. This cannot be done.

Solicitors—Simpson & Cullingford, for appellants; Alfred Henry Holmes, for purchaser.

CHITTY, J. } *In re THE BUILDING SOCIETIES' TRUSTS (LIMITED).*
1890.
March 15, 18. }

Practice — Company — Winding-up — Rival Petitions—Priority—Presentation of Petition—Advertisement of Petition.

The date of presentation and not of advertisement regulates the priority of winding up petitions: therefore, where two or more bona fide petitions have been successively presented by creditors of a company for its winding-up, the order should be made on the petition first presented, notwithstanding that such petition has not been advertised first.

In re The Norton Iron Company (47 Law J. Rep. Chanc. 9) *followed*, and *The United Ports Company* (39 Law J. Rep. Chanc. 146) *not followed*.

Two creditor's petitions had been presented for the winding-up of this company, the one by one Laughton, on the 25th of February, 1890, and the other by one

Pooley on the 4th of March, 1890. Both had been answered for the 15th of March, and now came on for hearing together, Laughton's petition standing first in the cause list. It appeared that Pooley's petition was advertised on the 4th of March, but Laughton's was not advertised until the 7th of March, he having abstained from advertising his petition pending certain negotiations for the settlement of his debt.

The question arose as to priority of the petitions. Laughton submitted that the order should be made on his petition only. Pooley submitted that the order should be made on both petitions, and that he should have the carriage of the order.

Romer, Q.C., and *Oswald*, for Laughton.—The date of presentation and not that of advertisement determines the priority—*In re The Norton Iron Company* (1). Pooley presented his petition with notice that Laughton's was already on the file. A second petition was altogether unnecessary.

Byrne, Q.C., and *T. B. Napier*, for Pooley.—The date of advertisement and not that of presentation determines the priority—*In re The United Ports Company* (2), *In re The Trades Bank Company* (3), *Buckley on the Companies Acts* (5th ed.), p. 215 and p. 611, and *Healey on Joint Stock Companies* (2nd ed.), p. 458. Where an order is made on several petitions, the petitioner first advertising is entitled to the carriage of the order—*The London and Australian Agency Corporation* (4).

Romer, Q.C., in reply.—The rule that the order is made on the petition first presented is only departed from under special circumstances, e.g. where the Court sees collusion.

Douglas, for a creditor supporting a winding-up order.

CHITTY, J.—In this case two creditor's petitions have been presented for winding up the company, and the question is which is entitled to have priority. Laughton, who presented his petition first, claims

- (1) 47 Law J. Rep. Chanc. 9.
- (2) 39 Law J. Rep. Chanc. 146.
- (3) Weekly Notes, 1877, p. 268.
- (4) 29 Law Times, 417.

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that the order should be made on his petition only. Pooley, who advertised his petition first, claims that the order should be made on both petitions, but that he should have the carriage of the order. I have made enquiries with regard to the practice at the Registrar's office, and have been informed that the Registrar, or, rather, the Registrar's clerk, when answering a winding-up petition, always allows the petitioner's solicitor to have some voice in selecting the day. Laughton's petition might have been answered on the 8th of March, as there would have been time for advertisement. His solicitor, however, could have had his petition answered either for the 8th or the 15th of March, for it appears that the Registrar's clerk allows some such margin as a matter of course. But if the petitioner's solicitor had asked, say, for the petition to be answered on a day a month distant, the Registrar's clerk would not then, as a matter of course, so answer it without making further enquiry, or requiring explanation. If, however, a petition which had been subsequently presented should happen to be answered on a day earlier than that on which the first petition was answered, then the second petition would come on for hearing before the first, and the second petitioner would obtain an order, notwithstanding that the other petition was still pending and had been answered for, say, the next petition day.

The circumstance that the first petitioner advertised his petition on the 7th of March, and had it answered for the 15th of March, is no evidence of want of *bona fides*, and no blame is to be imputed to the first petitioner because he did not have his petition answered at once, or for not having advertised it at once. There are many conceivable circumstances which might render it advisable and proper not to have the petition advertised at once or answered at once. I therefore hold that the first petition was rightly presented.

I now come to Pooley's petition. This was presented on the 4th of March, and answered for the 15th. According to the present practice a second petition always has notice—must, in fact, have notice—that there is already another and earlier petition on the file, and it was admitted that

Pooley presented his petition with notice of the first petition. The 15th of March was the earliest day on which the petition could be answered. The petition must have come on before the same Judge. Nothing, therefore, was to be necessarily gained by presenting a second petition.

Adopting what was said by the Master of the Rolls (Sir George Jessel) in *In re The Norton Iron Company* (1), I say that the second petition would have been rightly presented had Pooley been able to shew that the first petition was collusively presented. But, as the Master of the Rolls points out, if the second petitioner has presented his petition merely on a case of suspicion, he has acted at his own risk. In the present case no want of *bona fides* has been shewn. Therefore, adopting the rule of the Master of the Rolls, I think that the right course to be taken here is to make a winding-up order on the first petition, because it was properly presented, and to dismiss the second petition, because there was no reason why it should have been presented at all.

To say a word upon the other authorities. It was pressed upon me in argument that Vice-Chancellor James is said to have held in *In re The United Ports Company* (2) that the date of advertisement regulated the order of priority. On looking through that case I cannot find out that he said anything of the kind. In *In re The United Ports Company* (2) it appears that there were three petitions before the Court on the first petition day in the term, and all of them presented in the Long Vacation—the first petition presented on the 4th of October, but not advertised until the 26th; the second petition presented on the 12th of October, and advertised on the 26th; and the third petition presented on the 23rd of October, with actual notice of the other two, but advertised first.

Under these circumstances Vice-Chancellor James selected the third petition as the one upon which it was right to make the order, and dismissed the first and second petitions. There are certainly some expressions to be found in the judgment which look as if the Vice-Chancellor thought that the date of advertisement did fix the order of priority. However

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that may be, that was certainly not the test which was adopted by the Master of the Rolls in 1877 when he decided *In re The Norton Iron Company* (1), and, besides, I can find in the report of the case before Vice-Chancellor James some statements and expressions which lead me to infer that Vice-Chancellor James did think that both the first and second petitions were, as a fact, improperly presented. If, however, I have to choose between two decisions which are actually in conflict, I should follow that of *In re The Norton Iron Company* (1), because I think that the rule laid down by the Master of the Rolls in that case is the right and fair rule. With reference to the case of *In re The London and Australian Agency Corporation* (4), the Master of the Rolls there made an order on three petitions, and gave the carriage of the order to the petitioner who had first presented a petition, although his petition was the second advertised. The three petitions were all properly presented, and therefore the Master of the Rolls looked upon the presentation of the petition, and not the date of advertisement, as the chief element of consideration in a case where there were no special circumstances.

Yet, afterwards, the Master of the Rolls (Sir George Jessel) in *In re The Trades Bank Company* (3) on the 8th of December, 1877, which came on for hearing less than a month after *In re The Norton Iron Company* (1), is reported to have adopted a different rule. It appeared that in *In re The Trades Bank Company* (3) the Master of the Rolls had in reality only one petition before him, Frodsham's, and that there was another petition, Doulton's, for winding up the same company pending in another branch of the Court. Frodsham's petition had been advertised first, but Doulton's was first presented. The Master of the Rolls made an order on both petitions (Doulton undertaking to transfer his petition to the Master of the Rolls' branch of the Court), and gave the carriage of the order to Frodsham. In that case he is reported to have allowed the rule as to priority of advertisement to prevail, the reporter adding, "thus assimilating his practice to the other branches of the Court." That, however, is not accu-

rate, for the Master of the Rolls never intended to overrule what he had just laid down in *In re The Norton Iron Company* (1).

There is, however, another authority, *In re The General Financial Bank* (5), decided in 1882, in which the Master of the Rolls (Sir George Jessel) says: "Now Mr. Burbidge, a *bona fide* creditor, presented a *bona fide* petition, and at the same time he presented it he did not know of the petition of Ashley, Carr & Co.; he was therefore, according to the ordinary practice of the Court, entitled to his costs up to a certain point—that is, until he was aware, as he was on the 6th of February, of the advertisement of Ashley, Carr & Co.'s petition. Then in ordinary cases he ought to have stayed his hand and not gone on with his petition, but if it turned out that the first petition was not *bona fide* or was collusive he would be justified."

That is a statement entirely in accordance with what the Master of the Rolls said in *In re The Norton Iron Company* (1). I am satisfied that the right rule to be adopted in the case before me is what I have already stated. I have not got before me two competing petitions both properly presented. If that were the case, I might give the carriage of the order to that which was advertised first. All I have got is a second petition improperly presented, but previously advertised. I, under such circumstances, make the winding-up order on the first petition, and dismiss the second. I give Pooley his share in the costs of creditors supporting a winding-up order, and also the costs of his own petition up to the date of presentation, when he first had notice of Laughton's petition.

Solicitors—Herbert F. Oddy; W. A. Bilney;
E. Todd.

(5) 51 Law J. Rep. Chanc. 490, 491; Law Rep. 20 Ch. D. 276, 279.

[IN THE CHANCERY DIVISION AND IN
THE COURT OF APPEAL.]

KAY, J.
1890.
Feb. 10.
COTTON, L.J. }
BOWEN, L.J. } RENDALL v. BLAIR.
FREY, L.J. }
June 9, 10, 23.

Charity—Dismissal of Schoolmaster—Ejection—Action to restrain—Certificate of Charity Commissioners—Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 17.

The plaintiff brought an action claiming an injunction to restrain the trustees of a national school founded under the provisions of 4 & 5 Vict. c. 38, from removing or dismissing him from his office of head-master of the school, and from electing or appointing any other person to the said office, and from ejecting him from the schoolhouse or premises occupied by him in virtue of his office, on the ground that the trustees were not duly appointed. The defendants objected that the plaintiff could not sue for the relief claimed without previously obtaining the consent of the Charity Commissioners, as required by section 17 of the Charitable Trusts Act, 1853.

KAY, J., allowed the objection and declined to allow the action to stand over in order that the consent of the Commissioners might be obtained.

On appeal, Held, by BOWEN, L.J., and FREY, L.J., that section 17 relates exclusively to the administration of trusts, and does not apply to common law rights, legal or equitable modes of enforcing common law rights, or any individual equitable right not relating to the administration of a trust, and that as the plaintiff's claim was based on contract, and, so far as could be seen at the present stage of the action, did not involve the administration of the trust, the consent of the Commissioners was unnecessary.

Held, by COTTON, L.J., that having regard to the claim made by the plaintiff, it would be open to enter into discussion as to the proper administration of the trust, and therefore the consent of the Commissioners was necessary.

Held, by COTTON, L.J., BOWEN, L.J., and FREY, L.J., that the consent of the Com-

missioners may be obtained after the petition, action, or proceeding has been commenced.

The comments in Glen v. Gregg (51 Law J. Rep. Chanc. 581, 783) on The Attorney-General v. The Sidney Sussex College, Cambridge (Law Rep. 21 Ch. D. 514, note; 15 W.R. 162) considered.

This was an appeal from a decision of Kay, J.

The plaintiff brought this action to restrain the defendants from dismissing him from his office of schoolmaster of the Allerton and Bywater National School, and from electing or appointing any other person to the said office, and from ejecting him from the schoolhouse or premises occupied by him in virtue of his said office.

By his statement of claim, delivered on the 30th of January, 1889, he alleged that he was appointed head-master of the school in 1882. That the said school was founded under and in virtue of a deed dated the 15th of October, 1807, under the hands of William Constable, Baron Herries, and Edward Davidson Bland, the trustees of the will of the then late Thomas Davidson Bland, Esquire, and the venerable Charles Musgrave, Archdeacon of Craven, in the diocese of Ripon, such deed being made under the authority of the statute 4 & 5 Vict. c. 38, entitled "An Act to afford further facilities for the conveyance and endowment of sites for schools," and of the statute 7 & 8 Vict. c. 37, explaining the same.

That by the said deed the management of the said school, and the selection, appointment, and dismissal of the teachers, were placed under the control of the incumbent for the time being of the parish of Allerton Bywater, his licensed curate if the minister should appoint him to be a member of the committee, and four other persons *bona fide* members of the Church of England, to be nominated annually by the said incumbent as managers. That after the execution of the said deed managers were appointed by the then incumbent, and vacancies in their number were from time to time filled up by him and his successors. That in or about the year 1874,

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the defendant, the Reverend Alexander Blair, was instituted to the living of Allerton Bywater aforesaid, and from time to time managers were appointed by him, that is to say, Charles Bickersteth, of Allerton Bywater, cashier and agent at Kippax colliery, in the year 1874; Richard Cliffe, of Loch, Allerton Bywater, ship-builder and timber merchant, in the year 1884; John Davison Bland, of Kippax Park, Castleford, in the county of York, Esquire, in 1885; and William Breffet, of Glass Houghton, Castleford, manager of glass works, in October, 1887. Since their respective appointments these four managers had continued to act as such. That no actual annual election had taken place, but the managers had by acquiescence of the defendant, Blair, continued in their office from year to year. That on the 5th of April, 1888, before the year of office of the said managers had expired, the defendant Blair purported to appoint the defendants Thomas Long Tilney, Thomas Stokes, Benjamin Clayton, and Samuel Robinson to be managers of the said school. That the appointments of the said defendants were invalid, such appointments only being valid at or after the expiration of the then current year—that is to say, on or after the 15th of October, the date of the aforesaid deed. In the alternative the plaintiff contended that the appointments could only be validly made at or after the expiration of the then current year, that is to say, on or after the 1st day of January, 1889—or at or after the expiration of the then current school year, that is to say, on or after the 31st of August, 1888. That on the 18th of September, 1888, the defendant^s caused to be sent to the plaintiff the following notice:—

“18th September, 1888.

“Take notice that three months from the above date your services as teacher in the Allerton Bywater School will not be required

T. L. Tilney.

A. Blair.

S. Robinson (Chairman).

Benjamin Clayton. } (School

Thomas Stokes. } Managers).”

That by reason of the premises the defendants (except Blair) were not

managers of the said school on the said 18th of September, 1888, and have no authority to remove the plaintiff from the said office of schoolmaster.

The plaintiff amended his statement of claim on the 30th of December, 1889, and alleged that if the defendants were duly appointed managers, they did not properly dismiss him, as they had not *bona fide* exercised the discretion vested in them. This was not insisted on at the hearing of the appeal.

* The defendants by their defence alleged that the plaintiff was appointed schoolmaster by the defendant Blair, and that if he was duly appointed schoolmaster, he held his office under the provisions of 4 & 5 Vict. c. 38. The 17th section of that Act is as follows: “Be it enacted that no schoolmaster or schoolmistress to be appointed to any school erected upon land conveyed under the powers of this Act shall be deemed to have acquired an interest for life by virtue of such appointment, but shall, in default of any specific engagement, hold his office at the discretion of the trustees of the school.” They further alleged that they had properly dismissed the plaintiff, and that he refused to give up possession of the schoolhouse; and submitted that the plaintiff ought, under section 17 of the Charitable Trusts Act, to have obtained the leave of the Charity Commissioners to bring the action; and they counterclaimed for all sums properly expended by them in consequence of his refusal to give up possession of the schoolhouse, and for school pence received by him since his dismissal.

The case came before Kay, J., on the 11th of February, 1890, and was argued on the preliminary objection.

Cutler, Q.C., and *H. Lynn*, for the plaintiff.

Renshaw, Q.C., and *Sturges*, for the defendants.

KAY, J.—The question raised in this action is an important one. The object of the 17th section of the Charitable Trusts Act, 1853, was to prevent the property of a charity being wasted by suits in Chancery, or proceedings under Sir Samuel Romilly's Act, or other like

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proceedings, "concerning or relating to any charity, or the estate, fund, property, or income thereof," and to interpose an effectual bar to any such suit, petition, or other proceeding until the consent of the Charity Commissioners was first obtained. Now, in this case, a suit is commenced in Chancery, and it seeks for an injunction—that is, the main and principal object—to restrain the defendants from removing or dismissing the plaintiff from his office of schoolmaster. A subsidiary and consequential part of the relief sought is to restrain the defendants from electing or appointing any other person to the same office, and from ejecting the plaintiff from the schoolhouse and premises occupied by him in virtue of his office. The law on the subject is this. In order to provide a simple and summary mode of removing a schoolmaster from the schoolhouse and premises, the 13th section of the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), which I read shortly, provides that where any schoolmaster, being in possession by virtue of his office, of any house or property of the charity, shall be removed from his office, but shall refuse to relinquish possession of such house or property within one calendar month thereafter, it shall be lawful for two Justices of the peace—and they are required on production of an order of the Board of Charity Commissioners for England, certifying such schoolmaster to have been duly removed—to issue a warrant to any constables or peace officers of the district, within a period of not less than ten nor more than twenty-one clear days afterwards, to enter into the premises and give possession whereof to the trustees or their agent, and so remove such former schoolmaster, subject to the same provisions as are contained in section 3 of 1 & 2 Vict. c. 74, for facilitating the recovery of possession of tenements after the determination of the tenancy. A similar provision was contained in a former Act—4 & 5 Vict. c. 38. s. 18. Now, first, is this action within section 17 of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137)? It is an action in the Chancery Division—a suit for an injunction to restrain the defendants from removing the plaintiff from his office; and the Act of 4 & 5 Vict. c.

38. s. 17, which applies to the case, provides that no schoolmaster appointed under the powers of the Act shall be deemed to have acquired an interest for life by virtue of his appointment, but, in default of any specific engagement, shall hold his office at the discretion of the trustees. The trustees of the school, therefore, have a discretion to dismiss the schoolmaster from his office. It is said that that discretion has not been exercised properly, and an action is brought in this Court for an injunction on the ground that the trustees have not exercised it properly. Is not that a suit relating to the property of the charity? Does it not come within the words, "obtaining any relief, order, or direction, concerning or relating to any charity, or the estate, funds, property, or income thereof"? I have no doubt in the world that, in the exercise of the powers and trust conferred upon them, the trustees have proceeded to dismiss this schoolmaster. He doesn't like it, and says, "I will not be dismissed; you are not acting fairly;" and brings a suit, the object of which is to say, "you have no right to dismiss me." That is a thing "concerning" the charity in a matter which is solely the administration of the trusts of the charity. To my mind it is beyond question that a suit of this kind is within the very mischief aimed at by the section, and a suit ought not to be commenced until the leave of the Charity Commissioners has been obtained. Then it is said, whether that is so or not, the rest of the relief claimed is severable; and as to the rest of the relief, it is said to be a mere common law action. Though that is certainly not so, so far as it is sought to restrain the trustees from electing or appointing another schoolmaster. Now, even suppose this statement of claim had stated what it has not, that having dismissed the schoolmaster from his position, properly or improperly, the trustees proceeded to eject him forcibly without obtaining the order of two Justices, and he now sought in Chancery to restrain that, why should not that come within the section? If the dismissal were wrong, the Charity Commissioners would give leave to bring the action. It would be right and proper for an application to be

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made in Chancery by a schoolmaster, saying, "I have been improperly dismissed, and will not leave the house, or ought not to be turned out without the order of two Justices"; but before he puts the charity to such expense he ought to obtain the leave of the Charity Commissioners. It is said it does not come within the section, because in *Holme v. Guy* (1), in the converse case, where some one had taken possession of the property of the charity who had no right to be in possession, it was held that the charity trustees could bring ejectment without leave. But the converse case is very different indeed. The man may be a simple intruder or trespasser. It is not administration of the trusts of the charity to bring an action to turn him out. Where a man has been allowed to get into possession as schoolmaster in accordance with the trusts of the charity, and the charity trustees have dismissed him and are proceeding to eject him, and he seeks an injunction to restrain that, then I say, whether he is rightly or wrongly dismissed, section 17 does apply, and he ought not to institute proceedings till he has obtained the leave of the Charity Commissioners. Therefore, I am of opinion that there is no authority whatever to interfere with what I am saying. It is within the mischief intended to be provided against by section 17; and this suit in Chancery ought not to have been begun without the leave of the Charity Commissioners. Then I am asked to allow the matter to stand over to enable the plaintiff to obtain that leave. But the section says the leave is to be obtained before any suit shall be commenced; and I cannot help saying that if I were to sanction such a course of proceeding, what would happen would be that, in every case hereafter, people would not trouble themselves to get the leave of the Commissioners; they would begin and go on without it, and say they would get it when the objection was taken. That is exactly the thing which this section was intended to prevent; it is before commencing the proceedings that the leave is to be obtained.

(1) 46 Law J. Rep. Chanc. 648; Law Rep. 6 Ch. D. 901.

Another objection is, that I must hold, if I allowed it to stand over, that after leave obtained, a writ issued a year ago may be treated as a writ issued *nunc pro tunc*, and the action be treated as if commenced after the leave obtained. I think it would be wrong and against the purposes of the section to do so. I am told I can do so, following a precedent of Lord Chelmsford in a case which, on the main point, has been distinctly overruled; and the intimation there given is not a thing which is binding on me at all. I feel myself at liberty, therefore, to follow what is my own view, not feeling fettered by that case; and I hold that this suit is improperly instituted, the leave necessary to be obtained not having been obtained. Another argument was this: supposing the suit to be wrongly instituted, under the 13th section of the Charitable Trusts Act, 1860, proceedings are to be taken by the trustees for recovery of the premises before two Justices, and then if the schoolmaster still resists leaving the school, then, under another Act of Parliament referred to—1 & 2 Vict. c. 74. s. 3—there will have to be an action brought, which the plaintiff will be allowed to commence on giving certain sureties; and the present action, it is argued, may be treated as if it were an action of that kind. That seems to be a desperate argument. There is now no order of the Justices, and no such action can be brought. Here is a man seeking without the leave of the Charity Commissioners to obtain an injunction preventing his dismissal from the position of schoolmaster, and accordingly to prevent his being ejected from the schoolhouse, without having first obtained the authority of the Charity Commissioners, which I hold to be essential. That is a violation of the Act of Parliament; and I take the only course open to me, which is, to dismiss the action, with costs.

The plaintiff appealed from this decision.

Cutler, Q.C., and *H. Lynn*, for the appellant.—The consent of the Charity Commissioners is not necessary to enable us to maintain this action, as it is not an action for the administration of a trust, but is in

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its nature a common law action. *Holme v. Guy* (1) is an express decision that section 17 of the Charitable Trusts Act, 1853, does not apply to a common law action. We are prepared to have the action tried on the question whether the trustees were duly appointed, and to abandon the alternative case set up by our amended statement of claim. The defendants, we say, were not properly appointed trustees, and the claim made against them is made as against strangers to the trust. As they were not trustees at the time when they purported to dismiss us, we are entitled to proceed against them without the consent of the Charity Commissioners. Even if the consent of the Commissioners is necessary, Kay, J., was wrong in dismissing the action without giving us an opportunity of obtaining that consent—*Glen v. Gregg* (2).

They referred to the Endowed Charities Act, 1860 (23 & 24 Vict. c. 136), section 13.

Renshaw, Q.C., and *Sturges*, for the respondents.—The question whether the plaintiff ought or ought not to have obtained the consent of the Commissioners depends upon whether the suit relates to the administration of a charity. The plaintiff here is suing as an object of the charity, and is not suing as a mere outsider—for example, a baker suing for his account—he, in fact, is a *cestui que trust*, and he seeks to restrain his dismissal and his ejection from the house which he occupies by virtue of his office. The words of section 17 of the Charitable Trusts Act, 1853, are very wide, and this suit relates to the property of the charity within that section, relating, as it does, to the right of a schoolmaster, by virtue of his appointment, to reside in a house the property of the charity. We are precluded by *Holme v. Guy* (1) from saying the 17th section applies to a common law action, but we say it does apply to an action for equitable relief in respect of a common law right. The relief sought by the plaintiff is two-fold—first, to restrain his dismissal; secondly, to restrain the trustees from appointing another master.

(2) 51 Law J. Rep. Chanc. 558, 783; Law Rep. 21 Ch. D. 513.

Both of these, we submit, interfere with the management of the charity and its property, and the consent of the Commissioners is therefore necessary to the action—*Braund v. The Earl of Devon* (3) and *Markwell's Legacy* (4). The consent of the Commissioners ought to have been obtained before the action was brought; it was too late to apply at the hearing to have the case stand over to obtain the consent—*In re Pilcher*; *Pilcher v. Hinds* (5) and *Glen v. Gregg* (2), where *The Attorney-General v. Sidney Sussex College, Cambridge* (6) was commented upon.

[FRY, L.J., referred to *In re Bingley's Free School* (7), *In re Jarvis's Charity* (8), *The Chelsea Waterworks Act* (9), and *The Attorney-General v. The Haberdashers' Company* (10) as cases where adjournments had been allowed for the purpose of obtaining the consent of the Charity Commissioners.]

These were not cases of hostile proceedings; they were cases of petitions. There is no hardship to the plaintiff in not allowing him now to obtain the consent of the Commissioners; the objection was taken by our pleadings, and he should have applied at an earlier stage of the proceedings.

COTTON, L.J.—This is an appeal of the plaintiff from a decision of Mr. Justice Kay, dismissing his action on the ground that he had not obtained the previous consent of the Charity Commissioners under the 17th section of the 16th & 17th Vict. c. 137.

Now, at present I will not consider the question whether the consent of the Commissioners was required, but I cannot agree with the view which has been expressed by Mr. Justice Kay that the action ought to be dismissed because that

(3) 37 Law J. Rep. Chanc. 463; Law Rep. 3 Ch. App. 800.

(4) 17 Beav. 618; 23 Law J. Rep. Chanc. 502.

(5) 48 Law J. Rep. Chanc. 587; Law Rep. 11 Ch. D. 905.

(6) 15 W.R. 162; Law Rep. 21 Ch. D. 514.

(7) 2 Drew. 284; 23 Law J. Rep. Chanc. 672.

(8) 1 De Gex & S. 97.

(9) 25 Law J. Rep. Chanc. 49.

(10) 19 Beav. 385; 24 Law J. Rep. Chanc. 329.

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consent had not been obtained before the action was commenced. No doubt the terms of the 17th section do shew that the consent ought to be applied for before the action is begun. But the section does not say that if the consent is not obtained then the action must be dismissed, but that it cannot be entertained or proceeded with until the consent has been obtained. In my opinion it would be wrong, having regard to the decisions, to dismiss this action simply on the ground that the plaintiff had not obtained the consent of the Charity Commissioners before he commenced the action, without giving him an opportunity of obtaining that consent. No doubt it might save some difficulties, and some costs, if the rule were established that the consent of the Commissioners must be obtained before any action could be commenced. But, in my opinion, the course of the decisions, which we ought not to disturb lightly, has been this: that that consent may be obtained after the petition or after the action has been commenced. Of course, if the consent cannot be obtained here the result will follow which Mr. Justice Kay thought he could at once take into hand and settle—namely, that the action will be dismissed. Therefore, so far as that goes, I cannot agree with the view expressed by Mr. Justice Kay.

But then we come to the question whether the consent of the Charity Commissioners is required. Of course, if it is not required, then the plaintiff need not go to the Charity Commissioners, which I have said he ought to have an opportunity of doing, notwithstanding he did not—as he ought to have done—apply to them before he commenced his action. Section 17, I think, only requires consent where the administration of a trust is in some way required; and if I could agree with my learned brothers in thinking there was no administration of a trust required in this action, I should say the consent of the Commissioners need not be applied for at all. I understand that my learned brothers think that this is a mere action by a person claiming, under a contract with the managers of this charity, to enforce that contract and prevent anything being done in violation of that con-

tract; if it was the case of a mere tradesman claiming as against the managers of the charity, and seeking to enforce his rights under a contract made with them, I should say that the 17th section of the Act did not apply to such a case as that.

But is that the case here? I think all the relief the plaintiff will ever get—if he gets any—will be in respect of the contract between him and the managers; but I cannot say that that is all he has claimed by his statement of claim. Because, by his statement of claim he does not refer to his contract as giving him his right, but refers to the deed of trust under which this school is held, and says, Having regard to the trusts of that deed, and the fact that I have been appointed schoolmaster of this school, I have a right under the trusts of that deed to have the possession of this schoolhouse. That is really seeking to a considerable extent to obtain a decision of the Court on the proper administration of the trusts of the deed.

Now the plaintiff has undertaken before us to base his claim on this only, that those who dismissed him (namely, the vicar and the trustees appointed by him) were not, as regards the trustees or managers appointed by the vicar, duly constituted trustees or managers, and that they ought, therefore, to be looked upon as mere strangers. That undertaking, I understand, he is prepared to give, which will cut out so much of his statement of claim as alleged that the defendants had not properly exercised their discretion in dismissing him, and will, to a slight extent, modify the prayer. Still, to some extent, he does claim, as I understand it, that by his appointment as schoolmaster, under the trusts of the deed, he has a right—as a person claiming under the trusts of that deed—to retain possession of that schoolhouse. As the parties have not been able to come to a settlement, our decision is called for. My opinion is, that having regard to what the plaintiff has claimed (not what he is entitled to) on the statement of claim, it will be open to him to enter into discussion as to the proper administration of the trusts of this school. Therefore, in my opinion, though I believe both my learned brothers think differently, it is necessary that he

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should apply for and obtain, if the action is to go on, the consent of the Charity Commissioners.

BOWEN, L.J.—It is with much diffidence that I take a different opinion from that entertained by the Lord Justice Cotton, whose experience on this class of subjects, as indeed on most others, is much greater than my own. But I am of opinion that, on the true construction of the Charitable Trusts Act, 1853, section 17, the consent of the Commissioners is not necessary either for the originating or for the prosecuting of this action. Speaking broadly, I think that the section does not deal with or touch actions which are brought to enforce common law rights, whether such rights arise out of contract, or out of *tort*, or out of common law duty. I think also that it does not apply to suits by individuals whose object is solely to obtain equitable relief in respect of common law rights; and I think, lastly, that this action at this stage—so far as we can judge of it at this stage—falls within the class of cases to which I have already said, in my opinion, the section does not apply.

Now, in order to construe the section we must examine carefully the words of it; and it is apparent from the initial language that actions at common law are not within the scope of the section, which applies simply to suits, petitions, or other proceedings for obtaining any relief, order, or direction concerning or relating to any charity. Those were not, at the date of this statute, 1853, apt words for dealing with or describing common law actions, and it follows in my mind that no common law action, or, in other words, no action brought solely to enforce a common law right, whether such right arises out of contract or out of common law obligation or common law duty, is within the section. That view is in accordance with what I understand, though I am not sure that the language goes quite as far, would have been the view of the late Master of the Rolls according to his judgment in *Holme v. Guy* (1). Having advanced thus far in the construction of the section, it seems to me that reason and logic oblige one to go a step further. It is ob-

vious that in the examination of the question of common law rights, matters may be enquired into which really do concern the charity, or opinions may be expressed by the Court which govern, so far as the decision between the parties can govern—or may govern—the actions of those who are bound to administer the charity; because the decision may involve a declaration as to the common law rights of the parties. Nevertheless, that does not operate to bring common law actions within the scope of the section from the language of which they are omitted; and the mere fact, therefore, that incidentally in the action may be decided a question which concerns a charity, is not enough apparently to bring the action within the provisions of the Act of Parliament.

But, if that is so, must we not go a step further and ask ourselves whether it is possible that the Legislature can have enacted such an anomaly as not to require the consent of the Commissioners for actions for enforcing common law rights, but to make the obtaining their consent a necessity in such equitable suits as are merely instituted for the purpose of obtaining relief with regard to common law rights? Is it possible that such a construction of the statute can be reasonable? That would lead to the singular conclusion that, although a man was not obliged to obtain the consent of the Commissioners before prosecuting an action for breach of contract, he was obliged to obtain the consent of the Commissioners before he came to the Court of Chancery, or that which was the Court of Chancery, to appeal to the equitable jurisdiction of the High Court to prevent it. It would lead to this curious conclusion—that although a man was not obliged to obtain the consent of the Commissioners before instituting an action for trespass, in which action the sole question would be his title to possession under the deeds of trust, he would nevertheless be obliged to obtain the consent of the Commissioners before he obtained an injunction to prevent the trespass being committed. That would be a curious anomaly, and one which, unless the language of the Legislature constrained one, one would scarcely adopt.

But on turning to the language of the

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section, and reading it carefully, it seems to me that the scope of the section is indicated with sufficient precision to enable one to see that the Act of Parliament does not authorise such anomalies, and that on the contrary the consent of the Commissioners is only to be obtained in cases where administration of a trust is to be sought. This is a Chancery section. This is a Chancery statute. It was intended to cure the mischief of strangers instituting suits when the Charity Commissioners were the proper persons really to form an opinion on the subject; and the language is carefully confined to suits, petitions, or other proceedings for obtaining relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof. This language of the section seems to me to shew it is only in cases where administration is sought that the consent of the Commissioners becomes necessary, because the remedial provision introduced is that notice is to be given to them of the suit, and such particulars as may be required from time to time for explaining the nature and the objects of the suit; and the board, if they think fit, thereupon may do—what? Authorise or direct any suit, petition, or other proceeding to be commenced, presented, or taken, with respect to such charity, and they may by such order or certificate require and direct any such proceeding so authorised by them in respect of such charity to be delayed during such period as seems proper; while the section further provides that every such order or certificate is to be in such form, and may contain such statement of particulars as the board should think fit.

Now, is it possible that a section framed in those words is a section by which the Legislature intended to deal with individual common law rights, or any relief, legal or equitable, which was sought simply in respect of them? In the first place, be it observed that that would be to place the charity board in the remarkable position of a Court without appeal upon the subject of common law rights, and that a man who had a claim against a charity which he could only enforce by, or the apt relief in respect of which was an injunction from the Court of Chancery in regard to

a threatened wrong, would find himself absolutely at the mercy of an irresponsible board. Such legislation is possible, but I think we ought not to assume without the clearest language that Parliament intends to destroy common law rights of her Majesty's subjects by placing them at the mercy of an irresponsible tribunal or irresponsible department of the State. I think, therefore, that the true construction is that this section does not apply to suits whose object is merely to obtain equitable relief in respect of common law rights, any more than it applies to common law rights.

Then comes the question, what is this suit? And I begin by observing that in considering the question whether the consent of the Commissioners is necessary or not, we can only judge of the suit as it appears at the stage at which we embark on the enquiry. I do not say it is probable—I do not think it is—but it is possible that a suit which at one stage appears to ask for relief which falls solely within the category of that relief which I have said is not intended to be affected by the statute may, nevertheless, at the hearing turn out to be a suit which involves something further, and that might bring it within the scope of the section. I do not think it is likely, but still it is possible. We have only got to examine the suit as it is presented to us at the present moment. What is it? The plaintiff is a certificated teacher who was appointed head master at the National School at Allerton by the incumbent. The language of the deed which applies to him is this: "It is hereby declared that the selection, appointment, and dismissal of the school teachers shall be in all respects under the control and management of the incumbent and his curate, and of four other persons to be nominated annually by the incumbent." The selection, appointment, and dismissal of the teachers is to be in all respects under this control and management. And the 17th section of 4 & 5 Vict. c. 38, if it applies to it as it appears to do, provides "that no schoolmaster or schoolmistress to be appointed to any school erected upon land conveyed under the powers of this Act shall be deemed to have acquired an interest for

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life by virtue of such appointment, but shall, in default of any specific engagement, hold his office at the discretion of the trustees." Now, the claimant has been appointed by the incumbent, and he claims still to hold his office on the ground that those who dismissed him are not regularly appointed trustees, are trustees who profess to act under a valid appointment when valid appointment there is none. But it strikes me that the plaintiff's case really is one of contract only, or of common law right. He may be entitled so long as he is an authorised school teacher to hold the schoolhouse, but it is by virtue of the appointment which he holds from the trustees, which is really a contractual employment of him to teach. He is simply enforcing here, or seeking to enforce, what he considers to be his common law right not to be dismissed by those who have not employed him, and to hold premises which he has received from persons who are authorised to deal with the possession against the unlawful and unauthorised usurpation of those who are strangers altogether in the matter. That is his case. It may be that incidentally the question whether these are trustees of the school may be decided. We cannot help that, nor can the plaintiff help it. He is dealing with his masters or with those who profess to be his masters. He declares that those who are seeking to exclude him from these premises are not the persons who are lawfully entitled to possession. The common law question may incidentally involve the construction of a deed, may incidentally involve the question whether the trustees who are seeking to oust him are really properly appointed; but, as I said before in the earlier part of my examination of the statute, the mere fact that such questions incidentally arise does not seem to me to bring the case within the section.

For those reasons I think the learned Judge below was wrong in holding that this action in its present form, and as presented at this moment, was an action which fell within the 17th section of the Charitable Trusts Act of 1853, or which required the consent of the Charity Commissioners. Should a case ever arise in

which an action at any stage does not seem to require the consent of the Charity Commissioners, but in respect of which subsequent investigation shews it is an action of a different kind from that shape which it took when it was first launched, then would come the moment for applying the section.

With regard to the second point, whether supposing the consent of the Commissioners was necessary, although for the purpose of the decision of this case, if the first point I have dealt with is decided, as I think it ought to be decided, that point would not arise, nevertheless, having regard to the view of Lord Justice Cotton, I think it would not become me not to express an opinion upon the second point—namely, whether, supposing the consent of the Commissioners was necessary, it would be right to dismiss the action altogether. Upon that point I entirely agree with the Lord Justice. It does not seem to me that the proper course would be, if an action appears to the learned Judge at the hearing to be an action which falls within section 17, to dismiss it altogether; on the contrary, I think it ought to be allowed to stand over to see if the consent of the Commissioners can be obtained.

Now, first of all, I come to the conclusion upon the language of the section. We are all of us familiar with the way in which Acts of Parliament are drafted when it is intended to prevent actions being waged at all or writs being issued, unless some condition precedent has been fulfilled. The language of such sections we are all familiar with. But this section is not framed in the way in which sections are framed when it is intended that some preliminary steps should be taken before the action is maintainable at all. On the contrary, both from the absence of the usual words, and also from the presence of words which seem to me to indicate that the absence of the consent of the Commissioners is only a bar to the Courts dealing with the action, and not a bar to the original institution of the suit—on all those grounds I come to the conclusion that this section enables the Court, in such cases as I have indicated, to allow

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the action to stand over in order that the blot which has occurred may be cured if possible. In the first place, the section only begins with the enactment, "Before the suit shall be commenced there shall be transmitted notice in writing to the Board," but it abstains altogether from saying that the action is to be dismissed if no such notice is transmitted. On the contrary, it only indicates that, save as hereinafter provided, no suit, petition, or other proceeding shall be entertained or proceeded with by the Court; that is to say, the enactment is directory. It directs what ought to be done. Unless the duty is complied with by the litigant, the Court must hold its hand. But it does not oblige the Court to close the gates of mercy upon the applicant, but enables it to stay proceedings until that consent, which as a matter of duty ought to be obtained in the first instance, is obtained at last. That, to my mind, is the scope of the section, and I cannot help here saying, that if my view of the earlier point is correct, it adds additional weight to this conclusion on the second point, because, if the only cases with which the section is intended to deal are cases which affect the administration of trusts, and are really suits for administration of it, all the mischief, or substantially the entire mischief which used to arise, may be prevented if the Court is clothed with the power of staying the action until the proceeding has been had which ought to be had in the first instance.

If the matter rested upon logic and reason only, that would be my conclusion; but in looking back through the books we find a mass, or a considerable number, of authorities which shew that the Court has taken the view of the section on this second point which Lord Justice Cotton and myself both take, and has been satisfied with letting actions stand over to obtain the consent of the Charity Commissioners when such consent has not been acquired in the first instance. I will simply name the cases in which such procedure has been had—*In re Markwell's Legacy* (4), *In re The London, Brighton and South Coast Railway* (11), *In re*

The Bingley Free School (7), *In re The Chelsea Waterworks Act* (9), and *The Attorney-General v. The Deans and Canons of Manchester* (12), a case which went to the Court of Appeal, though I do not know that the point was brought before the attention of the Court afterwards. One case, and one case only, was said to be inconsistent with this view—namely, the case of *Glen v. Gregg* (2), in which it was said that the dilatory action taken by Lord Chelmsford as Lord Chancellor in *The Sydney Sussex College Case* (6), had been afterwards disapproved by the Court of Appeal. On examination of Lord Chelmsford's decision in *The Sydney Sussex College Case, Cambridge* (6), it does not appear to me that it is that portion of Lord Chelmsford's decision which is disapproved of by the Court in *Glen v. Gregg* (2), but the action taken by the Lord Chancellor in a case in which, *ex concessio*, the consent of the Charity Commissioners was required in deciding to allow such consent to be waived, and to proceed with the action although such consent had not been acquired. In doing that, Lord Chelmsford was enabling the parties by consent to waive a bar which was instituted for the benefit of the public and for the protection of charities. I think the Court of Appeal might well consider that such action by the Lord Chancellor was not to be justified upon the ordinary principles of law; and I think it is to that that the Court are directing their criticism in *Glen v. Gregg* (2). It does not appear to me that *Glen v. Gregg* (2) in any way decides, or was intended to decide, that in a case in which the consent of the Commissioners was required, but had not been obtained, the Court might not cure a blot by allowing the action to stand over.

On these grounds I think that the learned Judge below was incorrect in the view he took of this action, which I regret to think is going to be waged further, because nothing but disaster can come of it. Nevertheless, if the plaintiff desires it, I think he is entitled at our hands to a declaration that the learned Judge below

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proceeded on an erroneous construction of the Act of Parliament. The case must go back to be tried out, and if it is to be tried out to the detriment and ruin of the plaintiff, he brings it upon his own head. The costs of the hearing below and of this appeal ought, I think, to be borne by the respondents.

FRY, L.J.—I have had the benefit of discussing this question with my learned brothers, and the judgment of Lord Justice Bowen throughout so completely expresses the views which I entertain, that I shall only add one word of explanation. It is this, that in dwelling emphatically, as he has done, upon the 17th section of the statute in question not referring to common law rights, or to legal or equitable modes of enforcing those common law rights, he does not, as I understand, intend to imply that an individual equitable right, not relating to the administration of the trusts of the charity, would be any more within the 17th section than a legal right. In my opinion the section relates exclusively to administration.

Appeal allowed.

Solicitors—Baker & Nairne, for appellant; Vincent & Vincent, agents for North & Sons, Leeds, for respondents.

KEKEWICH, J. } *In re THOMPSON AND*
1890. } *HOLT'S CONTRACT.*
April 18.

Vendor and Purchaser — Mortgage — Power of Sale — Notice — Waiver of Notice — Conveyancing Act, 1881, ss. 19, 20, and 21 — Variation of Title offered by Vendor.

Mortgagees sold under their power, without formal notice to the second mortgagees or to the trustee in bankruptcy of the mortgagor, subject to conditions which stated that the vendors were mortgagees selling under a power of sale, and that the assignment was to be accepted from them under such power, without the concurrence of other persons. The purchaser repudiated the contract on the ground of the ab-

sence of the three months' notice required by section 20 of the Conveyancing Act, 1881. Subsequently the vendors offered to procure the concurrence of the second mortgagees and the trustee in bankruptcy of the mortgagor : —Held, that the concurrence of the other parties did not prevent the title from being a title under a mortgagee's power of sale; and that the purchaser was bound to complete notwithstanding the variation in the title offered.

Motion.

By a mortgage dated the 29th of March, 1889, and made between J. H. Brown of the one part, and the trustees of the Scottish Equitable Permanent Benefit Building Society of the other, in consideration of 5,000*l.* advanced to him as the ultimate value of his 100 shares therein, Brown covenanted to pay all subscriptions, fines, and other sums payable by him under the rules of the society in respect of his shares, and, as beneficial owner, conveyed to the said trustees certain leasehold property, subject to the proviso therein contained for redemption of the premises on performance of the covenants. And it was declared that if default should be made in the performance of any of the covenants, the total sum for which the mortgage should then be redeemable according to the rules should be considered as actually due and payable, and the power of sale, and other powers, rights, and remedies given to, or conferred upon, mortgagees by the Conveyancing Act, 1881, or any other statute, should apply to the mortgage, and vest in, and be exercisable by, the trustees of the society.

By a deed-poll of the same date the mortgagor executed a further charge to other persons on the mortgaged premises.

The shares of the society were worth 50*l.* each. Rule 41 provided that every member of the society should pay a quarterly subscription of 12*s.* 6*d.* a share, and a proportionate amount for every fractional part of a share, *un.* he should require an advance. Upon requiring an advance he was to pay an additional quarterly subscription of 12*s.* 6*d.* a share, and 5*d.* a quarter on each 12*s.* 6*d.* to meet expenses of management.

Brown's first instalment was due on the

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4th of April, and was paid by deduction from the advance. On the 14th of June he was adjudicated bankrupt, and the instalment due on the 4th of July was not paid.

On the 18th of July the trustees of the society, with the consent of the trustee in Brown's bankruptcy and of his second mortgagees, put up the property for sale by auction. The property was not sold, and the trustees, without giving notice to the mortgagor or second mortgagees, entered into a contract on the 25th of September to sell the property to Holt for 4,250*l.*, subject to conditions of sale, of which one was as follows:—"The vendors being mortgagees selling under a power of sale, the assignments shall be accepted from them under such power, without the concurrence of any other person or persons, and no covenants for title shall be required except the statutory covenant implied by expressing in the conveyance of the property to the purchaser that the vendors convey as mortgagees."

The purchaser, by his requisitions, on learning that no notice had been given, required the concurrence of Brown's trustee in bankruptcy. This was agreed to, and a draft assignment was prepared and approved. In the meantime the purchaser, from illness and other causes, no longer desired to complete. He accordingly took out a summons to have it declared that the vendors had not made a good title. To perfect the title the vendors offered, at the purchaser's expense, to obtain the concurrence of the second mortgagees. But the purchaser declined, and the chief clerk decided in favour of the vendors, without costs. The purchaser now moved to discharge this order, and to have it declared that a good title had not been shewn.

H. Terrell, for the motion.—The mortgagees had no power of sale. The power given by sections 19 and 20 of the Conveyancing Act, 1881, only arises when "the mortgage-money has become due" and three months' default has been made. Further, under section 20, the statutory power of sale does not arise until notice has been served on the mortgagor, and default has been made for three months

after service of such notice. No such notice was served. In any case, this title, which is totally different from the one we contracted for, cannot be forced upon us—*In re Bryant and Cullingford to Barningham* (1).

Rowden, for the vendors.—Some interest was due, and insurance money was due, so that, under sub-sections 2 and 3 of section 20, the power of sale was exercisable, and no notice was required. We therefore make a good title under the power of sale, and not a title different from that which was contracted for. The want of notice has been waived, and this waiver, according to *Selwyn v. Garfit* (2), will cure any defect, if any. The concurrence of the other parties will, of course, be at our expense.

Terrell, in reply.—There can be no waiver after the sale, though there may be confirmation. But that is not what we bargained for, and the concurrence of the other parties will cause delay and expense. This new title cannot be forced upon us—*In re Banister; Broad v. Munton* (3).

KEKEWICH, J.—Several points have been made on this motion, and one of them seems to be of some little importance. The purchaser insists that the power of sale in the Conveyancing Act does not apply to a building society's mortgage in the ordinary form; and that where the mortgage is in that form, and there is no express power of sale, there is no power of sale by the mortgagee. That is a point I need not deal with, as there is an express proviso in this mortgage that the power of sale given by the statute shall arise in certain cases, one of which has happened; therefore, it is incorporated by the act of the parties, whether it was applicable by force of the statute or not; and it became exercisable in July on default being made in payment of the instalment. But it is said that, admitting that the power of sale is applicable, it is not properly exercisable until after three

(1) *Ante*, p. 636.

(2) 57 Law J. Rep. Chanc. 609; Law Rep. 38 Ch. D. 273, 285.

(3) 48 Law J. Rep. Chanc. 837; Law Rep. 12 Ch. D. 131.

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months from the date when the July instalment became due; and that, as that period did not expire until after the date of the contract, the power of sale could not be exercised at all. The *prima facie* answer to that is that the restriction on the use of the power of sale is for the benefit of the mortgagor, as between him and the mortgagee, and is not intended to prejudice the purchaser if a good title is made independently of the contract between the parties, whether by statute or by private arrangement.

But the purchaser had notice in this case that no notice had been given, so that answer is not very material.

Then arises the point to which I have referred as being of some importance. The mortgagor has become bankrupt, and his trustee in bankruptcy has already agreed to be a party to the conveyance. In addition to the trustee another party was required—second mortgagees—and they have also agreed to concur and confirm the sale. But Mr. Terrell says if he gets the concurrence of these two parties he will, it is true, get a good title, but not the title for which he contracted, and that he is entitled to that and no other. What he has contracted for is a title under the mortgage, and a conveyance from the mortgagees only, without any other parties. So far as that is concerned, the difficulty may be got over by the second mortgagees and the trustee confirming the sale by an independent deed. But a more important matter is whether he will really get something different from what he has contracted to take. He says he will really get a conveyance by the mortgagees and the owners of the equity of redemption, and that that is not a conveyance by mortgagees with those covenants which mortgagees usually give. That proceeds on an incorrect notion of the function of a power of sale in a mortgage deed. These mortgagees will exercise the power of sale and convey as mortgagees, and enter into the covenants usual for mortgagees. It will not make any substantial difference to that conveyance that other persons are also made parties in order to confirm the conveyance. If they convey, their conveyance will pass what interest they have. If

they confirm by an independent document they will confirm what the others have done. Anyhow, the conveyance will be by the mortgagees under their power of sale. Therefore it is the same title, and the objection falls to the ground.

Then it is said that there was no waiver of the notice. That is not a very accurate, though it is a convenient, form of expression. In other words, the owners of the equity of redemption did not waive the right to receive the notice which the Conveyancing Act, section 20, sub-section 1, says shall be given to them. I am not sure that they did, in the sense in which the word "waiver" has been used. They were consulted as to the sale of the property by auction, but not as to the sale by private contract. However, I need not go into that. In *Selwyn v. Garfit* (2), Lord Justice Bowen says the waiver "is consent to dispense with the notice"; but what is waiver, or equivalent to waiver, may exist in other circumstances. I think in that sense there was a waiver. It is quite competent for the mortgagor to say after the sale, "True, I did not get a notice, but I do not object to that; I accept the sale, and I shall not interfere to prevent the title being accepted." It is not strictly waiver of notice, but it is waiver of the right to object on the ground that notice was not given. The difference is only a difference of words. Here he comes afterwards, and says, "I confirm this title." I think there is nothing in the point raised by the purchaser. He will get a good title with a confirmation by the mortgagor, and he will get it under the power of sale. If I had drawn up the order I should have inserted before the declaration of good title some words to shew under what circumstances the case came before the Court; but I have heard an affidavit read which states the facts, and is entered in the order, and the order proceeded on that affidavit. I have asked Mr. Rowden whether he is willing to procure the concurrence of the parties at his own cost, and he has admitted that he is bound to do so. If that concurrence is necessary to supply a defect in his title, the defect must be remedied at his cost. If the purchaser requires to be convinced that the second mortgagees are second mortgagees,

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or any expense is incurred in tracing the devolution of the title, the vendors must pay the costs; but that must not be an excuse for throwing on the vendors costs which, fairly, they ought not to bear. I propose to refuse the motion, but to preface the order with the words, "It appearing that the second mortgagees and the trustee in bankruptcy of the mortgagor are willing to concur in the conveyance to the purchaser, or otherwise to confirm the same, and that the vendors are ready to procure such concurrence and confirmation at their own cost."

Motion refused, with costs.

Solicitors—Lumley & Co., for Holt; Prideaux & Sons, agents for J. R. Poole & Sons, Bridgewater, for Thompson.

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

KEKEWICH, J.
(for KAY, J.)

1890.

April 25.

COTTON, L.J.

BOWEN, L.J.

FRY, L.J.

June 2.

In re THE NORTH AUSTRALIAN TERRITORY COMPANY.

Practice—Winding-up—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 115—Examination of Person capable of giving Information—Pending Action—Question relating thereto—Appeal from Order for Examination.

The liquidator of the above-named company brought an action against another company to set aside an agreement entered into by the two companies, on the ground of misrepresentation. An order was made in that action that the defendant company, through their secretary, should make an affidavit of documents relating to the matters in question in the action; but KAY, J., directed that there should be no production of documents until further order, and refused leave to the plaintiff to deliver interrogatories to the defendant company

until after the defence had been delivered. The plaintiff then obtained an order for the examination of the secretary of the defendant company under section 115 of the Companies Act, 1862. This order was not appealed from. On the examination, the secretary objected to answer a question put to him, on the ground that it related to the subject-matter of the action. KEKEWICH, J. (sitting for KAY, J.), directed him to attend at his own expense and answer the question:—Held, on appeal, that the question put related to the subject-matter of the pending action, and was put for the purpose of obtaining discovery which had been decided to be premature in the action, and was not properly put for the purposes of the winding-up, and therefore the secretary ought not to be compelled to answer it.

Semble, a person ordered to attend for examination under section 115 has a right of appeal from the order.

Observations of JESSEL, M.R., in *In re The Gold Company* (48 Law J. Rep. Chanc. 650; Law Rep. 12 Ch. D. 77) commented upon.

The above-named company was an English company formed for the purpose of purchasing a large estate in Australia from a Mr. Fisher and his mortgagees (Goldsbrough, Mort & Co.), who were an Australian company, having an office, directors, and secretary in England, under an agreement whereby the North Australian Company were to give debentures in their company to Goldsbrough, Mort & Co., in part payment of the purchase-money.

The contract between the North Australian Company and the vendors not having been carried out, Goldsbrough, Mort & Co. brought an action in Australia against the North Australian Company to enforce performance of the agreement for purchase.

On the 9th of August, 1889, the North Australian Company passed a resolution for voluntary winding-up, and a supervision order was subsequently made.

On the 7th of November the liquidator, by the leave of the Court, brought an action in this country against Goldsbrough, Mort & Co. to set aside the agreement for purchase, on the ground

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of misrepresentation. On an application in that action on behalf of the plaintiff that the defendants, through their secretary W. B. Hervey, might be ordered to make an affidavit of documents in their possession relating to the matters in question in the action, and to produce such documents for inspection, Kay, J., made an order that Hervey should make an affidavit of documents in the possession of the defendants, but directed that there should be no production of documents without the further order of the Court. On a further application in the action by the plaintiff for leave to deliver interrogatories for the examination of Hervey, Kay, J., refused the application, on the ground that it was premature, the defence in the action not having been put in. Subsequently the liquidator applied for, and obtained, an order in the winding-up under the 115th section of the Companies Act, 1862, for the examination of Hervey (who was a shareholder in the North Australian Company) as a person capable of giving information respecting the trade dealings, estate, and effects of the company. Hervey did not appeal from this order, but attended for examination. In the examination he admitted that letters had passed between the head office of Goldsbrough, Mort & Co., in Australia, and the office in London, as to the purchase of Fisher's property; and he was then asked whether "communications passed in the same way with reference to the formation of the company to purchase Fisher's property." This question he declined to answer, and the matter was referred to Kekewich, J. (sitting for Kay, J.).

Renshaw, Q.C., and *C. E. Jenkins*, for the liquidator, cited *Massey v. Allen* (1) and *In re The Metropolitan (Brush) Electric Light and Power Company; ex parte Leaver* (2).

Latham, Q.C., and *F. H. Pollard*, for the witness, relied on *In re The Metropolitan Bank; Heiron's Case* (3).

(1) 47 Law J. Rep. Chanc. 102; Law Rep. 9 Ch. D. 164.

(2) 51 Law Times, N.S. 817.

(3) 49 Law J. Rep. Chanc. 651; Law Rep. 15 Ch. D. 139.

KEKEWICH, J.—Having regard to the terms of the 115th section of the Companies Act, 1862, which does not contemplate the restriction of the examination to evidence according to strict rules, but contemplates information concerning the trade dealings, estate, or effects of the company, I have no doubt that, on general grounds of evidence, there is no objection to the question which the witness has refused to answer. The important point, however, is whether on principle it is right. Mr. Latham has properly argued it on the question of principle, and he says: "I object to give information respecting the matters in question in the pending action." He seems to me to be technically wrong in objecting to answer, and in that way not to bring himself within the decision in *Heiron's Case* (3). It appears that there the order was made, the Vice-Chancellor considering that the liquidator was entitled as of right to examine the defendant. Then the defendant appealed from that order. So that the Court of Appeal had before them, not the question whether the witness ought to be asked any particular question or give information of a particular character, but whether he was liable to be examined at all. Mr. Latham admits that he could not raise that objection properly, because he says the witness is liable to be examined on matters about which there is no objection—that is to say, not coming within the purview of the action.

But beyond noticing that technical difficulty, I do not intend in the least to base my decision upon it, because it is much more desirable, and more convenient to all parties, that the decision should rest on principle, which can if necessary be reviewed. I certainly have understood the practice for many years to be that a liquidator is entitled to examine the officer of a company, whether before or after action brought, and notwithstanding that it is deliberately with a view to assisting proceedings brought or intended to be brought against that company; and even although the officer of the company may be a party, I do not understand the decision in *Heiron's Case* (3) as at all disturbing that practice. There are some expressions to be found, I observe, in all the judgments

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which may be construed in that way; but Lord Justice James distinctly puts his decision on the axiom that *nemo debet bis vexari*, and I think the other Lords Justices follow him, though in different language. There the action was against Heiron. Heiron had been interrogated in the action, and the plaintiff had not succeeded in obtaining the information which he desired by interrogatories, and he had recourse to this other mode of extracting the information, which he had failed to extract in another matter. There was obviously an answer to that. Therefore *Heiron's Case* (1) does not touch this case, where the action is brought against the company and is not brought against the witness, and where the liquidator desires to examine this witness, not with a view to pending proceedings against him, nor, so far as I can see, with reference to any charge against him. I am far from thinking that the matter is not one which deserves consideration, because I have no doubt that the powers afforded by the 115th section have been used for purposes which probably were beyond the contemplation of Parliament when the Act was passed. But, to my mind, the practice of the Court, independently of the two cases of *Massey v. Allen* (1) and *In re The Metropolitan (Brush) Electric Power and Light Company (Limited)*; *ex parte Leaver* (2) cited by Mr. Renshaw (one decided by Vice-Chancellor Bacon, and the other by Mr. Justice Kay), is too well settled for me to interfere with it; and if any restrictions are to be placed on the power of the liquidator, they must be placed, I think, by the Court of Appeal. Therefore I must make the order asked for, and, for the sake of raising the question, I make the order in the fullest form—that the witness attend at his own expense, and do pay the costs of this application.

From this decision Hervey appealed.

Latham, Q.C., and *Pollard*, for the appellant.—The liquidator did not call upon Hervey to give information respecting the trade dealings, &c., of the company; but before doing so, and ascertaining what information he could give, he deliberately brought the action against the defendant company. In that action the liquidator

applied for discovery; *Kay, J.*, directed an affidavit of documents to be made by Hervey, the secretary of the defendant company, but refused at the then stage of proceedings to make an order for production of documents and to allow the plaintiff to deliver interrogatories. The liquidator then obtained an order for the examination of Hervey under section 115 of the Companies Act, 1862, endeavouring thereby to obtain the discovery which *Kay, J.*, had decided it was premature to grant; and the question which Hervey objects to answer relates, not to information as to the assets, &c., of the liquidating company, but to the subject of the action. Hervey ought not to be called upon to answer this question. In *In re The Metropolitan Bank; Heiron's Case* (3), where the party sought to be examined was defendant in an action brought by a company in liquidation, and he had already fully answered interrogatories, and the liquidator made no special case for further examination, the Court refused to order an examination under section 115. The application in *Massey v. Allen* (1) was *bona fide* for the purposes of obtaining information about the affairs of the company, but here the question objected to relates to the subject-matter of the action. We could not appeal from the order for the examination, because we did not know what questions would be asked. Any questions about the assets of the liquidating company Hervey would have been bound to answer; moreover, the language of the Master of the Rolls in *In re The Gold Company* (4) makes it doubtful whether Hervey would have any *locus standi* for appealing from that order. A question has been asked which relates to the subject-matter of the action, and we submit that Hervey ought not to be called upon to answer that question.

They cited also *In re The Silkstone, &c., Iron Company* (5) and *In re The Metropolitan Electric Light and Power Company; ex parte Leaver* (2).

Renshaw, Q.C., and *C. E. E. Jenkins*, for the respondent.—Section 115 is very general in its language, and it has always

(4) 48 Law J. Rep. Chanc. 650; Law Rep. 12 Ch. D. 77.

(5) 51 Law J. Rep. Chanc. 71; Law Rep. Ch. D. 118.

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been the practice of the Court, when an order has been made for the examination of a person under it, that he may be asked questions relating to pending litigation. *In re The Contract Corporation Company; ex parte Bateman* (6) is an authority that an actual litigant may be examined under section 115. Hervey is not a party to the litigation, but is examined as a person able to give information as to the assets, &c., of the company in liquidation. If he objected to be examined, he ought to have appealed from the order for his examination, or to have applied to have the examination postponed until after the trial of the pending action—*In re The Imperial Continental Water Corporation* (7). The question objected to no doubt relates to the matter in the pending action, but the information sought may be very material in the action by Goldsbrough & Co. in Australia against the liquidating company.

COTTON, L.J.—This is an appeal against an order of Mr. Justice Kekewich directing the secretary of the defendant company to attend at his own expense, and to answer the question which has been put to him and which he has declined to answer.

Now is that order right? We have not now to decide whether a person summoned under the 115th section has or has not any *locus standi* to appeal against an order made under that section. I do not express any opinion at all favourable to the view that he cannot in a proper case appeal, because it seems to me it would be wrong to say that when a person is examined, not as a witness in an action, but for the purpose of giving information to the liquidator of a company, he cannot appeal to the Court to know whether that order has been properly made or not. But here we have not to determine that question. Mr. Hervey, who has been summoned to be examined under section 115, has refused to answer a particular question, and the Judge has made an order compelling him to attend at his

own expense and answer that question. I think sufficient regard has not been paid to the terms of the section under which the order was made. It provides that the Court may, if it has made an order for winding up the company, summon before it any officer, or any other person, to attend and be examined, and give any information he can with reference to the company which is being wound up. That shews, as I pointed out in *In re The Metropolitan Bank; Heiron's Case* (3), that it is a matter in the discretion of the Court, and not a matter of right of any person.

In the present case a question has been put which is admitted, and which is apparent on the face of it, to be a question put simply for the purpose of obtaining information in the action which has been brought by the liquidator of the company against the defendant company, whose secretary Mr. Hervey is. It is very true that Mr. Hervey could not at first know what questions would be put; and, in my opinion, if we see that questions are put under the powers given by the section which ought not in the opinion of the Court to be put, we ought under the circumstances of the case to interfere. As a general rule, where liberty is given, not to the liquidator, but to a creditor or contributory to examine under this section, the Court does direct what questions shall be put in the examination. But in the case of a liquidator the Court does not generally direct what questions shall be put, but it trusts the liquidator. I should certainly do the same, unless I considered that questions were being put which in the particular circumstances of the case ought not to be put by the liquidator, even although trusting him only to put such questions as were necessary in the interests of the company. I do not say that the questions put in the present case are in no way in the interests of the company. They are no doubt put in the interests of the company with reference to the action which has been brought by the liquidator; but, except with the view of enabling the company in liquidation to get judgment in that action, the questions put do not in any way tend to assist the interests of the company in liquidation. In that action an order has been obtained by the liqui-

(6) 15 W.R. 118.

(7) 56 Law J. Rep. Chanc. 189; Law Rep. 33 Ch. D. 314.

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dator as against the defendant company requiring the secretary of the company to make an affidavit of documents; but the Judge held that it was premature at that stage of the action to direct that those documents should be produced, and also that it would be premature until the further progress of the action to require the defendant company by its secretary—it may possibly be—to answer the interrogatories which the plaintiff company desired put. As was pointed out in the course of the argument by Lord Justice Bowen, the present proceeding is really an attempt to act contrary to that order, and to get round it and try, by a side wind, as it were, by means of section 115, to do what the Judge by that order refused to do. That order has not been appealed from, and we must take it to be a right order, and, in my opinion, it would be wrong in the present case to allow the liquidator by means of section 115 to get discovery and inspection which the Judge has held that it would be premature to give. I do not at all say that circumstances may not hereafter occur when it may be right for the liquidator to put this question. But the only question we have now to consider is whether the Judge was right in requiring the secretary to attend and answer this question. I think he was wrong, and although all we shall do is to discharge the order made by him, yet I express my opinion that under the existing circumstances it will not be right to put to the secretary, Mr. Hervey, who is being examined, any question relating to the matters in question in the action. It is not in any way suggested, certainly not in such a way as that we can attend to it, that the question can in any way benefit the interests of the company, except that it will be assisting the company to get a judgment in an action which has been brought by them.

BOWEN, L.J.—I am of the same opinion. The section put in motion in the examination of a person under such circumstances is a section which places the decision as to examination and as to its limits within the discretion of the Court.

That being so, I do not think that we ought to attempt beforehand to classify

all the occasions upon which it may be proper to make such an order, nor to classify or categorise all the occasions on which it may be unwise to make such an order. We have no business to fetter the discretion of the Court in the future. But it does not follow from that, that nothing can be said on the subject which may not be worthy the attention of those who have to put in motion this section.

In the first place, it must be observed that it is an extraordinary section. It is an extraordinary power; it is a power of an inquisitorial kind, which enables the Court to direct the examination (not merely before itself, but before the examiner appointed by the Court) of some third person who is no party to a litigation. That is an inquisitorial power, which may work with great severity against third persons, and it seems to me to be obvious that such a section ought to be used with the greatest care so as not unnecessarily to put in motion the machinery of justice when it is not wanted, or to put it in motion at a stage when it is not clear that it is wanted, and certainly not to put it in motion if unnecessary mischief is going to be done or hardship inflicted upon the third person who is called upon to appear and give information.

Having regard to those characteristics of this section which I have touched upon, I certainly should be loth to conclude that the witness, if I may call him a witness, the examinee, the person who is to be examined, and against whom or upon whom the order has been served, has not a *locus standi* to complain that that order is oppressive or hard upon him; and though it is not necessary to decide one way or the other in this case, it seems to me that the point ought to be left open; notwithstanding the language of the late Master of the Rolls in *In re The Gold Company* (4), which seems to me, at the first blush, to go too far, and indeed to be contrary to the decision in *Heiron's Case* (3). But I leave the point perfectly open, because it is not necessary to decide it now, and it is much better not to fetter ourselves in the future by deciding that which is unnecessary; and for the same reason I abstain, like the Lord Justice

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who has preceded me, from attempting to lay down any hard and fast categories as to what ought to be the character of the occasions on which judicial discretion should be exercised to make an order for the examination of witnesses under this section. I do not, as far as I am concerned, lay down as a hard and fast line that the concurrence of an action is a necessary bar to the exercise of the discretion of the Court under this section, though we cannot but see that the concurrence of an action begun by the liquidator is a matter which ought to be carefully considered by the Court in exercising its discretion on the subject.

In this case it seems to me to be sufficient to say (and it is on that ground that I decide myself) that at this stage this order to answer cannot properly be wanted for the purpose of the winding-up. The question, it is admitted (and it cannot be denied), goes simply in aid of the discovery which would be given in the action which the liquidator has instituted. There is an order for an affidavit of documents which has to be complied with on the 7th of June next, and the production of documents is ordered to stand over. The summons for interrogatories was taken out and postponed—and rightly postponed I doubt not—on the ground that it was premature and that the issues in the action had not been sufficiently defined for interrogatories to be delivered, and that it would be time enough when the defence had been put in for interrogatories to be administered. Many of the interrogatories which otherwise would be administered might become wholly unnecessary if there was a little time taken, and the defence was waited for before they were administered. The Court, therefore, in this very matter has thought that complete discovery was not wanted for the purpose of the action even at this moment.

Now, if complete discovery for the purpose of the action is not wanted at this moment, *a fortiori* one would think it cannot be wanted for the purpose of the winding-up, it being admitted that the question here which is sought to be enforced goes simply in aid of the discovery which would be wanted in the action. It is impossible, therefore, to my mind, to

resist the inference that this question is simply sought to be pressed in order to give the go-by to the decision of the Court as to the postponement of the interrogatories and the non-immediate production of the documents, and it is really, when we read between the lines, an attempt to get discovery for the purpose of that action at a moment when the Court has said it would be premature to insist upon it.

The learned counsel who argued this case on behalf of the respondents asks us to infer that the liquidator had some mysterious and excellent reasons other than this for insisting upon the gentleman's answer—but he shews us none; and although it is not to be presumed that liquidators, who are officers of the Court, and who have a duty to perform, will perform their duty recklessly, unless the Court sees some reason to think they will, as they do sometimes; yet there is such a thing as over-zeal in officers, and, having regard to the facts of the case which we do know, I do not for one moment hesitate myself to draw the inference, as I have said, that this attempt to make the witness answer is simply an attempt to get discovery in that action at a time when the Judge thought it was not wanted. If so, it would be an abuse and an oppression to allow a witness to be forced. He will give such discovery in time as is wanted in the action, and I say nothing as to any case which can be made either in aid of the action or otherwise as to employing this section, should it be wanted for the purpose of the winding-up. It appears to me clear that at this stage this machinery is not wanted, and that it would be premature to use it in the way it is sought to use it, and that it would be an oppression.

I believe that under the 19 & 20 Vict. c. 113, and under the Bankruptcy Act, 1869, it will be found that appeals have been successfully maintained against orders of a similar nature to orders for examination under section 115.

Fry, L.J.—If I were not differing from the learned Judge of first instance I should probably only express my concurrence in the judgment of my learned

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brethren, but I think it right, as I am so differing, to say a few words for myself.

Now I entirely agree in what has been said as to the nature of this section of the Act. It is to be observed that this section gives a power to the Court to summon a person before it; and the examination is taken, not under the 115th section, but under the 117th section, and that section enables the Court to examine upon oath the person, either by word of mouth or by written interrogatories. The whole of the proceeding, therefore, is a proceeding by the Court; and the liquidator, or the contributory, or the other person whom the Court allows to intervene and to be active in the proceedings, only does so by the leave of the Court, because he is a person supposed to have the means of addressing enquiries to the witness; but it is an entirely different proceeding to that in which a litigant summons a witness, and examines that witness before the Court. The liquidator, therefore, in insisting, as he seems to me to have done in the argument before us, upon the right to the question, has, I think, entirely mistaken his position. Each question is put by the liquidator only by the leave of the Court and on behalf of the Court.

Now, the whole of the question comes, therefore, to be this, whether if I, as a Judge, and constituting a Court, were sitting and examining this witness with the information which has been given us on both sides, I should put this question to the witness and require him to make the discovery which would be involved in the answer to this question. What are the circumstances under which this man is brought before the Court? He is the secretary of a company which is the defendant in an action brought by the liquidator. After the liquidation, the liquidator, without thinking it necessary to examine Hervey, has (and no doubt by the leave of the Court) commenced an action against Goldsbrough, Mort & Co. (Limited); and he has obtained an order that these defendants do, by the aid of Hervey, on or before a day which is still to come, file a full and sufficient affidavit, stating whether the company have any

documents in their possession relating to the matters in question in the action; and, further than that, the applicant (that is, the plaintiff, the liquidator) is to be at liberty to make such further application as to all or any of the documents mentioned in the affidavit, and as to the production thereof, as he may be advised. In other words, he is to have at a future day the statement of whether the company has these documents, and then the question with regard to their production is postponed for a future application. That is the way in which the learned Judge, in the action instituted by the liquidator, has exercised his discretion. Should I, as a Judge in the winding-up, sitting with this man before me, put a question which, instead of exercising the discretion in the same way, exercises it in a totally different way, and, instead of requiring an affidavit to be made giving this full discovery on the 7th of June, requires Hervey to state then and there whether there had been this correspondence?

I should not have put that question to him; and I cannot help seeing that the liquidator has been endeavouring to induce the Court (Mr. Justice Kekewich in this case) to exercise his discretion in a manner entirely at variance with the exercise of a like discretion of Mr. Justice Kay in the action.

Now, I have spoken throughout as if Mr. Hervey were the same person as Messrs. Goldsbrough, Mort & Co., and I do so because he is the secretary in England of the English board of directors of that company—of course, it is manifest that he is examined in that character; and because the admissions—which were very properly and fairly made by the respondent's counsel at the bar—satisfied me that those questions were put with a view to elicit the same information, which is not to be obtained in the action until a later date.

Now, like my learned brother, I do not propose, and desire entirely to abstain from laying down any proposition which shall fetter the discretion of the Court from time to time to be exercised under the 115th and 117th sections of the Act. I have no right to fetter the discretion of

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the Court in those cases; but one can see this plainly, that the question whether a man may be twice vexed with the same question may often be material; and the question whether the putting to him the interrogatory under the 115th section would be inconsistent with some order which had been previously made in the litigation between the same parties may again be material, and, therefore, in this case I think that the right discretion would be not to allow this question to be put. The witness, therefore, having refused to answer, he ought not to be directed to attend.

No doubt the Court has been very unwilling, in a general way, to interfere with the discretion of the learned Judge who has the conduct of the proceedings before him; and we feel that in the present case. But at the same time it appears to me that Mr. Justice Kekewich has proceeded on some notion of the right of a liquidator to obtain discovery under this section. I repeat, in my judgment no such right exists. The right is that of the Court, and that of the Court only.

Therefore, I agree with my learned brethren that the decision of Mr. Justice Kekewich must be reversed, and the summons should be dismissed, with costs both here and below.

Appeal allowed.

Solicitors—Freshfields & Williams, for appellant; Saunders, Hawksford, Bennett & Co., for respondents.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
LINDLEY, L.J. } *In re BAKER; NICHOLS v. BAKER.*
LOPES, L.J. }
1890.
March 5, 12. }

Administration — Insolvent Estate — Right of Retainer—Refusal to plead Statute of Limitations to Statute-barred Debt—Transfer to Court of Bankruptcy—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125, sub-ss. 2, 3, 4, and 6.

The power given by section 125, sub-section 4, of directing a transfer of the administration of a deceased's insolvent estate from the Chancery Division to a Court having jurisdiction in bankruptcy is discretionary, and the fact that the executor by exercising his common law right of retainer, or by declining to plead the Statute of Limitations against a creditor who has obtained judgment in a creditor's action for administration, and whose debt is statute-barred, will prejudice the other creditors, is not enough to couple the power with a duty so as to convert that discretion into an obligation binding the Court to order such a transfer.

The testator, J. L. Baker, died on the 26th of October, 1889, having appointed the defendants executors of his will, who proved it on the 14th of December, 1889. On the same day a creditor of the deceased for a debt of 3,902l. 15s. 3d. took out an originating summons for the administration of his estate. On the 8th of January, 1890, the Stamford, Spalding, and Boston Banking Company, who were creditors for a sum of 2,500l., took out a summons, asking under section 125 of the Bankruptcy Act, 1882, to have the proceedings in the action transferred to the County Court at Northampton having bankruptcy jurisdiction to administer the estate.

The estate was admitted to be insolvent, the debts being stated to amount to nearly 9,000l., the assets to 4,000l. at the outside.

Both summonses came on together on the 27th of January, 1890, in the chambers of Chitty, J., when his Lordship made the usual order for administra-

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tion of the personal estate of the testator, and refused the application of the bank.

The bank stated as the ground of the application that the plaintiff's debt was barred by the Statute of Limitations, but that the executors did not intend to set up the statute; and further, that the executrix claimed to be a creditor of the testator for a large sum which she claimed to retain out of the estate.

On the 14th of February the bank moved to discharge the order of Chitty, J., refusing the application; but, his Lordship holding that the section 125 of the Act of 1883 gave him a judicial discretion as to directing a transfer, and that the grounds alleged as reasons by the bank were not such as to require him, in the exercise of that discretion, to give such direction, refused the motion.

The bank appealed.

Everitt, Q.C., and *Edward Ford*, for the appellants.—If this estate be administered in Chancery, the plaintiff, a friendly creditor, will be able to recover all his claim, notwithstanding that as to a part, if not the whole, it is barred by the statute, for as against a plaintiff who has got judgment the statute cannot be set up—*Fuller v. Redman* (1)—and the executrix will be able to retain something like 1,000*l.* as against this small estate. The words in sub-section 2, "unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased," are the key of the various provisions of the section; and in sub-section 4, if insolvency is proved, and if, as here, the transfer will produce a much more equitable distribution among the creditors, by excluding the right of retainer, the word "may" must be read as meaning "shall." The whole object of the Bankruptcy Act is to promote equality among the creditors. So in the Companies Act, 1862, section 75, the word "may" has often been read as "must," and the order to wind up been held to be of right—*Bowes v. The Hope Life Insurance Company* (2).

[COTTON, L.J.—That was so because the winding-up was the only way in which creditors of an insolvent company could obtain payment of their debts. It was never held as a matter of construction that "may" meant "shall."]

We ask the Court to overrule the case of *In re Weaver* (3). Bowen, L.J., in *Knowles v. Roberts* (4), lays down the rule that should guide the Court here, when he says that "it becomes the duty of the Judge who has to apply the rule, to apply his power in a fit case—and a fit case will be that which fulfils the definition of the rule, and in which there are no other circumstances which make it inappropriate and inconvenient or unjust to apply the power." All the cases are collected in *Julius v. The Bishop of Oxford* (5), a case under the Church Discipline Act, 3 & 4 Vict. c. 86. ss. 3 and 13, and those cases and *Alderman Backwell's Case* (6), *Macdougall v. Paterson* (7), and *The Queen v. The Tithe Commissioners* (8), all shew that where an apparent discretion in a Judge is coupled with a duty, then a word, although at first sight potential, is read as imperative. The main object of the Act is to produce equality among creditors. The effect of section 125 and sub-section 4 is considered by North, J., in *Jones v. Williams* (9).

Whitehorne, Q.C., and *Warrington*, for the executors.—This sub-section is clearly discretionary from beginning to end, while in sub-sections 3, 5, and 7 the word "shall" is used, which shews that the Legislature, where it imposes an obligation, uses the proper word to shew its meaning. Again, no period of time is limited within which this application to the Court is to be made. That is intelligible if the Judge has only a discretion; but if any creditor of a deceased insolvent has a right, as is urged, to call on the

(3) 54 Law J. Rep. Chanc. 749; Law Rep. 29 Ch. D. 236.

(4) Law Rep. 38 Ch. D. 263, 271.

(5) 49 Law J. Rep. Q.B. 577; Law Rep. 5 App. Cas. 214.

(6) 1 Vern. 152.

(7) 11 Com. B. Rep. 755; 21 Law J. Rep. C.P. 27.

(8) 14 Q.B. Rep. 459; 19 Law J. Rep. Q.B. 177.

(9) 57 Law J. Rep. Chanc. 264, 269; Law Rep. 36 Ch. D. 573.

(1) 26 Beav. 614; 29 Law J. Rep. Chanc. 324.

(2) 11 H.L. Cas. 389.

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Court to transfer the administration of the estate, it is inconceivable that no time should have been fixed. Suppose an administration action to be pending, and the estate almost wound up, and a creditor comes under this section, what is the official receiver to do? Then why is the plaintiff to be deprived of his right? The executrix thinks it unjust that his debt should not be paid, and refuses to set up the statute; and by the rule of the Court, he having obtained an administration judgment, no other creditor can plead the statute against him. Both the Judges, Pearson, J., in *Higgs v. Weaver* (3), and Stirling, J., in *In re York; Atkinson v. Powell* (10), have held that power given by this section to be discretionary. Sub-section 5 must be confined to property forming part of the estate when the vesting takes place. But if the executor has already retained a debt, the amount cannot be vested as part of the estate of the debtor. [They also referred to *In re Crowther* (11) and *In re Gould* (12).]

Byrne, Q.C., and *P. S. Gregory*, for the plaintiff.—There is no limit placed on the discretion of the Judge; and if the law recognises the right of retainer, why, in the absence of any enactment to the contrary, is the executrix to be debarred of her right? If the Legislature had intended what Mr. Everitt contended for, it would have been the simplest thing in the world to have said, "Henceforth all assets are to be administered as equitable assets," but it has not done so. If that contention were correct, a creditor for 50*l.* could, against the opposition of all other creditors, obtain a transfer.

Everitt, Q.C., in reply, urged that it could not have been intended that the mode of distributing the assets should depend on which of two proceedings was taken first.

COTTON, L.J.—This is an appeal from a refusal by Mr. Justice Chitty to order the transfer of the administration of this estate from the Chancery Division to the

Court of Bankruptcy. It is contended by the appellants, first of all, that it is imperative on the Judge to make the order, insolvency having been established. But I think that is not the case. The words are, the Court may in such a case order a transfer; but they cannot do more than give power to the Judge to order the transfer. They cannot make it imperative on him.

But there is another question that has to be decided in all these cases—namely, although those words only give power to the Judge to make an order which he could not have made unless the Act had authorised him to do so, is there anything in this or any other part of the Act that makes it the duty of the Judge to exercise the power? That is the explanation of the course which was taken by Lord Selborne in *Julius v. The Bishop of Oxford* (5).

I think that great misconception arises from the attempt to argue that the word "may" means "must." It never can mean "must" so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases where a Judge has a power given him by the word "may" it becomes his duty to exercise that power. It is not argued here that there is anything said in this Act as to the duty of the Judge to exercise the power given him by section 125, sub-section 4; but it is said that the whole object of the Act of Parliament was to secure equality among the creditors, and that, therefore, where leaving the administration in the Chancery Division may give priority to any creditor, where the personal representative is at liberty not to plead the Statute of Limitations, and where his right of retainer remains unaffected, it is the duty of the Judge, on the application of a creditor, to make the order, because it is said that the object of the section is to produce equality which is provided by the rule of bankruptcy.

In my opinion, if Parliament had meant to do away with the executor's right of retainer, it would have said so. Parliament is no doubt strong enough to do so if it likes. But it would be wrong to suppose that the right of retainer is an

(10) 56 Law J. Rep. Chanc. 552; Law Rep. 36 Ch. D. 233.

(11) 57 Law J. Rep. Q.B. 57; Law Rep. 20 Q.B. D. 38.

(12) 56 Law J. Rep. Q.B. 333; Law Rep. 19 Q.B. D. 92.

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equitable right. It is the right of the executor—the legal hand to receive the assets and to pay the debts—to retain out of the legal assets his own debt. But the Court of Chancery did not allow any right of retainer out of equitable assets, which shews that the Court recognises fully the equitable rights of creditors. Then, as regards the executor not pleading the statute, the Court of Chancery does not hold an executor liable for not pleading the statute, but leaves it to his discretion whether he will plead it or not. There may be circumstances which render it morally wrong to plead the statute, and, in my opinion, the defence of the statute is not looked upon with any particular favour.

Then it is said here that the language of the statute shews that it is intended not directly, but indirectly, to do away with these powers of the executor by saying that the receiver in bankruptcy is to have regard to any claim by the legal personal representative to payment of funeral and testamentary expenses incurred by him, and that they are to be payable in full. That is one case which has been provided for; but there are cases which possibly were never thought of by Parliament. But, in my opinion, the mere existence of a right which the personal representative would be able to exercise if there be no transfer, but which would not be recognised by the Court of Bankruptcy, is no ground for compelling the Judge to exercise the power given him by these subsections.

It may be (I do not express an opinion on it) that Mr. Justice Stirling was right in saying in *In re York* (10) that the fact of the existence of the right of retainer would not be a ground for not exercising the power of transfer. But there were circumstances in the case which, in my opinion, rendered a transfer advisable, and we may have to consider hereafter whether the transfer of an administration to bankruptcy will prejudice or injure an executor in his right of retainer, and if so whether that may be a ground for not exercising the power of transfer; but, in my opinion, you cannot take the existence of a right of retainer, or the fact that the executor

has not thought fit to plead the Statute of Limitations, as a ground for making the transfer, if there is no other reason for holding it desirable. In my opinion, if the Legislature had intended that in the case of an insolvent estate the executor should have no right of retainer, and that he should be bound always to plead the Statute of Limitations, it ought to have said so, and I think it would have said so.

In my opinion there is given by the word "may" a power as to the exercise of which there is a discretion, and there is not here enough to shew that it was the duty of the Judge to exercise that power. It is to be observed that there are many provisions in the Bankruptcy Acts to secure equality among the creditors, not only as regards property which the bankrupt has at the time of the bankruptcy, but also as regards property which he has parted with—as, for instance, property included in voluntary settlements made within a certain time before the bankruptcy, which provisions have been held not to be applicable in the administration of insolvent estates of deceased persons. That shews that Parliament did not intend by this section to apply all the provisions of the Bankruptcy Acts to the administration of the estate of a deceased insolvent.

In my opinion Mr. Justice Chitty was right, and although I hold that this is a discretion as to the exercise of which there may be an appeal, I think he exercised it rightly in this case.

LINDLEY, L.J.—No ground is alleged for transferring this action from this Court to the Court of Bankruptcy, except the broad and important ground that if a transfer is ordered, the assets will be administered in a different manner. That is quite true, and to many minds the mode of administering assets in bankruptcy is preferable to the mode of administering them elsewhere. The administration of assets in bankruptcy is statutory, and depends on well-considered enactments, whereas the administration of them in Chancery depends on technical rules which are not always quite satisfactory.

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The right of an executor to retain is a common law legal right. It depends on the old rule that a man cannot sue himself, and out of that the law developed the right of an executor to retain a debt due to him from the testator. That right has been disapproved of by those who have had the development of equitable jurisdiction, and they have declined to follow the law by applying it to equitable assets. But still that right exists, and is perfectly well known to every lawyer, and Parliament has never yet faced the difficulty of abolishing it. Whether it thought it had done so by creating section 10 of the Judicature Act, 1875, I do not know—that section is so worded as not to pre-judge the right.

There are certain other distinctions between administration in Chancery and in Bankruptcy. Is it right that in consequence of these distinctions whenever an insolvent estate is being administered in Chancery it should be transferred to the Bankruptcy Court? I cannot spell that out from this section. If Parliament had meant that, it would have used very different language, and would not have said “may” so often, and contrasted it with “shall.” As a matter of construction, I am convinced, having regard to the principle laid down in *Julius v. The Bishop of Oxford* (5), that this is a discretionary power, and I cannot say that Mr. Justice Chitty has exercised it wrongly. There is another important question, what the effect of the transfer would be, and whether the administration would not have to proceed on the footing on which it had been commenced—and this is a reason against the transfer. I am not prepared to differ from Mr. Justice Chitty.

LOPES, L.J.—Sub-section 4 of section 125 of the Bankruptcy Act, 1883, authorises in the cases provided for by that sub-section a transfer from the High Court to the Court exercising jurisdiction in bankruptcy—in the present case the County Court; and the first question raised is this, whether that power of transfer is discretionary or imperative. It is contended by Mr. Everitt that there is no discretion in the Judge. Now the word used in

sub-section 4 is “may,” and that word is beyond all question potential—implies a power; but if it is coupled with a duty on the Court or person to whom it is given to use that power in a particular way, it then no doubt becomes imperative, and there is plenty of authority to support that conclusion. In this case I can see no such duty, and in my opinion, therefore, the power conferred by this sub-section is discretionary.

But it is said that, even if there is a discretion in the Judge, he has exercised it wrongly in the present case. The ground on which he is said to have wrongly exercised it is that the effect of his exercising it in the way he has done is to preserve to the legal personal representative and the plaintiff creditor advantages which they possess if the administration takes place in the Court of Chancery. These rights of a legal personal representative and plaintiff creditor are rights which they possess, and I cannot say that the recognition of these rights is any ground for holding that the discretion has been wrongly exercised. It is perhaps anomalous that the distribution of assets should proceed in a different way, and depend on whether proceedings are taken first in the Court of Bankruptcy or in the Court of Chancery. But that is a matter for Parliament, and one with which we have nothing to do. The appeal must be dismissed.

Solicitors—Penley & Grubbe, agents for Hunnybun & Sons, Huntingdon, for appellants; Kinsey, Ade & Hocking, for plaintiff; Thornton Toogood, agent for Burnham, Son & Lewin, Wellingborough, for defendants.

KAY, J. }
 1890. } *In re* PARSONS.
 June 21. } STOCKLEY v. PARSONS.
 July 2. }

Married Women's Property Act, 1882,
 section 5—"Title"—"Contingent Title"—
Spes successionis.

A testator bequeathed a fund to trustees upon trust, in case his daughter should die leaving no issue, "for such person or persons as at the time of the failure of the preceding trusts would be my next-of-kin and entitled to my personal estate under the statutes for the distribution of the personal estate of intestates if I had then died intestate, and in the proportions in which they would be so entitled." The daughter died in 1886 without leaving any husband or having had issue. One of the persons entitled to a share of the fund was a woman who had married in 1857, and died in 1889, having made a will, and leaving her husband surviving. On summons taken out to determine who was entitled to the fund,—Held, that the married woman before 1886 had not a contingent interest or title to the fund, but a mere spes successionis, and that therefore her interest in the fund, having accrued since the Married Women's Property Act, did not belong to her husband, but was her separate estate and passed by her will.

In re Beaupré's Trusts (21 Law Rep. Ir. Ch. D. 397) disapproved.

John Stockley, who died on the 12th of July, 1879, by his will dated in February, 1877, left 1,600*l.* to trustees, upon trust for his daughter, Eliza Bird, for life, and after her death for her husband, if any, for life, and subject thereto for her children and issue, and the testator then continued as follows:—

"And if there shall be no child or other issue of my said daughter who shall attain a vested interest in the said trust-moneys, funds, and securities, then the same shall be in trust for such person or persons as at the time of the failure of the preceding trusts would be my next-of-kin and entitled to my personal estate under the statutes for the distribution of the per-

sonal estate of intestates, if I had then died intestate, and in the proportions in which they would be so entitled."

Eliza Bird died on the 21st of May, 1886, without leaving any husband or having had any issue.

Elizabeth Parsons would have been entitled to one-third of the testator's personal estate under the Statutes of Distribution if the testator had died simultaneously with his daughter.

Elizabeth Parsons was married to John E. Parsons in 1857. Without the knowledge of her husband, she made a will, of which the plaintiff was sole executor, dated the 5th of August, 1889, whereby she gave all her property whatsoever and wheresoever to her two nephews J. H. Ward and W. S. Ward. She died on the 10th of September, 1889, and on the 19th of March, 1890, probate of the will was granted to the plaintiff in general form according to the practice introduced by the Probate Rules of March, 1887, rules 15 and 18.

An originating summons was taken out by the plaintiff against the husband and nephews, asking for the decision of the Court whether the one-third of the legacy of 1,600*l.* to which Elizabeth Parsons was entitled at the time of her death was disposed of by her will, or belonged to the defendant J. E. Parsons by virtue of his marital right.

Townsend, for the plaintiff.—Section 5 of the Married Women's Property Act, 1882, applies, as the title to this property accrued since the Act. Consequently the property belonged to the lady for her separate use. He referred to *Reid v. Reid* (1).

Ingle Joyce, for the husband.—The exact point is covered by *In re Beaupré's Trusts* (2): where a lady married in 1860, who became entitled as one of the next-of-kin of a person who died in 1885 to a share of a fund settled in 1830, was held to have had a title before the Married Women's Property Act, 1882. The whole title did not accrue before the Act, but by *Reid v.*

(1) 55 Law J. Rep. Chanc. 294; Law Rep. 31 Ch. D. 402.

(2) 21 Law Rep. Ir. Ch. D. 397.

In re Parsons.

Reid (1) it is enough if there was a contingent interest before the Act.

[KAY, J., referred to the *Law Journal* report of *Smart v. Tranter* (3), in which it was stated that the lady had some separate estate—a fact not noticed in the *Law Reports*.]

The rule as to the grant of probate of the will of a married woman is laid down in *In the Goods of Amelia Price* (4). The Court now makes a general grant, not limited, as formerly, to “such property as the testatrix had a right to dispose of.”

Upjohn, for persons entitled under the will of Mrs. Parsons.—In *Smart v. Tranter* (3) the wife had no testamentary power of appointment, and no separate estate, and the husband had not assented to her will. It is settled by a long series of authorities that a mere possibility is not an interest. In *Lord Dursley v. Fitzhardinge Berkeley* (5), an unreported case of *Smith v. The Attorney-General* is cited for the proposition that the next-of-kin of a lunatic, however hopeless his chance of recovery, has no interest in the property, and De Grey, C.J., is quoted that at law the heir-apparent cannot have the writ *de ventre inspiciendo*. To the same effect are *Cloves v. Hilliard* (6), in which Jessel, M.R., distinguishes the case of *Roberts v. Roberts* (7), *Davis v. Angel* (8), *Meeke v. Kettlewell* (9), *In re Thompson v. Curzon* (10), *In re Tucker*; *Emanuel v. Parfit* (11), *In re Hobson*; *Webster v. Rickards* (12), and *Kekewich v. Manning* (13).

(3) 59 Law J. Rep. Chanc. 368; Law Rep. 43 Ch. D. 587.

(4) 56 Law J. Rep. P., D. & A. 72; Law Rep. 12 P. D. 137.

(5) 6 Ves. 251.

(6) 46 Law J. Rep. Chanc. 271; Law Rep. 4 Ch. D. 413.

(7) 2 Ph. 584; 17 Law J. Rep. Chanc. 174.

(8) 4 De Gex, F. & J. 524; 31 Beav. 223; 31 Law J. Rep. Chanc. 613.

(9) 1 Hare, 464; 1 Ph. 342; 11 Law J. Rep. Chanc. 293; 13 *ibid.* 28.

(10) 54 Law J. Rep. Chanc. 610; Law Rep. 29 Ch. D. 177.

(11) 54 Law J. Rep. Chanc. 874.

(12) 55 Law J. Rep. Chanc. 300.

(13) 1 De Gex, M. & G. 187; 21 Law J. Rep. Chanc. 577.

Townsend referred to *In re Cuno*; *Manfield v. Manfield* (14).

Joyce, in reply.

KAY, J. (on July 2).—In this case an originating summons has been taken out by the executor of the will of Elizabeth Parsons, asking for the decision of the Court whether one-third of a legacy of 1,600*l.*, to which the testatrix was entitled under the will of John Stockley, was disposed of by the will of Mrs. Parsons, or belongs to her husband in his marital right. [His Lordship then stated the facts of the case, and continued:] Elizabeth Parsons was therefore married before the passing of the Married Women's Property Act, 1882, and section 5 would make this interest which she took after the passing of that Act as one of the next-of-kin of John Stockley, supposing him to have died at the same time as Eliza Bird, in May, 1886, her separate property, unless she had a “contingent title” to it before the passing of the Act.

The question is whether she had then a contingent title. It is indisputable law that no one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir-at-law or next-of-kin of such living person. During the life of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to his property.

The law is the same where there is a limitation by will or settlement of real or personal property to the heir or statutory next-of-kin of a living person. During his life no one can say: “I have a contingent estate or interest as possible heir or next-of-kin”; just as in the first case no one can have more than an expectation or hope of being heir or next-of-kin. It makes no difference that the limitation is not to the actual heir or next-of-kin, but to the persons who would be heir or next-of-kin if the ancestor were to die at some future time. Until that time arrives there is no one who can say he has anything beyond a hope or expectation.

(14) Law Rep. 43 Ch. D. 12.

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For this reason, in a suit to administer the estate, you could not make such possible heir or next-of-kin a party; nor is there any case in which he has been allowed to sue to protect the estate, or has been recognised as having an interest, except that in proceedings in lunacy against the ancestor he is permitted to be before the Court. The reason for that is thus stated by Lord Eldon in *Ex parte Clarke* (15): "The principle which leads the Court to call for the next-of-kin and the heir-at-law of lunatics is to receive from the persons probably entitled, that assistance in the protection of the property which persons having such expectant rights will be likely to afford; but the enquiry is not considered to be binding."

The object of the Married Women's Property Act, 1882, was to benefit women who had married before the passing of the Act by giving them a separate estate in property to which they might become entitled during the coverture after the passing of the Act. It excepts all property their "title to which, whether vested or contingent," accrued before the Act. To give a wide meaning to "contingent title" would narrow the operation of the statute. But, without straining the words in either direction, can a possible next-of-kin of a person who is to be supposed to die at a future time be said to have a "contingent title," or is not the proper view that he has no title at all, nothing but an expectation or hope, which is not recognised in law as any title? While the *propositus* is living every relative he has in the world is a possible next-of-kin. Can each one say that he has a contingent title? He may have sons, brothers, and nephews. Can the nephew, living the sons and brothers, say, "I have a 'title' "? If he cannot, then the brother cannot, nor the son. A *spes successionis* is not a title to property by English law. Why should this meaning be given to it in the statute in order to deprive a married woman of her right to separate property? I suppose the object of excepting a title accrued before the Act was in order not to take from the husband any advantage which he

might then have. Possibly the exception goes further than is necessary for this purpose, but, if that is its main object, it would be contrary to the spirit of the enactment to construe the words so as to include an expectation of the wife in which the husband could not have any interest.

Now let me see how far this view of the law is supported by authority. In a note at p. 219 of the 8th edition of *Watkins on Conveyancing*, it is said in effect that there are two classes of possibilities—namely, possibilities coupled with an interest, "such as contingent remainders, executory devises, springing or shifting uses; the other, bare or naked possibilities, such as the hope of inheritance entertained by the heir." . . . "The former class may, perhaps, with more propriety be denominated contingent interests, and the latter mere expectancies; for a possibility coupled with an interest is more than a possibility, it is a present interest, and may be devised—*Perry v. Phelps* (16). On the other hand, the expectancy of an heir-apparent, during the lifetime of his ancestor, is less than a possibility, being but a mere hope or anticipation."

The statute 8 & 9 Vict. c. 106. s. 6, made a possibility coupled with an interest assignable at law, but not a mere possibility.

In *Smith v. The Attorney-General* (17), it was decided that an heir-apparent, during the life of his ancestor, though the ancestor is a lunatic who cannot recover, could not have a bill to perpetuate testimony in order to prove that he was heir-apparent, and could not, as the *verus hæres* might, have the writ *de ventre inspiciendo*.

In *Lord Dursley v. Fitzhardinge Berkeley* (5) Lord Eldon said, "The case of *Smith v. The Attorney-General* (17) went upon this: that the next-of-kin of the lunatic had no interest whatever in the property. Put the case as high as possible—that the lunatic is intestate; that he is in the most hopeless state—a moral and a physical impossibility, though the

(15) Jac. 589, at p. 595.

(16) 17 Ves. 173, 182.

(17) Cited 6 Ves. 259, and 15 Ves. 133, 136.

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law would not so regard it, that he should ever recover—even if he was *in articulo mortis*, and the bill was filed at that instant, the plaintiff could not qualify himself as having any interest in the subject of the suit. The case of an heir-apparent was very properly put by Lord Chief Justice De Grey in his most luminous judgment. Upon that occasion he said he never liked equity so well as when it was like law. The day before I heard Lord Mansfield say he never liked law so well as when it was like equity—remarkable sayings of these two great men which made a strong impression upon my memory. Lord Chief Justice De Grey said that at law the heir-apparent cannot have the writ *de ventre inspiciendo* in the life of his ancestor, as for that purpose he must be *versus hæres*. If the ancestor was in a fever, a delirium, having made no will, and it was not possible for him to recover, still the law would look upon him as a mere heir-apparent, having nothing but an expectation, which is different from an expectancy in the legal sense, and as having no interest whatever upon that ground. In *Smith v. The Attorney-General* (17) it was held that the bill would not lie. It is not to be taken upon the single dictum of any of the learned Judges who assisted upon that occasion; but the whole judgment went upon distinguishing between that expectation which the next-of-kin have in that case, and any sort of right which the law allows to be an interest. A contingent interest is not the less a present interest. It was not doubted in that judgment that a vested interest, though, in possibility, the least valuable that could be conceived, is yet of some value in consideration of law, and gives a right to preserve testimony. In the course of that cause cases were cited which go to this—that though the next-of-kin could not file a bill, or the heir-apparent in the case put, yet they might respectively enter into contracts with respect to their expectations and possibilities, the evidence upon which they might perpetuate. The law would frame an interest in respect to the contract, and with reference to that they would have a right to perpetuate testimony, though they could not qualify

themselves as to any interest in the subject itself.”

Nothing can be more clear and emphatic than these words of Lord Eldon, and I know of no case in which the law so laid down has been departed from or doubted.

Then has an expectant heir or next-of-kin any greater interest under a limitation to the heir or statutory next-of-kin of a living person? In *Meeke v. Kettlewell* (9) it was held that an assignment by deed of a mere possibility was only a contract, and being voluntary could not be enforced in equity. The possibility there, was the hope of succession as one of the next-of-kin of Hannah Meeke under a limitation by will in trust for her next-of-kin according to the statute in case she left no issue. While Hannah Meeke was living one of her possible next-of-kin made this assignment. Hannah Meeke died without issue, and the suit was instituted after her death to enforce the assignment. Vice-Chancellor Wigram said (18) that the assignor “at the time of the assignment had nothing but an expectancy in the fund in question (like that of an heir in the lifetime of the ancestor),” and he dismissed the bill. This was affirmed by Lord Lyndhurst, who said (19): “The assignment of an expectancy such as this is cannot be supported unless made for a valuable consideration.”

This is a direct decision that the expectant next-of-kin takes no greater interest under a limitation to next-of-kin than they would by the hope of an actual succession.

In *Clowes v. Hilliard* (6) the Master of the Rolls (Sir G. Jessel) had before him a case in which the limitation was identical with that which I have to deal with. A testator had left his residuary estate for the benefit of his three daughters and their issue, with an ultimate gift, if all of them died without issue, “in trust for such person or persons as would have been entitled to the residue of my trust estate under and according to the Statute of Distribution, in case I had then died intestate.” The testator died in 1869. While the daughters were living and unmarried

(18) 1 Hare, at p. 475.

(19) 1 Ph. at p. 347.

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some of the persons who would be next-of-kin of the testator if they had all died unmarried brought an action for administration of the estate as possible and presumptive next-of-kin entitled under the ultimate limitation. A demurrer was allowed on the ground that they had not sufficient interest to maintain the suit. Yet the veriest scintilla of interest will entitle a person to maintain such a suit, as is shewn by such cases as *Joel v. Mills* (20) and *Cosser v. Radford* (21). The Master of the Rolls said: "These plaintiffs, who claim to be some of the testator's possible next-of-kin, are in the same position as persons claiming to be next-of-kin of a living person. *Ex hypothesi* the testator is to live on. Whether, therefore, you attempt to ascertain the next-of-kin of a living person or of a person dying at a future period, it is the same thing, there is no difference. You cannot predicate of any one that he will not be a member of the class." Later he criticises *Roberts v. Roberts* (7), where Lord Cottenham made a difference between a widow and next-of-kin, and noticing *Davis v. Angel* (8) he says, "it is a decision that nothing less than an interest will allow a man to maintain a suit."

That decision follows what was laid down in *Meeke v. Kettlewell* (9), that possible next-of-kin have no greater interest during the life of the *propositus* under a limitation to his statutory next-of-kin than they would have in property which they hoped to take by succession to him, and shews that the same law applies where a time is fixed for the supposed death of the *propositus*, not the date of his actual death.

I have referred to this very familiar law, and the authorities upon it, because I am asked to follow a decision of eminent Judges in Ireland which, it is said, governs the case now before me, *In re Beaupré's Trusts* (2).

The facts in that case were as follows: By marriage settlement in 1830 10,000*l.* was settled in trust for wife for life, then husband for life, then children of wife by any husband, and in default of such chil-

dren, "in trust for such person or persons as, according to the statutes for the distribution of the estates and effects of intestates in Great Britain, would, at the time of such failure of issue as aforesaid, have been the next-of-kin of 'the wife' if she had departed this life intestate and without having been married." The husband died in 1862; the wife in 1885, without having had issue. One of her next-of-kin, Lady Nugent, had married in 1860 without settlement, and her husband was adjudicated bankrupt in 1881. The contest was between Lady Nugent and the assignees in bankruptcy of her husband, the question being whether or not the share which belonged to Lady Nugent had become her separate property under the Married Women's Property Act, 1882, or whether her title had accrued before that Act, in which case the share belonged to her husband's assignees. It was decided first by the Master of the Rolls in Ireland, and on appeal by the Lord Chancellor of Ireland, with the concurrence of Lord Justice FitzGibbon, Lord Justice Barry, and Lord Justice Naish, that Lady Nugent's title had accrued before the Married Women's Property Act, 1882, and that accordingly she had no separate estate, but that her share of the fund belonged to the assignees in bankruptcy of her husband.

The Master of the Rolls said that it was argued there could be no next-of-kin of a living person, and that the title of the next-of-kin and his right to payment arose at the same moment—namely, the death; therefore, till 1885, no one could predicate that he was, or ever would be, next-of-kin of the wife, and no title vested or contingent accrued prior to the passing of the Act. "Till the class is ascertained, it was argued, there was no title in any one, not even a contingent title within the statute. No authority for this proposition was referred to, which is a startling one. If it be well founded it would apply to many cases besides the present—cases in which no question of next-of-kin would arise—such as where property is left to or settled upon the children of A. B., living at a particular time, answering a particular description, or the like, since the class can-

(20) 3 Kay & J. 458.

(21) 1 De Gex, J. & S. 585.

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not be ascertained till the event happens." He then cites the language of Lord Justice Cotton in *Reid v. Reid* (1): "There must be an accruer of title after, and not before, the passing of the Act; and the title must be considered as accruing when the married woman first acquires her interest in the property, whether such interest is at that time in possession, reversion, or remainder, and, of course, also," the learned Master of the Rolls adds, "whether vested or contingent."

The Master of the Rolls then considers whether Lady Nugent had a contingent title to the fund before the Act, the policy of which he states to be, in the case of a previous marriage, to oust the marital right only in respect of property acquired after the Act in such a manner that it could not have been contemplated as part of the consideration of the marriage, or dealt with by husband and wife, or either of them, before the Act. He seems to consider that if the instrument under which the title accrued had been executed after Vice-Chancellor Malins's Act, Lady Nugent's title would have come within the description in that statute, "every future or reversionary interest, whether vested or contingent."

The Lord Chancellor, on appeal, treats *Reid v. Reid* (1) as having decided that if a woman married before the commencement of the Act had, before that time, acquired a title of any kind to any property, such property is not made her separate property by section 5 of the Act, though it falls into possession after the passing of the Act. His Lordship then says (at p. 407): "The title of the next-of-kin under the settlement of the 4th of June, 1830, was a title in contingency and in remainder. Their right to a contingent interest was hardly disputed;" and later on, after dealing with the maxim *Nemo est hæres viventis*, he says, "The settlement of the 4th of June, 1830, created a contingent limitation in favour of a class of persons who are of kin to the tenant for life and capable of being ascertained. In my opinion they had a right contingent on their surviving the tenant for life, under the marriage settlement, which is the foundation of their title."

Lord Justice FitzGibbon concurs in the conclusion, "though not without doubt." "Lady Nugent," he says, "could have parted with her title by assignment, or dealt with it as she pleased as an existing and accrued title, though contingent as to its actual enjoyment. Her title-deed is now the settlement of 1830." The word "title" in section 5 he treats as including "every kind of property," and he concludes by saying that Lady Nugent's title "accrued when the settlement was executed." Lord Justice Barry agrees, and Lord Justice Naish also, the latter saying, "It appears to me as much a contingent title as if the limitation had been to such of the nephews and nieces of Sophia Southwell as shall be living at her death."

If this were an English authority I could do nothing but follow it; but decisions of the Irish Courts, though entitled to the highest respect, are not binding on English Judges. If, therefore, I cannot agree, I am bound to decide according to my own judgment.

I confess I am unable to come to any conclusion, except one which is contrary to this decision. I cannot help feeling great hesitation in opposing my opinion to that of so many eminent Judges; but I must say that, if it were not for this authority, I should have no doubt whatever about the right conclusion, according to the English cases I have referred to. After all, the opinion I express is not so much mine as that of the Judges who decided those cases.

The point of difference, to state it shortly, is this. *Nemo est hæres viventis* should be construed literally. There is no such character in law as the heir of a living person, or as his statutory next-of-kin. There is a wide difference, for this reason, between a gift to such of the "children" or "nephews" or even "kindred" of A. who shall be living at his death, and a gift to those who shall then be his statutory next-of-kin. During A.'s life there may be children, nephews, or kindred. Each of them has probably sufficient interest, though contingent, to take proceedings to protect the fund—see *per* Lord Hatherley in *Joel v. Mills* (20). Some or all of them might be made defendants in an action to

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administer the trusts. Neither of these things can be done where the gift is to statutory next-of-kin. They have no existence whatever in law while the *propositus* is living. No one can, as possible next-of-kin, even bring an action to perpetuate testimony as to his kinship during that period. I am unable to agree with the judgments which consider these cases as parallel.

As I have pointed out, the learned Judges in Ireland treat the word "title" in section 5 as equivalent to "interest," citing Lord Justice Cotton's words in *Reid v. Reid* (1) to the same effect. With this I respectfully agree. One who has no interest whatever in property can hardly be said to have a title. But I have mentioned abundant authority to prove that no one can have any "interest" as heir or next-of-kin in the ancestor's lifetime. The familiar cases to which I have referred were not quoted; but I cannot suppose that they were not present to the minds of the learned Judges whose judgments I have been considering.

In *Reid v. Reid* (1) the Court of Appeal refused to accept the decisions upon the ordinary covenant in a marriage settlement to settle other or after-acquired property of the wife as a guide in determining what should be excluded under the word "title" from the operation of the 5th section of the Married Women's Property Act, 1882. Lord Justice Cotton adopted Vice-Chancellor Wickens's remark in *In re Clinton's Trusts* (22), that cases of that class must be approached with the presumption that the object of that covenant was to exclude the husband, whereas the object of the peculiar language of section 5 was to confine its operation to property in which the husband at the commencement of the Act had not any interest. Every one must, I think, agree in the reasonableness of this view, and it follows that if, under a covenant to settle any property to which the intended wife "is contingently entitled" at the time of the marriage, such a possibility as this which I am considering were included, it would

not necessarily be within the words "contingent title" in section 5. But, so far as I know, no such possibility has ever been held to be included in such a covenant, and I confess I should have no difficulty in deciding that it could not be. For, suppose the trust to have been declared before the marriage for the statutory next-of-kin of A., and that A. did not die till after the determination of the coverture by the death of the husband subsequently to the passing of the Act, and that the widow was one of A.'s next-of-kin under the statute at his death, I should imagine it would be held without hesitation that the intended wife had not at or before the coverture any interest whatever, and therefore her husband could have none by reason of the coverture, and consequently the words of such a covenant, though they might include all property to which the intended wife had a contingent title at the date of the settlement, would not comprise such a possibility as this.

In *Atcherley v. Du Moulin* (23) a marriage settlement contained a covenant to settle, which the Court held included all property to which at the date of the settlement the wife was "entitled." At that date the wife was contingently entitled under a bequest to all the daughters of her father living at his death who should attain twenty-one or marry. The father died in 1854. This daughter had married in 1846, and her husband had died in 1851. Lord Hatherley (at p. 193) held that, "although she had the transmissible contingent interest, she had nothing during the marriage which could be called property to which she was entitled. . . . The word 'entitled' might be large enough to include a contingent interest," but upon regarding the whole of the settlement, he thought in that case it did not.

In *In re Mackenzie's Settlement* (24), where the covenant included anything to which the wife was entitled at its date, and she was then entitled in reversion after the death of her mother to a share of consols, and her mother died during the

(22) 41 Law J. Rep. Chanc. 191; Law Rep. 13 Eq. 295.

(23) 2 Kay & J. 186.

(24) 36 Law J. Rep. Chanc. 320; Law Rep. 2 Chanc. 345.

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coverture, Lord Justice Turner said, in effect (see p. 348), "that if she was entitled contingently, the covenant would reach it;" *a fortiori*, as she had a vested reversionary interest.

This was followed in *Cornmell v. Keith* (25), where the interest was in remainder expectant on the death of the wife without issue, this contingent reversionary interest was bound.

It appears, therefore, that the Courts have hesitated to hold the word "entitled" in such a covenant to include a contingent reversionary interest under such a limitation as "to children of A. living at his death," though now that would probably be held to be included. But this, so far as I know, is the furthest extent to which the construction of that familiar covenant has gone.

I am bound to follow the English decisions to which I have referred, and I must hold that the property in this case first accrued in title and interest to Elizabeth Parsons on the death of Eliza Bird on the 21st of May, 1886, and that by section 5 of the Married Women's Property Act she was entitled to it for her separate use, and that it passed by her will in 1889.

Solicitors—Samuel Price & Son, agents for Andrew & Smith, Northampton, for plaintiff; Ullithorne, Currey & Villiers, agents for C. B. Roche, Daventry, for defendants.

(25) 45 Law J. Rep. Chanc. 609; Law Rep. 3 Ch. D. 567.

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

STIRLING, J. }

1890. }

Feb. 28. }

March 1, 7. }

April 23. }

BAIRD v. WELLS.

Club—Proprietary Club—Expulsion of Member by Committee—Irregularity—Committee not properly constituted—Remedy in Damages, and not by Injunction.

The jurisdiction of the Court to interfere in the case of a club on the expulsion of a member is based upon the right of property vested in the member; and in the case of a proprietary club the members of which have no right of property, but merely a right to use the club premises on payment of a subscription, the Court will not restrain by injunction the expulsion of a member by the committee, although the committee may have been invalidly constituted, and may not have acted in accordance with the rules. The plaintiff in such a case will be left to his remedy in damages.

This was a motion on behalf of Mr. George Alexander Baird for an injunction to restrain the defendants, Mr. Wells, the proprietor, and Mr. Raleigh, the secretary of the committee of the Pelican Club, from interfering with his use and enjoyment of the club as a member thereof. The Pelican was a proprietary club, established in 1887, and the plaintiff became a member of it soon after it was formed. There were original rules, to the effect that the club should be strictly proprietary; that general meetings for the election of a committee should be held in October or November in each year, proper notice of fourteen days clear being given to the members; that the committee should consist of not more than twenty-one members; that the proprietor should be an *ex officio* member, but not qualified to vote; that special meetings might be called; that members should be elected by the committee; that the subscription should be fixed from time to time; and that the rules should be printed and binding upon the members. The material rules were

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the 7th, which stated that the "Resolutions to be proposed at special or ordinary meetings shall be given notice of in writing a clear week previous to the meeting," and the 17th, which was that "any member whose conduct in or out of the club shall be unbecoming a gentleman, in the opinion of the committee, or with respect to whom any matter may have transpired which might be calculated to render his continued membership of the club injurious to its character or interests, shall, if the committee on enquiry find the same to be substantiated, be requested to resign; and in the case of his non-compliance, he shall be subject to expulsion." On the 29th of October, 1887, the first general meeting was held. In the year 1888 there was no general meeting. The evidence of the defendant Raleigh was that the committee early in December, 1888, consisted of only twelve members, and that on the 6th of that month eight gentlemen and himself were appointed to act upon the committee of the club for the purpose of filling up the vacancies which had arisen. Shortly afterwards there was a proposal made for new rules, and the secretary was directed to call a general meeting for the 2nd of April, 1889. The secretary accordingly issued a notice, dated the 13th of March, 1889, convening a general meeting; but the notice in no way stated the matters which were to be taken into consideration at the meeting, as required by the 7th rule (*supra*). The meeting was held, and the following resolutions were carried: "That the election of the then present committee be confirmed; that the elections and work of the committee be confirmed"; and the rules were read and amended, and finally confirmed. The new rules contained numerous material alterations of the old rules—in particular, the size of the committee was increased and the mode of election altered, while the former 7th rule was entirely omitted.

On the 23rd of December, 1889, a prize fight took place at Bruges, in Belgium, between two pugilists named Smith and Slavin, at which the plaintiff was present, and it was alleged that certain unseemly proceedings occurred in which one of the

officials of the club was, as alleged, implicated. On the 24th of December, 1889, an investigation by the committee into the conduct of that official was commenced and prosecuted. In the course of the investigation charges were made against the plaintiff by some of the persons examined; and in particular he was charged with having hired "roughs" who were present at the fight, and with having used violent and abusive language towards Slavin. On the 30th of December, 1889, a letter was sent to the plaintiff summoning him to attend before the committee on the 7th of January, 1890. In reply to it the plaintiff wrote and addressed to the chairman and members of the committee the following letter, which he handed to the secretary on the 7th of January:—

"My Lord and Gentlemen,—I attend at your request before you to-day in order to answer any question that you may put to me touching my conduct in connection with the late fight between Slavin and Smith. I point out to you the great loss and damage that would accrue to me socially and otherwise if an adverse decision is arrived at upon a hasty and partial investigation, and I request that before arriving at any such decision I may be supplied with an accurate statement of the complaint that you make against me, that I may examine into same with a view of ascertaining the true facts and placing them before you. I may add that I have not, either directly or indirectly, done anything that necessitates an enquiry into my conduct."

The plaintiff was examined before the committee. He made admissions as to his conduct at the ring-side, but expressly and emphatically denied that he had hired the "roughs." He did not, however, express any wish to call witnesses. The committee did not come to any resolution that the plaintiff had rendered himself liable to the penalty imposed by the 17th rule (*supra*). The evidence shewed that the committee acquitted the plaintiff on the charge of hiring "roughs," and that his language, although unbecoming that of a gentleman and a member of the club, and consequently deserving of regret, was

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not such as in their judgment to call for the application of the 17th rule.

On the 8th of January, 1890, the general meeting of the club was held, at which, from what took place, it was evident that the conclusion and resolution of the committee did not meet with the approval of all the members of the club, and in particular of the Marquis of Queensberry, who objected to them. He said that, although he did not wish to find fault with the action of the committee, he must say that fresh evidence had reached them on the previous day, and he was of opinion that sufficient time had not been given to the matter so far as it concerned Mr. Baird, and therefore he moved "That the examination into Mr. Baird's conduct should be re-opened, and continued by the committee from the point it left off." An amendment was proposed, "That the conduct of Mr. Baird be referred back to the committee for further consideration, and that they be instructed to report to a general meeting to be convened one month from this date." That amendment was, as the evidence shewed, after considerable discussion, carried. At that meeting the chairman briefly stated that the committee had resolved to resign in a body, and that a general meeting would be called in a fortnight's time to elect a "better lot." The report of the proceedings which was in evidence did not state that the meeting was adjourned, but a notice of an adjourned meeting was posted at the club and sent to every member. On the 22nd of January, 1890, the meeting was held, and the minutes shewed that a proposition that the old committee be invited to return to office *en bloc* was seconded and carried unanimously. That committee proceeded to deal further with the case against the plaintiff, and at a meeting of the committee, held on the 29th of January, 1890, it was, according to the minutes, resolved, "That in view of the report made by the committee to the general meeting, and of the vote of the members thereon, Mr. G. Baird be requested to resign his membership of the club in conformity with rule 17"; and on the 10th of February, 1890, the committee met again and passed a resolution expelling the plaintiff from the

club. The plaintiff thereupon brought this action.

Sir Charles Russell, Q.C., Sir Horace Davey, Q.C., and Ernest de Witt, for the plaintiff.—The committee must shew—first, that they have proceeded in carrying out the rules in accordance with the ordinary principles of justice; secondly, that they have been duly constituted as a committee; and thirdly, that they have acted in accordance with the rules—*Fisher v. Keane* (1) and *Labouchere v. The Earl of Wharncliffe* (2). The committee were not duly elected, and they did not proceed with due formalities. The plaintiff was not given a proper opportunity of explaining his conduct or of being heard in his own defence. He has paid his subscription, and is entitled to use the club. That right is no doubt subject to the rules, but if they authorise expulsion for any cause they must be strictly complied with.

[They then argued that on the evidence the proceedings of the club were wholly irregular, having regard to the rules, both as to the election and constitution of the committee and to the action of the committee in this particular matter, and that consequently the plaintiff was entitled to the relief he claimed.]

Graham Hastings, Q.C., and Levett, for the defendants.—This is a proprietary club, and the Court has no jurisdiction to entertain such an application. The right of property in the club is the foundation of the jurisdiction in all these cases, and here the plaintiff has no property in the club at all, everything being vested in the defendant Wells. All that the plaintiff had was a right, subject to the rules, to use the club premises for a certain period on payment of a subscription. He was a mere licensee, and if improperly interfered with his only remedy would lie in damages. *In re The St. James's Club* (3), *Hopkinson v. The Marquis of Exeter* (4), *Rigby v.*

(1) 49 Law J. Rep. Chanc. 11; Law Rep. 11 Ch. D. 353.

(2) Law Rep. 13 Ch. D. 346.

(3) 2 De Gex, M. & G. 383; 20 Law J. Rep. Chanc. 630.

(4) 37 Law J. Rep. Chanc. 173; Law Rep. 5 Eq. 63.

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Connol (5), *Lyttleton v. Blackburn* (6), *Milikin v. Sullivan* (7), and *Wood v. Leadbitter* (8). Although there is no express decision, it may be gathered from the authorities that the Court will not interfere in such a case as this where a member pays a subscription in return for which he gets the run of the club. But, assuming there is jurisdiction, the committee was *de facto* the committee of the club, and they having heard the plaintiff in his defence came to a conclusion. Any irregularity there may have been was waived by the plaintiff, and he cannot now ask for an injunction.

Sir Horace Davey, in reply.—We do not deny that the jurisdiction is founded upon property. *Wood v. Leadbitter* (8) has not been universally accepted, and it has no application here, because it was a case of assault and trespass. The point on which it was decided was that a licence, even for valuable consideration, is revocable. There are those who think that *Taylor v. Waters* (9) is more consistent with principle than *Wood v. Leadbitter* (8). Here the plaintiff has contracted with the defendant Wells that, in consideration of his entrance fee and subscription, he shall be entitled to the use of the club, subject to the rules. It is a contract for the use of certain rooms, and none the less so because the right is to be enjoyed in common with others. It is a tenancy in common with the other members of the right of occupation, except that it is not transmissible. Perhaps it is more like a joint-tenancy. But, that being the nature of the contract, *Rigby v. Connol* (5) does not apply.

[STIRLING, J.—Is it not an interest in land claimed, requiring a contract in writing under the Statute of Frauds?]

If so, there has been part performance, and the statute does not apply—*Maddison v. Alderson* (10). The only difference be-

(5) 49 Law J. Rep. Chanc. 328; Law Rep. 14 Ch. D. 482.

(6) 45 Law J. Rep. Chanc. 219.

(7) 4 Times Law Rep. 203.

(8) 13 Mee. & W. 838; 14 Law Times Rep. Exch. 161.

(9) 7 Taunt. 374.

(10) 52 Law J. Rep. Q.B. 737; Law Rep. 7 App. Cas. 467.

tween a proprietary club and an ordinary club is that in one case the property remains in the proprietor and the right of the members is to use the club, and in the other the contract is not with the proprietor, but with the members *inter se*. Why should not such a contract as the present be enforced by injunction? If the only remedy is in damages, then it is in the power of any club proprietor to get rid of a member on returning his subscription. The plaintiff's contract gives him an interest in property—that is, in the occupancy and use of the rooms of the club. As to the irregularities, the plaintiff could not waive them; he could not alter the rules and give an improperly constituted committee power to expel him. He had no knowledge of the irregularities at the time, and could not therefore waive them. The case is really concluded by *Labouchere v. The Earl of Wharnccliffe* (2). If the committee did not resign they returned to office with the original vice of invalid constitution by mere nomination and non-election according to the rules—*Dawkins v. Antrobus* (11) and *Wertheimer on Clubs*. It is one thing for a member of a club to entrust his character to a committee elected by the club, and another to entrust it to a self-appointed body, affirmed perhaps at a meeting of which no notice was ever given. The more extended the jurisdiction which is given to the committee, the more important it is that they should act in strict accordance with the rules. Moreover, the proceedings were so conducted in this case that the plaintiff was never properly heard by the committee in defence of his conduct.

Cur. adv. vult.

STIRLING, J. (on March 7).—This is a motion to restrain the defendants from excluding the plaintiff from the use and enjoyment of the Pelican Club, of which the plaintiff was threatened to be deprived in consequence of a decision of the committee of the club. In cases similar to the present the Court, as has been repeatedly held, does not undertake to act as a

(11) Law Rep. 17 Ch. D. 615.

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Court of Appeal from the decisions of the committees of clubs—*Fisher v. Keane* (1), *Labouchere v. The Earl of Wharncliffe* (2), and *Dawkins v. Antrobus* (11). The only questions which this Court can entertain are—first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bona fide*. I propose to enquire into these matters in the first place, reserving for consideration hereafter a further question—namely, whether the decisions to which I have referred apply to a club constituted as the present is.

[His Lordship having referred to the rules, the most material of which were the 7th and 17th, above set forth, and the evidence of the defendant Raleigh in reference to the filling up of vacancies on the 6th of December, 1888, continued:] What was done on the 6th of December, 1888, and also the proceedings of the 2nd of April, 1889, were entirely irregular. If the election of the committee was to be confirmed, and new rules were to be adopted, proper and distinct notice should have been given to the members. No such notice was given, and the proceedings, as it seems to me, were consequently not binding on the members who were not present. Those proceedings took place in April, 1889, and the transactions complained of were in January, 1890. Were the acts of the meeting of the 2nd of April, 1889, assented to by the plaintiff or other members of the club in the interval—a considerable interval—between the two dates? It was admitted by the secretary on cross-examination that copies of the new rules were not sent to the members, and there is not the slightest evidence that the plaintiff knew what had been done, or that will justify me in holding that he assented to be bound by the new rules or by the acts of the committee so elected. I come now to the transactions which gave rise to the present proceedings. [His Lordship having stated them, continued:] The statements made by the plaintiff on the 7th of January, 1890, may be used as evidence against him. He has filed no affidavit

upon this motion, and his counsel do not now seriously complain of the proceedings at that meeting. I think it may fairly be inferred from the account given by the secretary, in the absence of any other evidence, that the committee were justified in concluding that the plaintiff was not prepared to dispute the substantial accuracy of the accounts given to them as to the language made use of by him at Bruges, and I also think that his admissions were such that if the committee had there and then resolved that the plaintiff had rendered himself liable to the penalty imposed by the 17th rule, I could not have held that such a decision was other than *bona fide* in the sense in which those words are used in the cases on this subject. The committee, however, did not come to that conclusion. From the finding and resolution, I understand that the committee acquitted the plaintiff as to the charge of hiring "roughs"; and that they held that his language, although unbecoming that of a gentleman and a member of the club, and, consequently, deserving of regret, was not such as, in their judgment, to call for the application of the 17th rule and to justify them in excluding him from the club.

[His Lordship then referred to what took place on the 8th of January, 1890, set forth in the statement, and continued:] I think that the meaning of that meeting was that a new trial was resolved upon. There was great confusion at the meeting, and the report is not clear as to what actually occurred, but, according to the final paragraph, the chairman stated that the committee had resolved to resign in a body, and that a general meeting would be called in a fortnight's time to elect a "better lot." There was no formal adjournment of the meeting; but a notice of an adjourned meeting to be held on the 22nd of January, 1890, was given—posted at the club and sent to every member. On the 22nd of January a meeting was held, and at it Lord Queensberry rose and expressed his regret that his resolution at the last general meeting should have come into conflict with the wishes of his brother committee-men. He proposed to make a statement with regard to Mr. Baird. It

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was then proposed that the election of a committee should be proceeded with, and a member proposed that the old committee should be invited to return to office *en bloc*, and that proposition was carried unanimously. It was that committee which proceeded to deal further with the case. If the proceeding on the 22nd of January was a new election it was irregular. The notice did not specify the object of the meeting, and it was not sent at a sufficiently early date—fourteen days clear, according to the rule, was not given; for although the notice was posted at the club on the same day, the circular to the members was not issued until the 11th of January, 1890. It was said, however, that it was merely non-acceptance of resignation. There are difficulties as to that view, because at that meeting, according to the new rules, five members were to retire; however, I treat it in that way. Still the committee was only that elected on the 2nd of April, 1889—and, as I hold, irregularly elected. Was its decision binding on the plaintiff? All the cases lay down that the rules must be observed. It was held in the case of *Labouchere v. The Earl of Wharnccliffe* (2) that the decision of a meeting of which proper notice was not given according to the rules was not binding on the plaintiff, although he appeared before it without protest. That being so, it seems to me that the present plaintiff cannot be bound by the decision of an irregularly elected committee. The rules of the club as to the election of a committee are certainly of not less importance than those which relate to the length of notice to be given of a general meeting; and I hold on the evidence now before me that the plaintiff had no knowledge of and did not waive the irregularity. Subsequently, at a meeting of the committee held on the 29th of January, 1890, the Marquis of Queensberry, who had taken a prominent part at the meeting on the 8th of January, read a statement, of which his Lordship's notes have been put in evidence on behalf of the plaintiff. He urged that the committee should enquire further into matters which had been mentioned to them prior to the 7th of January, but were not referred to on that day,

on which alone the plaintiff attended the committee. If they were to take that course, which seems to have been that intended by the general meeting, the committee were, in my opinion, bound to call the plaintiff before them and give him an opportunity of answering the new matter for the first time brought forward in his presence. Lord Queensberry said, however—and I accept his statement—that the committee refused to do what he wished in that respect. What they did do appears only in the minutes, and, according to them, it was resolved, "That in view of the report made by the committee to the general meeting and of the vote of the members thereon, Mr. G. Baird be requested to resign his membership of the club, in conformity with rule 17." It thus appears that the same committee which on the 7th of January came to the conclusion—and, as I must assume, *bona fide*—that the offence of which the plaintiff was guilty did not call for expulsion from the club, determined on the 29th of the same month, without taking any further evidence and without hearing the plaintiff, that the penalty imposed by rule 17 ought to be put in force against him. No member of the committee has made any affidavit explaining the grounds on which that conclusion was arrived at, and in the absence of such evidence I am not satisfied that the resolution of the 29th of January represents the fair and unbiassed judgment of the committee. Lord Queensberry, who, on the 8th of January, is reported to have stated that he was entirely satisfied with the result of the committee's enquiry, appears to have urged upon the committee that even if the plaintiff did not hire the roughs who were present at the fight, he so acted as to render himself responsible for their conduct. That view of the plaintiff's conduct was not dealt with in the report of the committee; it does not seem to have presented itself to that body on the 7th of January, and if it did not present itself to the committee it was hardly likely to occur to the mind of the plaintiff. It is true that one question put to the plaintiff, according to the evidence of the secretary, seems to shew that some attention was

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directed in that way; but, notwithstanding that, upon the materials before me I think that that charge was not so formulated or so prominently brought forward on the 7th of January as to be made the ground of the decision of the committee unless the plaintiff had an opportunity of dealing with it. The resolution of the 29th of January may be susceptible of another meaning. It is quite consistent with the terms of it that some members of the committee, or even the majority of them, may have adhered to their original opinion, but thought that they were bound to give effect to the general feeling of the members of the club as expressed in the vote of the following day. In my judgment, they could not be justified in so doing. The question was one for the decision of the committee who had heard the evidence, and not for a general meeting of the members who, as opposed to the committee, had not; and though the committee might take advice on the matter before them, they were bound to form and act on their own opinion. I do not forget that a further resolution was passed on the 3rd of February, 1890. That was done under legal advice; and to that resolution, in the state of the evidence before me, I cannot attach any weight. In truth, however, it appears to be consistent with the prior resolution, and to be open to the same objections. I am, therefore, of opinion, first, that the decision complained of was not that of a committee duly elected according to the rules of the club; and, secondly, that it is open to serious question whether the resolution of the 29th of January can be regarded as representing their unbiased judgment after fairly hearing the plaintiff.

The question then arises, whether this case falls within the class of cases in which the Court grants relief by way of injunction. In all the cases of this nature in which up to the present time an injunction has been granted, the club has been one of the ordinary kind—that is, it has been possessed of property, such as a freehold or a leasehold house, furniture, books, pictures, and money at their bankers, which was vested in trustees

upon trust to permit the members for the time being to have the personal use and enjoyment of the club-house and effects in and about it. But the interest of the members is not confined to that purely personal right. The members might, if they all agreed, put an end to the club; and in that case they would be entitled, after the debts and liabilities of the club were satisfied, to have its assets divided among them. In the present case the club, as such, has no property. The club-house and furniture belong to the defendant Wells, and by him the subscriptions are taken. He is not a trustee, but the owner of the property. If the club were dissolved at any moment there would be nothing whatever to divide among the members. Now the interference of the Court in the cases which have hitherto occurred was justified, being based on the rights of property of the members of which they had been improperly deprived. The general principle was laid down by Lord Cranworth in the case of *Forbes v. Eden* (12), where he said (13): "Save for the due disposal and administration of property, there is no authority in the Courts of England or Scotland to take cognisance of the rules of a voluntary society entered into merely for the regulation of its own affairs." And the same principle was stated at greater length by the late Master of the Rolls (Sir George Jessel) in the case of *Rigby v. Connol* (5). In that case the plaintiff sought to restrain the defendants from excluding him from the benefits of a trades union of which he was a member. Sir George Jessel said: "The first question I will consider is, what is the jurisdiction of a Court of equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed, in this country at least,

(12) Law Rep. 1 H. L. Sc. 568.

(13) Ibid. p. 581.

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in any of the Queen's Courts to decide upon the rights of persons to associate together when the association possesses no property. . . . I cannot imagine that any Court of justice could interfere with such an association if some of the members declined to associate with some of the others. That is to say, the Courts, as such, have never dreamt of enforcing agreements strictly personal in their nature; . . . in such cases no Court of justice can interfere so long as there is no property the right to which is taken away from the person complaining. If that is the foundation of the jurisdiction, the plaintiff, if he can succeed at all, must succeed on the ground that some right of property to which he is entitled has been taken away from him. That this is the foundation of the interference of the Courts as regards clubs, I think it quite clear." Then his Lordship referred to the cases mentioned in the report, and came to the conclusion that the plaintiff was not entitled to any relief. Here, as I have pointed out, there are no funds vested in trustees or settled to be disposed of by the members of the Pelican Club in accordance with the rules of that association, and the question is whether the plaintiff, as a member of that club, has any right of property for the protection of which the Court will interfere by way of injunction—and in my judgment he has not. The position appears to me to be this: each member is entitled by contract with the defendant Wells to have the personal use and enjoyment of the club, in common with the other members, so long as he pays his subscription and is not excluded from the club under rule 17. That right is, as it seems to me, of a personal nature such as, if infringed, may give rise to a claim for damages, but not such as the Court will enforce by way of specific performance or injunction. The contract in its legal nature closely resembles contracts for providing board and lodging in a particular house, as when the head of a household admits a boarder into his family for a fixed period, or the proprietor of a private boarding-house agrees to provide for a term board and lodging for one boarder in common with others—*Wright*

v. Stewart (14). The contracts in these cases fall, in my opinion, under the head of agreements strictly personal in their nature, and consequently in neither of them would the Court interfere by way of injunction at the instance of the boarder. So also, in my judgment, is it in the present case. It was contended that damages might be an insufficient remedy, by reason of a decision being given which affects the character and position in society of the plaintiff and does not satisfy the requirements of the law. In no case, so far as I am aware, has the existence of such circumstances been treated as affording ground for the granting of an injunction to restrain the proceedings of a voluntary society, and indeed, upon the principle laid down in the case of *Forbes v. Eden* (11), it might well happen that decisions which gravely affect some members of a voluntary society and do not satisfy the requirements of the law might be arrived at by the committee or other like body without being open to be questioned in any civil Court or giving rise to any right of action whatever. Under these circumstances, I make no order on the motion.

Against this decision the plaintiff appealed, but on the 23rd of April, 1890, the appeal was, by consent, dismissed, with costs.

Solicitors—Lumley & Lumley, for plaintiff
Lewis & Lewis, for defendants.

(14) *Sub nom. Wright v. Stewart*, 29 Law J. Rep. Q.B. 161; 2 E. & E. 721.

[IN THE HOUSE OF LORDS.]

1889.
Dec. 12, 13. } LAWRENCE v. LORD NORREYS
1890. } AND OTHERS.
April 22. }

Practice—Abuse of Process of Court—Fivolous and Oppressive Action—Inherent Jurisdiction to dismiss—Statute of Limitations (3 & 4 Will. 4. c. 27), s. 26—Concealed Fraud.

The exercise by a Court of its inherent jurisdiction to dismiss an action as an abuse of its process is not justified merely by great improbability in the case made by the pleadings. But all the circumstances may be considered.

Where, in a statement of claim, a charge of concealed fraud, within section 26 of the Statute of Limitations (3 & 4 Will. 4. c. 27), was stated vaguely and generally, and previous litigation with reference to the same subject-matter led to the conclusion, which was confirmed by an affidavit filed on the plaintiff's behalf, that the allegations were an afterthought and wholly incapable of proof,—Held, that the action was properly dismissed as an abuse of the process of the Court.

The decision of the Court of Appeal affirmed.

This was an appeal from a decision of the Court of Appeal, which reversed one of Stirling, J.

The action was brought by the appellant to recover possession of certain lands in Lancashire, Yorkshire, and Durham. The statement of claim alleged: 1. That the plaintiff was entitled to the possession of the estates in question. 2. That Richard Towneley died seised in fee and in possession of these estates in 1706. 3. That the premises were vested in the plaintiff as heir-at-law of Richard Towneley. It also alleged alternatively: 4. That Jonathan Lawrance the younger died seised in fee and in possession of the premises in 1816. 5. That the premises were vested in the plaintiff as heir-at-law of Jonathan Lawrance the younger. The statement of claim then proceeded: 6. To trace the heirship from Richard Towneley to Jonathan Lawrance the younger, and from him through his son Lebius Law-

rance, who died in 1818, to the plaintiff, whose father died in 1884. He alleged that the eight ancestors through whom he traced his descent had all died intestate.

The following allegations were also made:—

7. "Upon the death of Jonathan Lawrance the younger, John Towneley wrongfully took possession of the premises in paragraph 1."

8. "The said Lebius Lawrance, and the persons deriving title through him, have been deprived of the premises by means of the fraud of the said John Towneley, which was concealed from the said Lebius Lawrance and the persons deriving title through or under him. The following are the particulars:—

"A. Jonathan Lawrance the younger was for many years, and until shortly before his death, out of possession of the said premises. He came from America (where he resided) to England for the purpose of establishing his title to the premises, and brought an action, or actions, for the recovery of the possession thereof, and partly by means of such actions, and partly under or by virtue of a deed of compromise to which the said John Towneley was a party, he recovered possession of the premises.

"B. Jonathan Lawrance the younger died, in 1816, intestate, seised of the premises in fee simple, and also possessed of divers documents constituting the evidence of his title to the premises, including divers certificates proving the pedigree stated in paragraph 6, so far as the same then existed, and also the said deed of compromise.

"C. Lebius Lawrance was the eldest son and heir-at-law of Jonathan Lawrance.

"D. At the time of the death of Jonathan Lawrance the younger, Lebius Lawrance was resident in the United States of America, and was ignorant of the said actions and of the said compromise, and that Jonathan Lawrance the younger had recovered possession of the premises, and of his death, and that he died intestate, and that he was entitled to the said premises, and that he was seised thereof at the time of his death, and that he was in

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possession thereof, and that he was possessed of the said documents and evidences of title.

"*E.* The solicitors in England of the said Jonathan Lawrance the younger, who had been employed by him in and about the said actions, compromise, and other proceedings mentioned in paragraph *A*, and who were employed by him as his solicitors in all matters connected with the Towneley estates down to and at the time of his death, were aware of all the facts mentioned in sub-paragraphs *A* to *D*, both inclusive, and were also acquainted with the address in America of the said Lebius Lawrance, and intended and were about to communicate to the said Lebius Lawrance the facts mentioned in sub-paragraphs *A* and *B*; but the said John Towneley fraudulently, and with intent to deprive the said Lebius Lawrance of the said premises, induced and procured such solicitors not to communicate, and in fact they did not communicate, the said facts to the said Lebius Lawrance; but to conceal, and they did in breach of their duty to the said Lebius Lawrance and the said Jonathan Lawrance the younger conceal, from the said Lebius Lawrance the said facts, and that the said Lebius Lawrance had become entitled to the said premises as the heir-at-law of the said Jonathan Lawrance the younger. By reason thereof the said Lebius Lawrance remained ignorant of the said facts.

"*F.* At the time of the death of Jonathan Lawrance the younger the documents and evidences of title mentioned in sub-paragraph *B* were in the possession of the solicitors mentioned in sub-paragraph *E* as the solicitors for the said Jonathan Lawrance the younger, upon whose death the said Lebius Lawrance became entitled to the same, but the said John Towneley, fraudulently and with such intent as aforesaid, induced and procured the said solicitors to deliver to him, and they did in breach of their duty as aforesaid deliver to him, the said documents and evidences including the said certificates and deed of compromise then belonging to the said Lebius Lawrance, and the said John Towneley thereupon fraudulently and with such intent as aforesaid destroyed the same."

G. [This paragraph alleged the fraudulent destruction of a tombstone.]

"*H.* By reason of the premises the said Lebius Lawrance and the persons claiming under him, and mentioned in paragraph 6, remained ignorant of their title to the said premises until the year 1886."

Then followed allegations that the defendants were wrongfully in possession of the premises, that they derived their title from John Towneley, but not as *bona fide* purchasers for valuable consideration, that the plaintiff did not discover the fraud till 1886, and that it could not have been discovered sooner by reasonable diligence. The plaintiff claimed possession of so much of the premises as were in the defendants' possession, a declaration of his title to so much as was in the possession of tenants, an account of rents, and a receiver.

In a previous action commenced in 1886, in the Queen's Bench Division, the same plaintiff had sued the same defendants to recover the same and other property. The statement of claim made allegations as to the property now in question identical with the first six paragraphs referred to above, and then simply stated that the defendants were wrongfully in possession. On the 29th of October, 1886, the defendants took out a summons to have the statement of claim struck out as disclosing no reasonable cause of action, or the action stayed or dismissed as frivolous and vexatious. The summons was referred by the Master to the Judge, and by the latter to a Divisional Court, and on the 6th of November, 1886, a notice of motion to the like effect as the summons was served. On the 22nd of November, the plaintiff took out a summons for leave to amend his statement of claim. The proposed amendment made the claim very similar to that in the later action, but the allegations as to the action and the deed of compromise by Jonathan Lawrance were not included, nor was it stated that the solicitors of Jonathan Lawrance knew anything of Lebius Lawrance.

The applications of the plaintiff and the defendants were heard together by Lord Coleridge, C.J. and Day, J., in June, 1887, who refused leave to amend, and

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dismissed the action. In doing so they noticed the vagueness of the allegations, the fact that the solicitors of Jonathan Lawrance were not named, and the absence of any allegation that the solicitors knew anything of Lebius Lawrance.

The present action was brought in the Chancery Division in December, 1887, and the defendants separately moved to strike out the statement of claim as disclosing no reasonable ground of action, and to dismiss the action as frivolous and vexatious.

Stirling, J., before whom the motion was made, adjourned it for evidence as to the reasons why the allegations of fraud had not been made at first, and as to the grounds for making them.

The plaintiff filed an affidavit by J. F. Jaques, a retired American colonel, to the following effect. He had been formerly employed as the agent and attorney of the plaintiff's father for the purpose of collecting proofs of his title to the estates, and, since the death of the father in 1884, he had acted as attorney and agent of the plaintiff for the purpose of establishing his title to the estates. He was first employed by the father in 1879, and went on collecting proofs till 1885. He went on to say, "In the year 1885, I finally succeeded in obtaining what I believe to be conclusive proofs of the facts alleged in clauses A, B, E, and F of the 8th paragraph of the statement of claim in this action." In a subsequent paragraph he deposed that, from the facts ascertained by him personally and from facts ascertained by other persons who had been engaged from time to time in investigating the title to the estates, he firmly and sincerely believed that the allegations in paragraph 8, and every of them, were true, and that the same would be proved at the trial. He gave as the reason for commencing that action without any allegation of fraud that he had come to the conclusion that the fraud need not be mentioned in the pleadings, unless the defendants pleaded the Statute of Limitations, and that then the fraud could be alleged. He stated that he was desirous not to communicate more facts than he considered necessary, as he had reason to believe that solicitors whom he

had formerly instructed to act for the plaintiff had communicated to the then solicitors of the defendants, particulars which he had stated to them as to the fraud, and that such information had been used to the prejudice of the plaintiff.

The motions were heard by Stirling, J., on the 13th of April, 1888, and by him dismissed with costs.

The defendants appealed, and on the 15th of June, 1888, the Court of Appeal reversed the decision of Stirling, J., and made an order dismissing the action as an abuse of the process of the Court.

Warmington, Q.C., and *Upjohn*, for the appellant.—The statement of claim disclosed a good cause of action, and would not have been demurrable before the Judicature Acts. The facts stated amount to a "concealed fraud" within 3 & 4 Will. 4. c. 27. s. 26—*Petrie v. Petrie* (1). It is alleged that the plaintiff was deprived of the estates by a concealed fraud, and particulars are given of a fraud which might have had that effect. This is sufficient without an exact statement of the way in which the fraud prevented the plaintiff from obtaining his rights. Pleadings are not to be construed so strictly as when demurrers were in use—*Dadswell v. Jacobs* (2) and *The Republic of Peru v. The Peruvian Guano Company* (3). If the statement of claim be bad it may be amended; the action ought not to be dismissed. The Court of Appeal did not act under Order XXV. rule 4, but under its inherent jurisdiction, independent of the rules. Their reason for dismissing the action practically amounted to this, that the case made by the appellant is highly improbable. Improbability is not a good ground for such a decision. A party has a right to a hearing—*Seaton v. Grant* (4). In all previous instances where the power has been exercised of dismissing an action as an abuse of process, no question arose as to the facts, but the statements of

(1) 1 Drew. 371.

(2) 56 Law J. Rep. Chanc. 233; Law Rep. 34 Ch. D. 281.

(3) 56 Law J. Rep. Chanc. 1081; Law Rep. 36 Ch. D. 489.

(4) 36 Law J. Rep. Chanc. 638; Law Rep. 2 Chanc. 459.

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claim disclosed no ground of action—*Castro v. Murray* (5), *Dawkins v. Prince Edward of Saxe-Weimar* (6), and *The Metropolitan Bank v. Pooley* (7).

Rigby, Q.C., Jeune, Q.C., and W. B. Trevelyan, for the respondents, were not called upon.

Cur. adv. vult.

LORD HERSCHELL.—This is in some respects an extraordinary case. The present appellant, who is the plaintiff, commenced an action in the Queen's Bench Division in June, 1886, against the same defendants, claiming to recover possession of the Towneley estate, in the county of Lancaster. By his statement of claim, he alleged title alternatively as the heir-at-law of Richard Towneley, who died in 1706, and as the heir-at-law of Jonathan Lawrance the younger, who died, seised of the premises claimed, in 1816. A summons was taken out to dismiss the action, on the ground that no reasonable cause of action was disclosed, and that it was frivolous and vexatious. This summons was referred by the Judge at chambers to the Divisional Court, and whilst the matter was pending there, the appellant took out a summons for leave to amend, which was also referred to the Divisional Court to be heard with the other summons. The proposed amendments were framed with the view of shewing such a concealed fraud as would prevent the lapse of time operating, by virtue of the Statute of Limitations, as a bar to the action. In the result the Court made an order dismissing the action. This was admitted to be inevitable, unless the proposed amendments were allowed, and the Court considered that, under the circumstances before them, leave to amend ought not to be granted. The present action was then brought in the Chancery Division against the same parties, upon the same title, and to recover the same estate, the allegations designed to avoid the operation of the Statute of Limitations comprising those

embodied in the proposed amendments. Where an action is thus brought, on a title which accrued more than seventy years ago, to dispossess those who, or whose predecessors, have been in possession during that length of time, it is obvious that the allegations by which it is sought to prevent the statute being a bar need to be closely scrutinised. I will first call attention to what a plaintiff must prove in order to oust the ordinary operation of the statute. The Act says, "In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by such fraud shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered." It is not enough, therefore, to prove a concealed fraud; the person bringing the suit must shew that he or some person through whom he claims has been by such fraud deprived of the land which he seeks to recover, and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action was brought.

I proceed now to consider the allegations made in the statement of claim. It is noteworthy at the outset that testamentary disposition has been apparently unknown in the family, for every person named in the pedigree is alleged to have died intestate. The connecting link between the families of Towneley and Lawrance is said to have been Mary, the daughter of Richard Towneley, who married one John Lawrance, and died in America in 1742. She became heiress of Richard Towneley on the failure of the issue of his son Charles. When this event occurred is not stated, but it appears to have taken place many years before 1816, for it is alleged that Jonathan Lawrance the younger was "for many years and until shortly before his death out of possession of the premises." He came from America, where he resided, to establish his title to the property, but at what date is not stated. He employed solicitors in England, and brought an action or actions,

(5) 44 Law J. Rep. M.C. 70; Law Rep. 10 Exch. 213.

(6) 45 Law J. Rep. Q.B. 567; Law Rep. 1 Q. R. D. 499.

(7) 54 Law J. Rep. Q.B. 449; Law Rep. 10 App. Cas. 210.

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in what Court does not appear. He made a compromise with one John Towneley, whose position in regard to the property is not disclosed. "Partly by means of such actions, and partly under or by virtue of the deed of compromise," Jonathan Lawrance recovered possession of the Towneley estates. He died in 1816, seised in fee, and in possession of those estates. He left behind him as his heir-at-law his son, Lebius Lawrance, who was then grown up, and had a son born to him two years afterwards. But, until 1886, Lebius Lawrance, and the persons claiming under him, remained ignorant of their title to the property. That is the story told in the statement of claim.

The story of the fraud, which is said to be a concealed fraud within the meaning of the Statute of Limitations, and to have deprived Lebius Lawrance, and those claiming under him, of the property in question, is equally singular. It is this: On the death of Jonathan Lawrance, his solicitors in England, who had in their possession the evidences of his title and the deed of compromise, were about to communicate to Lebius Lawrance, whose address in America they knew, the facts that his father had recovered the estates and died intestate seised of them. But John Towneley, the party to the deed of compromise, having wrongfully taken possession of the Towneley estates, intervened and fraudulently induced them not to make the communication. He further fraudulently, and with intent to deprive Lebius Lawrance of the property, induced the solicitors to deliver to him the evidences of Jonathan Lawrance's title to the property, including the deed of compromise, and having thus obtained possession of them, he fraudulently, and with the intent aforesaid, destroyed those documents. It is also alleged that John Towneley fraudulently, and with the same intent, procured to be taken up and destroyed the tombstone erected over the grave, at Walpole, in the State of Massachusetts, of Mary Towneley, afterwards Mary Lawrance, and her husband, "on which certain material particulars establishing the identity of the said Mary Towneley, and certain material particulars of her family, were inscribed," Lebius and his son being

ignorant of the facts inscribed on the tombstone.

Assuming that it could be proved that the solicitor abstained, at the instance of John Towneley, from communicating to Lebius Lawrance the facts with which they would otherwise have made him acquainted, how would this shew that the non-communication of these facts by the solicitors deprived Lebius Lawrance, or his successors in title of the estate? It does not appear to me to be a natural or necessary consequence. He knew that he was the heir-at-law of his father, and I take it that he knew also that his father had gone from America to England for the purpose of establishing his title to the estate. I say this because in paragraph D, where the state of ignorance of Lebius Lawrance at the time of his father's death is as to certain facts elaborately averred, he is not alleged to have been ignorant of this. An heir-at-law of one who, as far as appeared to him, had died intestate (for, if he knew nothing of any will, he would naturally assume this) would ordinarily be led to make enquiries for the purpose of ascertaining what property his ancestor had died possessed of—and the more so if he knew that the person to whom he was heir, laid claim to an estate, and had shortly before his death gone to England to establish his title to it. The fraud, if committed, shut up one avenue only by which Lebius Lawrance could have ascertained his rights; it left all others open. And I am not prepared to say that, if it were proved beyond doubt, it would make good the essential element in the chain of proof—namely, that the plaintiff had thereby been deprived of the estate. What is there to shew that, in spite of the fraud, Lebius or his successor might not with diligence have ascertained their rights. No circumstances are stated here to shew how in the present case the fraud had an effect which, as I have said, does not appear to me to be a natural or necessary consequence of it. This was the view taken by Mr. Justice Stirling.

And I think the same observation applies to the suggested destruction of the tombstone. What is there to shew that Lebius Lawrance or his successors knew of the existence of the tombstone, or would

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have done so but for its destruction, or that with due diligence they could not otherwise have ascertained the facts which they would have derived from an inspection of it?

Mr. Justice Stirling, however, thought the allegation that John Towneley had fraudulently obtained possession of the deed of compromise and other evidences of title and destroyed them, would, if established, be sufficient to sustain a charge of concealed fraud within the meaning of the statute. The Court of Appeal expressed no opinion upon this point. I propose to take the same course. But I must observe that it is not stated how or when the fraud was discovered. For aught that appears, so far as the facts are stated, the rights of the appellant's predecessors might have been ascertained, and the means of establishing them obtained half a century ago.

The statement of claim being of the character I have described, I think it becomes important to consider the history of the litigation by which the appellant has sought to assert his alleged right, and to ascertain the origin of the allegations which it contains. Mr. Justice Stirling was disposed at first to treat these allegations as mere fiction, but he ultimately allowed the plaintiff to adduce evidence to shew that they were not so. The Court had, therefore, before it all the explanation which the plaintiff or his advisers have to offer of the development which the charges of fraud undoubtedly exhibit since they first took shape, and all the facts which can be suggested to shew that the claim is a genuine one.

The suggestion of a concealed fraud appears for the first time in a crude form in the amended statement of claim submitted to the Queen's Bench Division. The alleged reason why the original statement of claim was silent on the subject was, in substance, this: that Colonel Jaques, the agent of the plaintiff, late in the American army, who had been called to the bar in America, would neither take the law from his own counsel nor trust his own solicitors with the facts, lest perchance they should fall into the hands of the enemy. He had read a reported case which led him to differ from the counsel

who was advising him, and he had reason to believe, he says, that some other solicitors whom he had previously instructed "to follow up the clues" which he gave them in reference to the claim had betrayed his confidence.

A comparison of the statement of claim in this action with the proposed amendment in the Queen's Bench Division shews a distinct growth in the charges of fraud. Neither the tombstone, nor Jonathan Lawrance's litigation, nor the deed of compromise, has any place in the amended statement of claim submitted to the Queen's Bench Division. There was, however, an allusion in the course of the argument to a tombstone, and the appellant's solicitor is careful to explain that the story of the tombstone was, in substance, to be found in the instructions laid before counsel to settle the amendments; but he is unable to say why it was omitted from the proposed amendments. I can only draw the inference either that it was not then thought of sufficient importance to be put forward, or that it was known to be incapable of proof. The story of the litigation and of the deed of compromise seems to be of later origin, and to owe its existence to the discussion in the Queen's Bench Division. The only allegation in the statement of claim then prepared was, that John Towneley obtained from the solicitors, and destroyed, "the evidence of title to the said premises." The counsel who was resisting the application to amend argued, upon this, that the best thing that could happen to the heir-at-law would be to destroy the deeds. What was the answer given by the counsel for the plaintiff? He said that the case had been argued as if the documents which constituted evidence of title must have been deeds; but when the heir-at-law claims through a pedigree, as Lawrance did, the best evidences of title are the certificates of births, deaths, and marriages. Not a word about actions ending in a deed of compromise by which the ancestor obtained possession of the estate. And yet the destruction of this deed is one of the most—indeed, perhaps the most—material allegations in the present statement of claim.

The main point to which the learned Judges in the Queen's Bench Division

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directed the attention of the appellant's counsel was the apparent impossibility of bringing forward any proof of such a fraud as that alleged to have been committed so far back as the year 1816. As to this, the learned counsel stated that reliance would be placed on one Richardson, who was said to have been a clerk in the office of the solicitors who acted for Jonathan Lawrance. Richardson was said to be in America, and it was admitted that he must at that time have been probably upwards of ninety years of age. Extracts were read from two letters of his, written more than thirty years ago, to certain persons whose connection with the present case did not appear, referring, apparently, to some claim to the personal property of a Lawrance, and offering his assistance for a 5*l*. note. But these letters contained no allusion of any kind to any fraud. Then it was said that Richardson had made some verbal communications to somebody in Court "in connection with the fraud." And beyond that counsel could not go. On the materials before them the Queen's Bench Division thought the story unworthy of serious attention.

Mr. Justice Stirling, as I have said, though at first disposed to treat the allegations in the statement of claim as fiction, gave the plaintiff an opportunity of filing affidavits. The affidavit of Colonel Jaques was accordingly filed. I agree with the Court of Appeal that it is impossible to conceive anything more shadowy or unsatisfactory than that gentleman's affidavit. It does not shew how or when the alleged fraud came to be discovered. It does not shew—as might easily have been done if the allegations were true—when, and in what Court, the alleged action or actions were brought. It proffers no explanation of the strange circumstance that Lebius Lawrance never enquired or never learned what his father, whose heir he was, died possessed of. There is no reference in it to Richardson, nor is there any suggestion that any means of proving the appellant's allegations can be found in any other quarter.

It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought

to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved. But the Court of Appeal did not proceed on that ground. They took into consideration all the circumstances of the case. We have, to begin with, a statement of claim which, if it discloses a concealed fraud within the meaning of the statute, does so in the barest fashion, with much that is most material left vague and undefined when there ought to have been distinctness and precision. Moreover, this is not the first, but the third, edition of a statement of claim delivered with the object of recovering the Towneley estate; and when we review the history of the litigation there is much to lead to the belief that important allegations now made were an afterthought, the result of criticisms of the earlier form in which the charges of fraud were presented, and that the charges thus raised against persons long dead are wholly incapable of proof. These impressions might have been dissipated by the affidavits filed on behalf of the appellant; but they have not been so. On the contrary, I think they have been strengthened. Both in what it says and in what it does not say, Colonel Jaques's affidavit confirms in my mind the impression that the case has not a solid basis capable of proof, but that the story told in the pleadings is a myth, which has grown with the progress of the litigation, and has no substantial foundation. For these reasons, I concur with the Court of Appeal in thinking that the action is an abuse of the process of the Court. I accordingly move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON.—This is a case of a very unusual character. Your Lordships are of opinion that its circumstances are such as to justify the exceptional treatment with which it met in the Court of Appeal. I shall endeavour, without entering into minute details, to indicate the reasons which have led me to the same conclusion.

At the time when this suit was brought

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on the Chancery side of the High Court, more than seventy years had elapsed from the date at which the title alleged by the appellant accrued; and, during the whole of that period, the respondents and their predecessors remained in the undisturbed possession of the lands which he is now, for the second time, and upon substantially the same grounds, attempting to recover from them. It is sufficiently obvious, on the face of the previous common law action, as well as of the present proceedings, that the appellant's claim is barred by the Statute of Limitations, unless he can shew, in terms of section 26, that he has hitherto been fraudulently deprived of his estate, and of the means of recovering it.

The 26th clause of the Act reserves no remedy against purchasers for value; but the respondents do not stand in that position; and it is conceded that they are affected by the acts of their ancestor, John Towneley, to whom the frauds alleged in his pleadings are imputed by the appellant. But it is not any and every fraud which will elide the provisions of the statute, and keep alive a right of action for recovery of the lands. In order to constitute a fraud which will have that effect, these statutory requirements must be fulfilled. In the first place, it must be a fraud which has deprived the plaintiff of his land; and, in the second place, it must be a concealed fraud, in this sense, that it was not only unknown to the plaintiff, and to those through whom he derives right, but could not, with reasonable diligence, have been discovered by him or them before the commencement of the twelve years immediately preceding the institution of his suit. The onus is, therefore, upon the appellant to allege and prove that the frauds of which he complains were of such a nature, or were perpetrated in such circumstances, that neither he nor his predecessors entitled for the time being could have come to the knowledge of them, by the exercise of reasonable diligence, during the fifty-nine years which followed the death of his great-grandfather, Jonathan Lawrance, in 1816.

In my opinion, a plaintiff who desires to avail himself of the provisions of section

26 is not released from the ordinary rule of pleading applicable to cases of fraud, which was thus expressed by Lord Chancellor Selborne in *Wallingford v. The Mutual Society* (8). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice." It is not a sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or some one for whose action he is responsible, did commit a fraud of some kind. There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and the injuries complained of stood to each other in the relation of cause and effect.

When a plaintiff, in order to escape from the Statute of Limitations, brings charges of concealed fraud, for the first time, at a distance of seventy years, it appears to me that the duty of making a full and candid statement is specially incumbent upon him. And unless the nature of the frauds alleged is in itself calculated to suggest the improbability of their being discovered by ordinary research, it is equally his duty to state the considerations to which he ascribes his ignorance of their existence. The amount and kind of explanatory statement required in order to impart relevancy to such charges will necessarily vary according to circumstances. But I have rarely seen a case in which fulness and candour of statement were more imperatively required than in the present; and I have met with no other case in which both were so studiously withheld. The appellant argued, as might have been expected, that he could not make a fuller statement without detailing his evidence. That is the usual excuse put forward when an

(8) 50 Law J. Rep. C.P. 49; Law Rep. 5 App. Cas. 685.

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attempt is made to launch a tentative charge of fraud, in vague and general terms; and it rests on no better foundation than the fallacious assumption that a statement of facts and circumstances admitting of proof is the same thing with a statement of the evidence required to substantiate them.

I purposely avoid particular criticism of the defects of averment which I find in the appellant's statement of claim. One observation I think it right to make, and it is this: that his averments, so far from excluding, seem to me to point directly to the inference that the alleged frauds (if they ever were committed) could, with due diligence, have been easily discovered at any time after the news of Jonathan Lawrance's death became known to his relatives in America. Stripped of its general assertions, which are of no relevancy, the statement of claim presents to my mind a tissue of improbabilities which ought not to be sent to proof.

Such being the opinion which I entertain with respect to the character of the appellant's allegations, I concur with the Court of Appeal in thinking that the present action is in the strictest sense of the words vexatious and oppressive. With a view to that result, it is legitimate to examine not only the pleadings in this suit, but the whole probabilities of the case, and the judicial history of the claim, from first to last, which is a very singular and suggestive one. These considerations satisfy me that the order appealed from ought to be sustained, not in pursuance of any Order or rule, but in virtue of the inherent jurisdiction of the Court to prevent abuse of its procedure.

LORD MACNAGHTEN.—I concur.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—H. Thomas, for appellant; Witham, Lambert & Roskell, for respondents.

[IN THE COURT OF APPEAL.]

COTTON, L.J.	} <i>In re THOMPSON.</i> BEDFORD v. TEAL.
BOWEN, L.J.	
FRY, L.J.	
1890.	
June 25.	

Charity—Bequest to—Corporation Bonds—Charge on Surplus Borough Fund—Pure Personality—Mortmain Act (9 Geo. 2. c. 36).

A charge upon a borough fund existing either under the Municipal Corporations Act, 1835, s. 92, or the Municipal Corporations Act, 1882, Part VII., and partly arising from rents of real estate and partly from other sources, is a charge on the surplus remaining in the hands of the corporation after the payments directed by the Acts have been satisfied, and does not give the holder an interest in land within 9 Geo. 2. c. 36.

A mortgage was created on a district fund under an Act which did not expressly incorporate section 175 of the Public Health Act, 1875, which directs that surplus lands shall be sold and the proceeds applied towards the discharge by means of a sinking fund, or otherwise, of any principal moneys which may be borrowed upon the security of the district fund:—Held, without expressing any opinion whether or not section 175 might apply if the district fund had been in part constituted of the proceeds of sale of surplus land, that there was no evidence that the corporation had any surplus lands, and that the mortgage was not a charge upon an interest in land within 9 Geo. 2. c. 36.

Decision of STIRLING, J. (reported ante, p. 249), on these points reversed.

This was an appeal from that part of the decision of Stirling, J. (reported ante, p. 249), by which he held that certain corporation bonds were impure personality and could not be given to charity.

The bonds in question were as follows:—

1. A mortgage of the Dewsbury Corporation for 500*l.*, dated the 7th of October, 1878, and expressed to be made under the Batley Corporation Waterworks Act, 1871, and the Dewsbury and Heckmondwike Waterworks Act, 1876, and to be a mortgage of the share and interest of

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the mayor, aldermen, and burgesses in the rates, rents, and moneys to be received in respect or by means of the waterworks of the Dewsbury and Heckmondwike Waterworks Board, and also, as a collateral security, the borough rates and borough fund or general district rate and public water rates of the said borough. By the Act of 1876, section 111, the corporation were empowered to charge the borough fund as a collateral security. With reference to the borough fund, the town clerk deposed as follows: "The corporation is seized or possessed of the following hereditaments and real estate—that is to say, (a) the Town Hall, now in course of construction upon freehold land acquired by the corporation for the purpose; also the borough offices of Dewsbury, held by the corporation for an unexpired term of years under a lease thereof granted to the said corporation; some portions of the borough offices, which are not required or constantly used by the corporation for their own use or that of their officers, are sublet by the corporation to the School Board, the Waterworks Board, and the Chamber of Commerce of Dewsbury, as yearly tenants thereof at certain rents, which rents are paid to the treasurer of the corporation, and are by him carried to the credit of the account of, and form part of, the borough fund."

The Dewsbury borough fund exists by virtue of the Municipal Corporations Act, 1835 (5 & 6 Will. 4. c. 76), s. 92 (1).

(1) The Municipal Corporations Act, 1835, section 92, provides that the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging to any corporate body, shall be carried to the account of a fund to be called the "borough fund"; and such fund, subject to the payment of any lawful debt due from such corporate body to any person, contracted before the 9th of September, 1835, and unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon real or personal estate of any body corporate by virtue of any proceedings either at law or in equity which have been already instituted, or which may hereafter be instituted, or by virtue of any mortgage or otherwise, shall be applied to various specified purposes, including the payment of the salaries of the mayor, recorder, and other officers, and in case the borough fund shall be more than sufficient for the purposes

2. A mortgage of the Bradford Corporation for 400*l.*, dated the 1st of April, 1887, and expressed to be made under the Bradford Improvement Act, 1850, and in exercise of all other powers vested in the said corporation or enabling them in that behalf, and to be a mortgage of the borough fund of the said borough, and the rates, rents, and profits, and other moneys forming such borough fund, or arising or accruing from the said borough fund.

The Bradford Improvement Act, 1850, constituted the corporation the local board of health; but it did not authorise them to charge the borough fund. The corporation were, however, authorised, as the local authority, to charge the borough fund by the Tramways Act, 1870, and by a provisional order obtained thereunder from the Board of Trade.

The town clerk deposed that the corporation were seized and possessed of, *inter alia*, the following real or leasehold property: the Town Hall of Bradford, the markets and market-places situate in Bradford acquired by the corporation under the Bradford Corporation Act, 1866, and certain surplus lands acquired by the said corporation for the purpose of effecting an enlargement of the Town Hall and improvements of the streets in the said borough, but which had not yet been used for that purpose, and in the meantime were let to several persons as tenants of the said corporation at yearly or other rents.

The Bradford borough fund exists by virtue of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 56), Part VII., the provisions of which are substantially the same as those of section 92 of the Act of 1835.

3 and 4. Two mortgages of the Wakefield Corporation for 500*l.*, dated respectively the 10th of May, 1881, and the 9th of December, 1884, and respectively expressed to be made under the Wakefield Corporation Waterworks Act, 1880, and to be mortgages of the share and interest of the mayor, aldermen, and burgesses in the revenues to be received in respect or

aforsaid, the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and the improvement of the borough.

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by means of the waterworks authorised by the said Act, and also as a collateral security the general district rates and district fund of the said borough. By section 58 of the aforesaid Act, "for securing repayment of moneys borrowed under the authority thereof, the said corporation may mortgage the water revenues and the district fund and general district rate, or either of them." With reference to the district fund, the town clerk deposed that it consisted "of the income and profits accruing from the various undertakings of the corporation, the proceeds of the said general district rate, contributions from the county authority and from the Government in respect of the maintenance of main roads, and the rent of a cottage, the site of which with other surplus lands was acquired by the corporation under the Public Health Act, 1875 (38 & 39 Vict. c. 55), for the purposes of their sanitary department or undertaking.

These mortgages or bonds were the property of John Robert Thompson, who, by his will, gave several pecuniary legacies to charitable institutions, which he directed should be paid exclusively out of such part of his personal estate as might be legally bequeathed for charitable purposes.

The further facts of the case are set out in the report of the case before Stirling, J., *ante*, p. 249.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the appellants, charitable legatees.—With regard to the Dewsbury and Bradford bonds, they are charges on the respective borough funds. Those funds respectively exist by virtue of the Municipal Corporations Act, 1835, section 92, and the Municipal Corporations Act, 1882, the provisions of the Acts with respect to the borough fund being similar. Out of the fund certain payments mentioned in the 92nd section have to be made, and, when they are satisfied, power is given to the corporation to apply the surplus, if any, for the benefit of the inhabitants of the borough. The charge is not on the borough fund generally, but on the balance after payment of the sums specified in the schedule, and it does not confer on the mortgagee any right to go upon the land or to take rents from the tenants. It is

analogous to a charge upon a railway which gave to the mortgagee an interest in the net result, and was held in *Attree v. Howe* (2) not to give the mortgagee an interest in land within 9 Geo. 2. c. 36. The saving clause in section 92 of the Act of 1835 as to rights, interests, claims, or demands of any persons in or upon any real or personal estate of any body corporate by virtue of any proceedings at law or equity which have been already instituted, or which may hereafter be instituted, or by virtue of any mortgage or otherwise, applies to rights existing at the time of the passing of the Act, and does not give a mortgagee, in the case of mortgages created after the Act came into operation, any right against the land. The charge here is on the floating balance, not on the sources of the fund; and the case is, therefore, distinguishable from *In re David*; *Buckley v. The Royal National Life-boat Institution* (3).

The Wakefield mortgages are charged upon the district fund under the Wakefield Corporation Act, 1880. That fund is not fed by the rents and profits of land. Section 175 of the Public Health Act, 1875, which empowers any local authority for the purposes of the Act to purchase or take on lease, sell, or exchange, whether situated within or without their district, and requires that surplus lands shall be sold, and the proceeds of such sale shall be applied towards discharge, by a sinking fund or otherwise, of any principal moneys which have been borrowed on the security of the district fund, is not expressly incorporated in the Act of 1880, although other sections are; and, therefore, it does not apply. Moreover, there is no evidence that any part of the district fund arises from the proceeds of sale of surplus lands. These mortgages, therefore, are not charges on any interest in land within 9 Geo. 2. c. 36.

C. Browne, for the residuary legatees under the will.—The Dewsbury and Bradford mortgages are charged on the borough fund—that is, they are charges upon that which constitutes the fund, and, as this

(2) 47 Law J. Rep. Chanc. 863; Law Rep. 9 Ch. D. 387.

(3) *Ante*, p. 87; Law Rep. 43 Ch. D. 27.

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includes the rents of real and leasehold property, the charges are interests in land within 9 Geo. 2. c. 36—*Brook v. Badley* (4). *Marsh v. The Attorney-General* (5), which is rather against us, was not approved in *Brook v. Badley* (4). The right of a mortgagee of the borough fund to enforce his security is expressly preserved by the saving clause in section 92 of the Act of 1835, and one of those rights would be a right against the land.

[BOWEN, L.J., referred to *Arnold v. The Mayor of Gravesend* (6) and *The Attorney-General v. The Mayor of Newcastle* (7).]

The Wakefield mortgages are charged upon the district fund. Section 209 of the Public Health Act, 1875, provides for the constitution of the district fund. Section 175 of that Act, although it is not expressly incorporated in the Wakefield Waterworks Act of 1880, would apply to these mortgages; it expressly requires that surplus lands of the corporation shall be sold, and the proceeds shall be applied towards the discharge of mortgages on the district fund. These mortgages are, therefore, charged on a fund partly constituted of the proceeds of sale of real estate, and are, therefore, interests in land within 9 Geo. 2. c. 36.

F. Hoare Colt, for the trustees of the will.

COTTON, L.J.—This is an appeal from Mr. Justice Stirling with regard to certain bonds of three municipal corporations, which he has held to create an interest in land within the Act 9 Geo. 2. c. 36. I do not use the expression "impure personality" or "personalty savouring of realty," for what the Act speaks of is an interest or interests in land, or a charge or incumbrance affecting land.

The Bradford bond and Dewsbury bond really come within the same class, although one is a charge on the borough fund of the corporation under the Municipal Corporations Act, 1835 (5 & 6 Will. 4. c. 76),

and the other on the borough fund under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50); that makes no practical difference, as the provisions of the two statutes as to the borough fund are substantially the same. Now, although the Dewsbury bond and the Bradford bond charge other things besides the borough fund, the respondents rely solely upon the fact that they charge the borough fund. They urge that the borough fund consists in part of rents arising from real estate, and that a mortgage of it is therefore an interest in or a charge upon land within the meaning of 9 Geo. 2. c. 36. Now, the borough fund no doubt does, to a certain extent, arise from rents of land; but what is to be done with them when they become part of the borough fund? In my opinion, the Act of 5 & 6 Will. 4. c. 76. s. 92, imposes a statutory duty upon those who administer the corporation funds to apply the borough fund for the purposes there mentioned; and although there is in that section a saving clause in favour of persons claiming under any mortgage, it is, in my opinion, only a saving of the rights of those who, at the time of the passing of the Act, had charges, with the rights existing under which the Legislature did not think it just to interfere. A saving clause, as a general rule, is not intended to give power to a corporation or body to do something which they could not otherwise do, but to prevent the enactment from interfering with rights already acquired. On the true construction of these bonds they do not, in my opinion, purport to charge the borough fund before the duties mentioned in section 92 are performed by the corporation. The object of the Acts under which the Corporations of Bradford and Dewsbury gave the bonds which are before us was to enable them to do what they otherwise could not do—namely, to charge beforehand that portion of the borough fund which in each year would, after satisfying the liabilities imposed by section 92, remain in their hands to be applied for the benefit of the inhabitants and the improvement of the borough. If a power were not given to charge that surplus beforehand, it might be said—and, as I think, correctly—that the corporation could not, until it arose, determine how it was to be applied for the

(4) 37 Law J. Rep. Chanc. 881; Law Rep. 3 Chanc. 672.

(5) 2 Jo. & H. 61; 30 Law J. Rep. Chanc. 253.

(6) 2 Kay & J. 574; 25 Law J. Rep. Chanc. 530.

(7) 58 Law J. Rep. Q.B. 558; Law Rep. 23 Q.B. D. 492, 498.

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benefit of the borough. The funds, then, being only charges on the surplus remaining in the hands of the corporation after they have satisfied the purposes pointed out in section 92, the case comes within the principle of *Attree v. Howe* (2), and, in my opinion, these bonds do not give the holder any interest in land within the meaning of 9 Geo. 2. c. 36. The case stands on precisely the same footing under the Municipal Corporations Act, 1882. This disposes of the Bradford and the Dewsbury bonds.

Then as to the bonds of the Wakefield Corporation. The only point laid hold of with regard to them is that they charge the district fund of the borough, and it is said that this makes a charge upon land or an interest in land within the meaning of the Act of 9 Geo. 2. c. 36. What is relied upon principally—and it seemed to me at first sight to be a strong point in favour of the respondents—is section 175 of the Public Health Act, 1875, which declares that the surplus lands—that is to say, lands that the corporation have acquired, but do not require for the purposes of the Act—shall be sold, and the money arising from the sale shall be applied towards discharging and paying off the money that has been borrowed on the security of the fund or rate applicable for the general purposes of the Act, or, if no principal moneys are outstanding, shall be carried to the account of such fund or rate—that is, the district fund and the general district rates. There may be a grave question, which I do not think it is necessary to answer on the present occasion, whether, where an Act of Parliament directs land to be sold, any charge on the money arising from the sale of that land can ever enable the holder of the charge to take the land. Where no charge is given except upon the proceeds of sale of land which an Act of Parliament directs to be sold and converted into money, can that charge be a charge or interest in land within the meaning of 9 Geo. 2. c. 36? That point may hereafter have to be decided; but it lies on the respondents to shew that this is an interest in land or a charge upon land. How can they shew that? They must shew that there is land which comes within the purview of section 175, and the

proceeds of which are to be applied in payment of these bonds. It does not appear from the evidence that there is any surplus land, unless the cottage is to be taken as such. The cottage now seems to be employed for the purposes of the corporation, and we cannot, in the absence of distinct evidence, hold that it is land which ought to have been sold and the proceeds brought into the district fund.

Another contention was raised by Mr. Cozens-Hardy, that section 175 is not incorporated with the special Act of the Wakefield Corporation. But there is a question—upon which, as it has not been fully argued, I give no opinion—whether this is not a general section, which, without being incorporated, would apply to all lands bought by the corporation and not required for its objects.

BOWEN, L.J.—I am of the same opinion. The question with regard to all these bonds is the question which the Lord Justice Cotton has enunciated—namely, whether they constitute an interest in, or charge on, land within the statute 9 Geo. 2. c. 36. We may divide them into two classes—the Dewsbury and Bradford bonds, and the Wakefield bond. The Dewsbury bond was given under the authority of section 111 of the Dewsbury Waterworks Act, 1876, which authorises the Dewsbury Corporation to create a collateral security on the borough fund. What does that enable them to do? The borough fund exists by virtue of section 92 of the Municipal Corporations Act, 1835, and the character of the fund is shewn by that section. It is a fund which may arise partly from rents; for if the corporation has real property producing rent, the rents are to be carried to that fund. Out of that fund, certain payments specified by the section which are vital to the existence of the corporation have to be satisfied, and the surplus is to be applied for the public benefit of the inhabitants and the improvement of the borough. Is it, then, intended by section 111 of the Dewsbury Waterworks Act of 1876 to enable the creditor who lends money upon the collateral security of the borough fund to get a charge upon the rents of the real property of the corporation before they pass into the fund,

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and before the statutory purposes which are created by section 92 of the Municipal Corporations Act have been satisfied? It is to my mind impossible to suppose that such was the intention of the Legislature. All, therefore, that is charged by the bonds, and the only thing in which an interest is created by them, is the surplus which from time to time may exist or may not exist, and which exists only if the fund is more than sufficient for the statutory purposes which are made a primary charge upon it by the Municipal Corporations Act. The charge is not a charge upon the corporate property, but simply a charge upon a floating balance such as was alluded to by Lord Justice Fry at the end of his judgment in *Buckley v. The Royal National Lifeboat Institution* (3). It is the primary duty of the corporation to apply this fund in satisfying the ordinary municipal wants, and it is impossible, therefore, that a receiver could be appointed of the rents. That disposes of the Dewsbury and Bradford bonds.

The Wakefield bonds were given under section 58 of the Wakefield Waterworks Act, which enables the corporation to mortgage the district fund, and incorporates with regard to the mortgage of the district fund the provisions contained in sections 236 to 239 of the Public Health Act, 1875. The district fund is fed by realty because the proceeds of the sale of surplus land are to be paid into it. Whether by reason of this a charge on the district fund creates an interest in or a charge upon land may be open to doubt. It is not necessary to decide the point in the present case, and I reserve to myself the full right to consider, when the proper occasion arises, the question whether it is possible to treat as an interest in land a security which only affects a fund arising in part from the sale of land which the statute directs to be sold. That question does not arise unless section 175 is a section which we can treat as bearing on those mortgages. Mr. Cozens-Hardy says it is not incorporated with the Wakefield Waterworks Act. It is not incorporated in terms, but I, like Lord Justice Cotton, somewhat doubt whether it is not a general provision that would apply to these mortgages without express incorpo-

ration. But the respondents are met by another difficulty. Section 175 can only be invoked by them if there is surplus land, and it seems to me that their case breaks down because there is no proof that there is any surplus land.

I will say nothing more except to mention that I entirely agree with Lord Justice Cotton in holding that in the saving clause in section 92 the words "by virtue of any mortgage" apply only to existing rights and not to prospective ones. That point seems to me to have been decided by Vice-Chancellor Wood in the case of *Arnold v. The Mayor of Gravesend* (6), and his view has been lately affirmed in *The Attorney-General v. The Mayor of Newcastle* (7).

I agree that the judgment below must be reversed as regards the four bonds before us.

Fry, L.J.—I also find myself unable to agree with the decision of the learned Judge. The questions in controversy have been ranged around two funds, the one the borough fund of a municipal corporation, and the other a district fund created under the Public Health Act, 1875, and the question in each case is whether a charge on the fund is or is not an interest in land or a charge upon an interest in land?

Now with regard to the borough fund I must express my doubt whether in any case a charge on a fund which gives no right to go on anything except the money when it has gone into the fund ever can be a charge upon real estate. It appears to me that money which comes from land in the form of rent, when it has been paid into a bank or otherwise been realised in the form of cash, is pure personal property; and although a charge on that money if it gives in addition a right of going upon the land may be a charge on realty, I at least express a doubt whether a simple charge on the money when it has fallen into the fund ever can be an interest in realty. But it is not necessary to decide that point, for in the present case it appears to me that a charge on the borough fund of a municipal corporation is only a charge on the surplus balance of a fund, arising no doubt partly out of the rents

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and profits of land, and partly out of other sources, which from time to time remains after numerous payments have been made out of the fund. The balance of the fund after the application of part of it to prior charges is, in my opinion, pure personalty, and the person who is entitled to that and nothing more has no interest in the land.

Mr. Browne argued that the saving clause in section 92 of the Municipal Corporations Act, 1835, which saves the rights of all persons and bodies corporate in or upon any real or personal estate of any body corporate by virtue of any proceeding instituted before or after the passing of the Act, "or by virtue of any mortgage or otherwise," gave to the mortgagees whose titles were created subsequently to the Act a right against the fund in priority to the purposes mentioned in the section. But it is to be observed that, according to the ordinary functions of a saving clause, it saves existing rights, and it is not an enabling clause and does not authorise the creation of new rights. Now the right which Mr. Browne argued for is a right subsequently created. I think, therefore, that that clause has no application to the present case.

The considerations with regard to the district fund are to a great extent the same as those which apply to the borough fund, but there are two points of difference. In the first place the district fund itself is not fed by rents and profits of land. So far it is less favourable to his argument; but, on the other hand, there is a section which requires great attention—namely, the 175th section of the Public Health Act of 1875—because that directs that surplus lands shall be sold and the proceeds applied towards the discharge, by means of a sinking fund or otherwise, of any principal moneys that may be borrowed upon the security of the fund or rent. I shall not enter upon the construction of that section, on which many questions may arise, because it does not appear to me from the evidence that the Wakefield corporation has any surplus land. I therefore shall not enter upon an enquiry whether a mortgagee might, if any surplus land existed, obtain by *mandamus* or otherwise a sale of such land, or whether if he had such a right that would

create an interest in land. I leave those questions for further discussion if they should ever arise.

COTTON, L.J.—I think we ought to mention that the ground upon which we have decided this appeal does not seem to have been taken in the Court below, and the attention of the learned Judge was not directed to it (8).

Solicitors—Fowler, Perks, Hopkins & Co., for appellants; Torr, Janeways, Gribble & Oddie, agents for M. Cranswick, Leeds, for trustees; T. W. & T. B. Nelson, agents for Nelson, Eddisons & Lupton, Leeds, for residuary legatees.

CHITTY, J. } MACNEE v. THE PERSIAN
1890. } INVESTMENT CORPORATION
April 18. } (LIMITED).

Injunction—Company—Foreign Lottery
—*Lottery Acts*, 9 Geo. 1. c. 19. s. 4; 6 & 7 Will. 4. c. 66.

A company, acting within the objects for which it had been incorporated, had agreed to purchase a concession by the Shah of Persia for initiating and conducting all operations in the nature of lottery loans throughout the Persian empire, and had issued and advertised a prospectus offering its shares to the public, containing statements enlarging upon the value and importance of the lottery concession, and that "at least five issues had to be made annually in Persia, with minimum drawings of 10,000l." Upon an application by a shareholder, suing on behalf of himself and other the shareholders of the company, for an injunction to restrain the company from acquiring or dealing with the concession and from advertising any such prospectus, —Held, that the lottery enterprise of the company was not an erection of a foreign lottery within 9 Geo. 1. c. 19. s. 4, as that statute contained no prohibition against the erection of foreign lotteries in foreign countries, and that the publication of the prospectus was not an advertisement of a foreign or other illegal lottery within 6 & 7 Will. 4. c. 66, and that the plaintiff had no interest sufficient to support his application.

(8) See, however, the argument as reported in the Court below, *ante*, p. 249.

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This was a motion by the plaintiff, a holder of 150 shares in the defendant company, suing on behalf of himself and all other the shareholders, for an interim injunction to restrain the above-named company from acquiring or dealing with, and to restrain the company and its directors from printing or publishing, or causing to be printed or published, any prospectus, proposal, or scheme for or relating to the acquisition by the defendant company of a concession of the 20th of July, 1889, by the Shah of Persia, for conducting operations in connection with lottery loans or other similar issues in Persia, or any other concession for the like purpose, and from printing or publishing any prospectus, advertisement, or notice in any manner relating to such operations or lottery loans, and from applying or pledging any of the funds of the defendant company in or towards or for the purpose of the acquisition of the concession aforesaid, or any such other concession, or for any purpose connected therewith or in relation thereto.

It appeared that the company was registered on the 26th of November, 1889, and its objects, as stated in its memorandum of association, were, *inter alia* :—

1. To acquire any concessions, rights, or privileges for any objects or purposes whatsoever, granted or to be granted by his Majesty the Shah of Persia, or by any other sovereign, State, Government, power, or authority, which the company may think capable of being profitably dealt with, and to carry into effect, work, exercise, or otherwise turn to account, deal with, or dispose of, any such concessions, rights, or privileges.

2. To carry on all kinds of financial and banking business, and in particular to negotiate loans and advances, to offer for subscription, place, buy, sell, and deal in shares, bonds, obligations, stock, bills, notes, and securities of all kinds.

19. To adopt and carry into effect, with or without modification, the agreement referred to in the company's articles of association, being an agreement made on the 15th of November, 1889, between the Anglo-Asiatic Syndicate, Limited, of the one part, and J. T., as trustee for the then proposed company, of the other

part, for the purchase by the company, for 220,000*l.* in cash and shares, of a concession granted on the 20th of July, 1889, by the Shah of Persia of the exclusive right and privilege, for a period of seventy-five years from the date of the concession, of initiating and conducting, throughout the whole of the Persian empire, all operations relating to loans, redeemable by drawings with bonuses and lotteries, and the promotion of lottery companies, and the sale of lottery tickets ; and

20. To procure the company to be registered or recognised in Persia or elsewhere abroad.

On the 25th of November, 1889, a prospectus was issued and advertised in the newspapers, offering the company's shares, and stating that the company was formed to acquire and work concessions for lottery loans granted by the Shah of Persia, and referring to the importance and remunerative nature of such a concession, and stating as follows :—

"The head-quarters of the system will be in Persia ; but the company will not be limited to that country in the field of its operations, for it is intended, as in the case of the Continental issues above referred to, that the company should be represented by agents in the chief cities of Eastern Europe for the purpose of obtaining subscriptions."

"The intended operations of the company will (pursuant to the terms of the concession) be conducted generally upon the lines adopted in the European States where Government lotteries are in vogue. At least five issues have to be made annually in Persia, with minimum drawings of 10,000*l.*, and it is estimated that these operations should return continuously increasing dividends."

"It is known that lottery loans, in which there are chances of drawings with prizes, are a favourite form of investment, not only with Persian and Oriental capitalists generally, but also for the savings of other classes of the community, who for years past have invested largely in Greek and other loans. It is confidently expected that whenever the Government requires to raise money, local lottery loans issued by the company under its auspices

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will be preferred by native investors, and afford an attractive outlet for the employment of native capital."

On the 13th of January, 1890, a letter was written to the company by the Director of Public Prosecutions, stating that the attention of her Majesty's Government had been called to the prospectus, and that the enterprise described therein was unlawful, and if continued the officers of the company and other persons engaged therein would render themselves liable to the penalties prescribed by the Lotteries Acts. A correspondence ensued, in which the directors stated that they did not intend to advertise the lotteries in this country, and that they had obtained the opinion of counsel advising that the enterprise described in the prospectus was not unlawful. They also stated that they did not intend to issue any further copies of the prospectus. They, however, stated their intention to be to raise in Persia, or in other foreign countries where lotteries were legal, Persian State and other loans by drawings there, but that they intended to take care that when any such lotteries were established or about to be drawn, not to advertise them in any way in this country.

The defendants at the bar also stated that it was not their intention in future to issue or advertise the prospectus complained of, or any other similar prospectus, but they declined to give any undertaking not to do so.

The only Lottery Acts relied upon by the plaintiff, or which were referred to by either party, as material, were 9 Geo. 1. c. 19. s. 4 (1), and the Act to prevent the

(1) 9 Geo. 1. c. 19. s. 4: "And whereas, in order to elude the many good laws made for suppressing unlawful lotteries, several evil-disposed persons have of late presumed to erect and carry on several lotteries, upon pretence and colour of some grant or authority given by foreign princes or states: for the better preventing of which illegal practices for the future, be it declared and enacted by the authority aforesaid, that if any person or person shall, from and after the 1st day of July, 1723, by virtue or colour of any grant or authority from any foreign prince, state, or government whatsoever, erect, set up, continue, or keep, or shall cause or procure to be erected, set up, continued, or kept, any lottery or undertaking in the nature of a lottery, under any denomination whatsoever, or

Advertising of Foreign and other Illegal Lotteries, 1836 (6 & 7 Will. 4. c. 66) (2)

The hearing of the motion was by consent of the parties treated as the trial of the action.

Byrne, Q.C., and *J. G. Wood*, for the plaintiff.—Although the acquisition of the concession is not *ultra vires* the objects of the company, we are nevertheless entitled to an injunction if we can shew that what the company proposes to do is to spend the money of the company on that which is illegal. We say in the first place that the company is "erecting, setting up, and publishing a scheme for" a lottery "upon pretence and colour of some grant or authority given by foreign princes or states," within the words of 9 Geo. 1. c. 19. s. 4; and secondly, that the company is advertising a foreign lottery within the words

shall make, print, or publish, or cause to be made, printed, or published, any proposal or scheme for any such lottery or undertaking, or shall within this kingdom sell or dispose of any ticket or tickets in any foreign lottery, and shall be convicted of any the said offences by two or more Justices of the peace of the county, division, or liberty where such offence shall be committed or the offender shall be found, the person so convicted shall, for every such offence (over and above any former penalties inflicted by any former Act or Acts of Parliament made against unlawful lotteries), forfeit the sum of two hundred pounds."

(2) 6 & 7 Will. 4. c. 66: "An Act to prevent the Advertising of Foreign and other Illegal Lotteries. Whereas the laws in force are insufficient to prevent the advertising of foreign and other illegal lotteries in this kingdom, and it is expedient to make further provision for that purpose: Be it therefore enacted that from and after the passing of this Act, if any person shall print or publish, or cause to be printed or published, any advertisement or other notice of or relating to the drawing, or intended drawing, of any foreign lottery, or of any lottery or lotteries not authorised by some Act or Acts of Parliament, or if any person shall print or publish, or cause to be printed or published, any advertisement or other notice of or for the sale of any ticket or tickets, chance or chances, or of any share or shares of any ticket or tickets, chance or chances of or in any such lottery or lotteries as aforesaid, or any advertisement or notice concerning or in any manner relating to any such lottery or lotteries, or any ticket, chance, or share, tickets, chances, or shares thereof or therein, every person so offending shall for every such offence forfeit the sum of fifty pounds."

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of 6 & 7 Will. 4. c. 66. The statement in the prospectus that "at least five issues have to be made annually in Persia" is no more nor less than an advertisement of so many lotteries. If the company should persist in its enterprise, it must by the very nature of its business render itself obnoxious to proceedings for illegal acts. The business of the company will be stopped and the money of its shareholders will have been wasted.

Sykes v. Beadon (3) was referred to.

Romer, Q.C., and *G. F. Hart*, for the defendants.—The company does not propose to do anything illegal. 9 Geo. 1. c. 19. s. 4, is only aimed at the erection, &c., of foreign lotteries in the United Kingdom, and 6 & 7 Will. 4. c. 66 is merely directed against advertisements for the sake of obtaining subscriptions to lotteries. The statements in the prospectus are general statements of fact. If anything illegal should be done by the defendants the plaintiff will not be liable to penalties.

Byrne, in reply.

CHITTY, J.—Two points are raised on this motion. The first and the more important point is this. The plaintiff says that the company, by its directors, are about to apply their money in the performance of an illegal contract. The case is not one of an illegal company, for it has not been contended, nor can it be contended, that the company has among the objects appearing on the face of its memorandum of association any object or any purpose which is illegal—and it is admitted that the contract for the purchase of this concession is within the powers of the company—but it is said that the contract itself is an illegal one. The illegality alleged is illegality under the Lottery Acts, and the only Act that counsel for the plaintiff has been able to point to as being the Act which makes the contract illegal is the Act of 9 Geo. 1. c. 19. s. 4. [His Lordship read this section and continued:]

Now, is the contract that I have mentioned a contract falling within the scope of that section? The words principally

relied on were: "erecting, setting up, continuing, keeping, or causing or procuring to be erected or set up." The company, by virtue of its contract, do not propose to set up any lottery in this country. The proposal or the object of the contract is very simple. In Persia, I take it, seeing that the concession has been granted by the Shah, lotteries are lawful, and this company proposes, under the concession, to set up lotteries in that country. This Act of Parliament is not addressed to such a case as that; it is unquestionably directed against the erection of lotteries in this country; but the Legislature of Great Britain of that day did not intend to exercise any jurisdiction over lotteries in foreign countries, kept and carried on exclusively in foreign countries; and there is nothing in this Act, nor indeed in any Acts that I know of, which would prevent two Englishmen in this country, British subjects, from putting together a fund for the purpose of employing that fund in erecting a lottery in a foreign State where foreign lotteries are lawful. By no ingenuity can the case be brought within that section; and it is to be borne in mind in considering these lottery Acts that they are particular enactments directed to particular offences, which are specified; and I am not at liberty to take some general notion of what may or may not have been the intention of the Legislature, because I am here dealing with criminal law, and it is important to remember that the Act of Parliament is so framed as to create and deal with specific offences. It is said, as part of the argument for the plaintiff, that it would be impossible for the company to perform this agreement without violating in some way or other the provisions of some other portions of the Lottery Acts. I see no foundation whatever for that proposition. I am not at liberty to speculate and say that the company who can perform its operations lawfully, and without violating the Act of Parliament, will probably do something which will bring it within some one or other of the Lottery Acts. That is not my function sitting here as a Judge. Turn it over in what way I can, I can find no ground for the suggestion that this is an illegal contract; and there

(3) 48 Law J. Rep. Chanc. 522; Law Rep. 11 Ch. D. 170.

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is no ground therefore for restraining the company from applying its money in the way it proposes. That is the main point of the motion; but there is a subordinate one founded on the prospectus. The company have issued this prospectus, they have obtained their capital, and, as has been stated in the correspondence with the Director of Public Prosecutions, they do not intend to issue any further prospectus. But the plaintiff says that he has got no undertaking from the company that they will not issue some further prospectus, and that they may, and probably will, put forward to the public another prospectus similar, or somewhat similar, to the one that I have before me. Then it is argued that the prospectus which they have actually issued, and which prospectus has done its business, is an illegal one. Now the material parts of the prospectus which are attacked by the motion are these: "The head-quarters of the system will be in Persia, but the company will not be limited to that country in the field of its operations, for it is intended, as in the case of the Continental issues above referred to" (the Continental issues above referred to relate to Italy, Austria, Hungary, Spain, &c.), "that the company should be represented by agents in the chief cities of Eastern Europe for the purpose of obtaining subscriptions." It is plain, therefore, that the company, upon that statement in the prospectus, does not propose to seek for subscriptions to lotteries in this country. Then the following paragraph was relied on by the plaintiff: "The intended operations of the company will (pursuant to the terms of the concession) be conducted generally upon the lines adopted in the European States where Government lotteries are in vogue. At least five issues have to be made annually in Persia, with minimum drawings of 10,000*l.*, and it is estimated that these operations should return continuously increasing dividends." It is said that that is an advertisement or notice of lotteries to be held in Persia. Now the Act of Parliament relied on by the plaintiff on this point is that of 6 & 7 Will. 4. c. 66. The title of that Act is "An Act to prevent the Advertising of Foreign and other Illegal Lotteries." [His

Lordship read the Act, observing that the important words on the questions before him were, "any advertisement or other notice of or relating to the drawing or intended drawing of any foreign lottery," and continued:] This again is a particular and special enactment; and the only words that the plaintiff could rely upon as bringing the case within this enactment are the latter general words—namely, "any advertisement or notice concerning or in any manner relating to any such lottery or lotteries." Now I am dealing with this question on a motion for an injunction, and I am not really called upon to express an opinion with reference to this prospectus, because the defendants have said that they do not intend to issue another prospectus of similar effect, and merely at the bar they refuse to give an undertaking. I am not prepared to say in circumstances of this kind that the plaintiff is, without any other evidence than the issue of this prospectus, entitled to call upon the Court to hold as a matter of inference that there is an intention hereafter to issue a similar prospectus, and that that intention is to be inferred from the act already done and the refusal to give the undertaking, and that this is to be inferred notwithstanding the statement in the correspondence with the Government to the effect that the prospectus has been issued, and there is no intention to issue any further prospectus. But if I am called upon to express an opinion upon the point, I hold that this prospectus is not within those general words at the end of the section—in other words, it is not within the section. There is no lottery that has been set up, that has been opened, that has been commenced; there is no invitation in this prospectus to anybody to subscribe to the lottery or to take tickets in the lottery; it is a mere statement that at least five issues have to be made annually in Persia—that is the material part of the statement. Supposing a newspaper dealing with public news said, "there are five state lotteries held every year in Persia," if the plaintiff's proposition is right, that is an offence against the Act. I think that would be straining the Act, and that that is not made an offence by the Act. I am pur-

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posely very careful in what I say with regard to any Act of Parliament of this sort, because I am not disposed in any way to make observations which may lessen the effect of the enactment; and it appears to me that I discharge my duty rightly in this case, supposing I am bound to decide this question, by holding, as I do, that this prospectus is not within the Act of Parliament.

The mere general statement that there will be at least five issues to be made annually in Persia with minimum drawings of 10,000*l.*, I say is not an advertisement or notice of any such lottery within the meaning of that section.

Then there is the further point, supposing that what I have said is not well founded. On the second point, what interest has the plaintiff? The Act is a penal Act, and the persons who contravene the Act will be the agents of the company who issue the advertisements. What has the plaintiff to do with that? He will not be liable, and they cannot make him under any criminal law responsible for their acts; and he cannot of course, after what has taken place, in any way be liable, although he has taken shares in this company, and although this prospectus was before him when the shares were taken—he may or may not have read it—but that is quite immaterial; and he cannot be said to have caused to be printed or published any such advertisement or notice as that which he is afraid may hereafter be issued. Therefore he has no sufficient interest in the question to justify his motion on that point.

Upon these grounds, the first question being the substantial one, and the second question being comparatively trifling, I refuse the motion, and the motion being treated as the trial, the order I make is that the action be dismissed, with costs.

Solicitors—Faithfull & Owen, for plaintiff;
Michael Abrahams, Son & Co., for defendants.

KEKEWICH, J.
(for KAY, J.) }
1890. } BATTEN, PROFFITT AND
May 3, 9, } SCOTT v. THE DARTMOUTH
10, 23. } HARBOUR COMMISSIONERS.

Mortgage—Costs — Action by Puisne Incumbrancers—Plaintiffs' Costs of Action —Apportionment—Costs of Commissioners —Right of Indemnity — Commissioners' Clauses Act, 1847 (10 Vict. c. 16), ss. 60–64.

An action was brought by judgment creditors against harbour commissioners, in which the plaintiffs were found entitled to a charge on the undertaking, a receiver was appointed, and the priorities of other incumbrancers (some of whom were prior to the plaintiffs) were ascertained, and certain funds arising from the undertaking paid into Court. The funds now available being insufficient for all the payments required, — Held, that the plaintiffs were entitled to be paid in priority to prior incumbrancers their costs of the action, so far as the other incumbrancers had had the benefit thereof in securing the fund or in determining the rights of the parties to it, but that their other costs of the action (if any) must be added to their security, and the Taxing Master was directed to distinguish such costs accordingly. Held also, that under the Commissioners' Clauses Act, 1847, s. 60, the commissioners were entitled to be paid their costs as between solicitor and client out of the fund in priority to all parties, and that it made no difference that the fund had not actually come to the hands of the commissioners, but had been paid into Court by the receiver.

This was the further consideration of an action brought by the plaintiffs to enforce a charge upon the undertaking of the Dartmouth Harbour Commissioners in respect of a judgment which they had obtained against the commissioners for their bill of costs for work done as solicitors for the commissioners.

The other parties were several incumbrancers of the defendants' undertaking, having leave to attend the proceedings.

By their claim the plaintiffs claimed a declaration that they were entitled to a

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charge, an enquiry what persons had liens or charges, and that the rights of the plaintiffs and such persons might be ascertained. On the 29th of January, 1886, a receiver was appointed, who had paid into Court certain funds received for rates and tolls. Judgment was afterwards given directing an account of what was due to the plaintiffs; an enquiry as to the defendants' estate and property; an enquiry as to their debts and liabilities, and whether the same were incumbrances upon the undertaking or the tolls arising thereout, and as to the priorities of the persons entitled thereto. The chief clerk had made his certificate under this order, finding that the plaintiffs were creditors for 664*l.* 3*s.* 9*d.*, and were entitled to a charge for that amount on the tolls, rates, and charges receivable by the commissioners, subject to certain incumbrances and in priority to others, and that the property of the defendants consisted of a number of items, including two sums paid into Court and a small sum of cash on deposit. The funds now available were insufficient for the various payments required, and two questions were now raised: First, whether the plaintiffs were entitled to be paid their costs of the action in priority to the other incumbrancers; and, secondly, whether the commissioners were entitled, as trustees, to their costs between solicitor and client in priority to all other parties.

The Dartmouth Harbour Commissioners were incorporated by certain special Acts of Parliament (26 & 27 Vict. c. 104, 33 & 34 Vict. c. 82, and 45 & 46 Vict. c. 200), which confirmed certain provisional orders of the Board of Trade, and incorporated the Commissioners' Clauses Act, 1847, with power to execute works and borrow moneys on the security of the revenues of their undertaking, and the rates, dues, tolls, and charges which they were authorised to levy and receive.

By section 45, sub-section 2 of 45 & 46 Vict. c. 200, it is provided that the commissioners shall apply rates, dues, and other income in paying, first, the costs of passing the Act; secondly, salaries, and the expenses of watching, lighting, and maintaining the harbour, and of providing

and maintaining in proper condition all the works, buoys, mooring appliances, and other conveniences belonging to the harbour, and paying "all other current expenses of the commissioners"; thirdly, interest on borrowed money; fourthly, in providing a sinking fund; and fifthly, in paying the costs of the works and the other expenses incurred in the improvement of the harbour, or otherwise under the Act.

The Commissioners' Clauses Act, 1847 (10 Vict. c. 16), provides:—Section 2: "The expression 'the commissioners' shall mean the commissioners, trustees, undertakers, or other persons or body corporate constituted by the special Act, or thereby entrusted with powers for executing the undertaking."

The Act also enacts: "And with respect to the liabilities of the commissioners, and to legal proceedings by or against the commissioners, be it enacted as follows:—Section 60: No commissioner by being party to or executing in his capacity of commissioner any contract or other instrument on behalf of the commissioners, or otherwise lawfully executing any of the powers given to the commissioners, shall be subject to be sued or prosecuted, either individually or collectively, by any person whomsoever; and the bodies, or goods, or lands of the several commissioners shall not be liable to execution of any legal process by reason of any contract or other instrument so entered into, signed, or executed by them, or by reason of any other lawful act done by them in the execution of any of their powers as commissioners; and the commissioners respectively, their heirs, executors, and administrators, shall be indemnified out of the rates and other moneys coming to the hands of the commissioners by virtue of this and the special Act for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs, and damages, which they may incur in the execution of the powers granted to them."

Section 61 provides that actions or suits may be brought by or against the commissioners, where such commissioners are not a body corporate, in the names of any

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two of the commissioners or in the name of their clerk.

Section 62 provides that execution shall be levied only on goods belonging to the commissioners in virtue of their office.

Section 63 provides that every commissioner or clerk in whose name any such legal proceeding shall be carried on, either as plaintiff or defendant, on behalf of the commissioners, shall be reimbursed out of the moneys which shall come into the hands of the treasurer by virtue of his office, all damages, costs, charges, and expenses to which any such commissioner or clerk may be put, or with which he may become chargeable by reason of being so made plaintiff or defendant.

Millar, Q.C., and Mulligan, for the plaintiffs.—The plaintiffs who, by their action, have secured and realised these funds and ascertained the priorities of the various incumbrances, are entitled to the costs of the action in priority to those of all parties—*Ford v. Lord Chesterfield* (1), *Wright v. Kirby* (2), and *Seton on Decrees* (4th ed.), p. 1062.

Marten, Q.C., and Swinfen Eady, for the commissioners.—The commissioners are in the position of trustees, and, by virtue either of the special Act (45 & 46 Vict. c. 200), s. 45, or the general Act of 1847, section 60, are entitled to their costs as between solicitor and client in priority to the plaintiffs and all other parties—*Gardner v. The London, Chatham, and Dover Railway Company* (3).

[KEKEWICH, J.—Is there any distinction between money coming into the hands of the commissioners, and money paid into Court?—His Lordship referred to *In re Birt*; *Birt v. Birt* (4) and *Richmond v. White* (5).]

We submit there is none.

Renshaw, Q.C., and Grosvenor Woods, for incumbrancers prior to the plaintiffs.—The plaintiffs' costs of the action should be added to their security—*In re The*

Dominion of Canada Plumbago Company (6) and *Johnstone v. Cox* (7).

As to the commissioners, they are not entitled to costs out of the fund in priority to the incumbrancers. The special Acts give no such right; and the Commissioners' Clauses Act, 1847, section 60, applies to individuals, not to corporations. In any case, this section does not apply to the money in Court—*In re Jones*; *Calver v. Laxton* (8).

Horton Smith, Q.C., and Stewart Smith, for other incumbrancers; and

Ingle Joyce, Fitzgerald, Upjohn, and Bakewell, for other parties.

Millar, in reply.

KEKEWICH, J.—Two questions of costs which have to be decided on the same application are of considerable difficulty. I will deal with Mr. Millar's point first, because it is freshest in my mind, having been last argued. He desires to put his claim on *Ford v. The Earl of Chesterfield* (1); but I think I may leave *Ford v. The Earl of Chesterfield* (1) out of consideration for the moment, because *Wright v. Kirby* (2) was decided by the same Judge (Lord Romilly), and in *Wright v. Kirby* (2) he stated the principles by which the Court ought to be guided, and the rules in such cases, and expressly stated that it was in accordance with these rules that he decided *Ford v. The Earl of Chesterfield* (1), and the rules are stated at 23 Beav., p. 467. I do not propose to read them, except to point out this, that the Master of the Rolls places an action by an incumbrancer in which the plaintiff gets his costs on the footing of an administration action, and gives him his costs as in an action of that character. That seems to me at once to let in the discretion of the Court to see what is and what is not proper administration, and what costs have been properly incurred for the purpose of administration. The case is, to some extent, new to me, and I am dealing with it at some disadvantage; but from what I

(1) 21 Beav. 426.

(2) 23 Beav. 463.

(3) 36 Law J. Rep. Chanc. 323; Law Rep. 2 Chanc. 201.

(4) 52 Law J. Rep. Chanc. 397; Law Rep. 22 Ch. D. 604.

(5) 48 Law J. Rep. Chanc. 798; Law Rep. 12 Ch. D. 361.

(6) 53 Law J. Rep. Chanc. 394; Law Rep. 27 Ch. D. 33.

(7) 50 Law J. Rep. Chanc. 216; Law Rep. 19 Ch. D. 17.

(8) 55 Law J. Rep. Chanc. 350; Law Rep. 31 Ch. D. 441.

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have seen and heard I do not think it at all clear that the plaintiffs have throughout acted for the benefit of those other incumbancers whose title, to some extent certainly, they were disputing. On the other hand, there can be no doubt that, whether they intended it or not, they have done much good to them. They have obtained the appointment of a receiver, and have got a fund brought into Court, and an enquiry has been directed and answered, so that the parties entitled to the fund have been ascertained. So far, certainly, they have laboured for the advantage of others. Mr. Millar has said that they are, therefore, entitled to all their costs of the action. That, to my mind, does not follow. They may be entitled to all their costs. I do not say they are not, but it is probable that some of the costs have been incurred on their own behalf only, and with a view solely to their own interest. I think I ought to give them those costs which come within *Wright v. Kirby* (2), but I think I ought not to give them those costs which in the result may be ascertained not to be within the doctrine of that case. I shall direct the Taxing Master in taxing the costs of the plaintiffs to distinguish the costs of which the other parties, except the commissioners, have had the benefit in securing the fund in Court, or in determining the rights of the parties to it. These costs, I think, they are entitled to in priority; and, as Mr. Millar pointed out, they must be distributed over the three funds. As regards the rest of the costs, the plaintiffs must add them to their security in the usual way as mortgagees. That disposes of the plaintiffs.

Then as to the costs of the commissioners, there is also a question of some little difficulty. Priority for them is claimed under the general Act, the Commissioners' Clauses Act, 1847, and also under the special Acts. I shall call them special Acts, because, although they are in fact provisional orders, they are confirmed by Act of Parliament and have the force of Acts of Parliament, and really are Acts of Parliaments, being scheduled to Acts. As regards the special Acts, I do not see myself any ground for acceding to Mr. Marten's argument. I think that the costs and expenses there mentioned

do not mean costs or expenses of litigation, but only ordinary expenses—that is, those necessarily or properly occasioned by managing their undertaking and doing the work which the Act of Parliament throws upon them. I will not go through all the different clauses of the Acts of 1863 and 1870, because I turn to section 45 of the Act of 1882 (45 & 46 Vict. c. 200), which I think is strongest in favour of the commissioners' view, because under section 45, sub-section 2, the moneys are to be applied in paying—first, the costs of passing the Act; secondly, salaries and other payments there specified “and all other current expenses of the commissioners,” and that is a phrase stronger than I find in any of the other Acts. I do not think it can extend to the costs of litigation such as this, but that it points to ordinary expenses incurred by the commissioners in discharging their ordinary duties, and I do not think anything has been said which supports the contrary view. Therefore, as regards those Acts, I decide against the commissioners, but after some consideration I have come to a different conclusion as regards the general Act. Mr. Renshaw argued that sections 60 to 64 of the Commissioners' Clauses Act, 1847, are only applicable to the commissioners personally, and not to a body incorporated such as are the commissioners in the present case. I cannot think that the Legislature could have intended that, especially when we find that “commissioners” (section 2) means, “commissioners, trustees, undertakers, or other persons or body corporate constituted by the special Act or thereby entrusted with powers for executing the undertaking,” and I do not think the words are necessarily limited to persons. The set of sections to which sections 60 and 64 belong are introduced by the words “with respect to the liabilities of the commissioners, and to legal proceedings by or against the commissioners,” and I see nothing there to limit it to commissioners not incorporated. That is my view. It is rather that there is nothing to limit it than that there is anything to extend it. By section 60, commissioners are exempted from personal liability, and that provision is no doubt more applicable to persons than to

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a corporation; but after thus exempting them from liability, the section contains the following indemnity clause, "and the commissioners respectively, their heirs, executors, and administrators, shall be indemnified out of the rates and other moneys coming to the hands of the commissioners by virtue of this and the special Act for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs, and damages which they may incur in the execution of the powers granted to them." They are to be indemnified against liabilities," and although it may be impossible to issue execution against them individually and get payment of the costs, still the commissioners as a corporation are liable for any costs they may be ordered to pay, so as, at any rate, to establish a debt. The commissioners might, I suppose, have the ordinary order for taxation made against them on the retainer given by them, and in that way there is a liability to pay costs. Against that, it seems to me, they are indemnified. Why should I construe this section differently from the construction of the ordinary indemnity clause in a settlement? It is in every settlement now by Act of Parliament. According to the old form the trustees are indemnified against all liabilities incurred by them in the execution of the trusts, and supposing in the administration of their trusts it becomes necessary to enquire what mortgages have been made and what incumbrances there are, the parties claiming through the *cestuis que trust* can only take subject to that indemnity. It seems to me I ought to apply the same sort of principle, and that the commissioners, being trustees against whom nothing has been said as regards the propriety of their conduct, must be entitled to be paid out of their trust fund before anybody else who is interested in it, notwithstanding that they are in the position of mortgagees. It is not a perfect settlement, because, as has been said, the commissioners are at the same time trustees and mortgagors. But I think that I am bound to regard them substantially as trustees instead of mortgagors, and to give them the indemnity. But then it is suggested that what they are entitled to have is money coming into

the hands of the commissioners, and that what we are dealing with is money which has been brought into Court, and that as against that they have no priority. I referred to a case of *Richmond v. White* (5), which has recently been followed in *In re Jones; Calver v. Laxton* (8). What was decided in the last-mentioned case was that the executor's right of retainer was interfered with by the appointment of a receiver, and that as the moneys taken by the receiver were not moneys in the hands of the executor he could not insist on his right of retainer. *Richmond v. White* (5) is an example of a different kind, because there the money was paid into Court by an insurance company, and that was said not to have taken away the right of retainer. But I do not think that that applies to this case, because an executor's right of retainer is a very peculiar, though well-recognised right. Here I have a distinct settlement, a statutory right to have these costs paid, and I do not think that the substance of the clause is that costs are to be paid or liabilities on their part discharged by means of moneys in the hands of the commissioners, so much as by moneys which may come to them by virtue of the Act for rents and tolls; and the use of the words "coming to the hands of the commissioners" is for the purpose of pointing out that to which they would resort. I think it would be a narrow construction to say that it only meant the amount actually received. I think what it means is money receivable for tolls or rents by virtue of the provisions of the Act. I therefore think that it is clear that the commissioners are entitled to their costs in priority.

Solicitors—Batten, Proffitt & Scott, for plaintiffs; Granville Smith & Co.; Kendall, Price & Francis; Austin & Austin; Woodcock, Rylands & Parker, agents for Bartlett, Dartmouth; and Herbert Barnes, for the various other parties.

KEKEWICH, J. }
 1890. } KINAHAN v. KINAHAN.
 May 9. }

Practice—Service of Writ out of Jurisdiction—Discretion of the Court—Convenience—Rules of Court, 1883, Order XI. rule 1 (f), and rule 2.

In an action to restrain the infringement of the plaintiffs' trade mark and the sale of the defendants' goods as those of the plaintiffs', the defendants being resident in Ireland, and having neither property nor place of business nor agents within the jurisdiction, the Judge discharged an order which he had made in chambers on an ex parte application for service of the writ out of the jurisdiction, on the ground that the action could have been more easily and cheaply tried in Ireland than in England, notwithstanding that a motion was pending in this Court, on behalf of the plaintiffs, for the registration of their trade mark and the removal from the register of the defendants' trade mark.

Motion.

This was a motion by the defendants to discharge an order obtained *ex parte* in chambers for service of a writ out of the jurisdiction.

The plaintiffs had carried on business as wine and spirit merchants for upwards of 100 years. Their principal place of business was in Dublin, where they traded as "Kinahan & Sons." They had also a London house under the style of "Kinahan & Co," but it was the same firm in both places. Their whisky was well known as "Kinahan's Whisky." They had registered in 1876 under the Trade Marks Act, 1875, a trade mark consisting of a label with the words "Kinahan's LL Whisky."

The defendants, Lyle & Kinahan, Limited, were a company formed in 1888, and carried on a business at Belfast, which had been established for 40 years or more. They stated that their whisky was well known throughout Ireland and elsewhere as Kinahan's V. O. Whisky—V. O. standing for "very old." They had, however, no agents outside Ireland, though they received orders from private customers from all parts of the world, which they

executed by sending the whisky straight to the customers.

On the 28th of December, 1888, the plaintiffs applied under the Patents &c. Act, 1883, to register the words "Kinahan's Whisky" as an old mark. But the Comptroller-General objected to the registration without an order of the Court, on the ground that they conflicted with a prior registration by C. J. Kinahan, on behalf of himself and his partner, F. Kinahan, trading as Lyle & Kinahan. This mark was registered in 1878, and had been publicly used ever since both by the firm of Lyle & Kinahan and the company to which its business had been transferred. A motion on behalf of the plaintiffs was pending to rectify the register by expunging the defendants' trade mark.

On the 31st of March, 1890, the plaintiffs obtained an order from the Judge in chambers, *ex parte*, for leave to serve a writ out of the jurisdiction on the defendants, at their registered office at Belfast. The writ claimed an injunction to restrain the defendants from infringing the plaintiffs' registered trade mark, from selling, offering for sale, labelling, invoicing, or consigning as "Kinahan's Whisky," "Kinahan's V. O. Whisky," or under any other name, designation, or description by which the plaintiffs' whisky was known, or any colourable imitation of such name, designation, or description, any whisky other than that made by, or obtained from, the plaintiffs; and from so getting up, labelling, and marking their goods as to enable the defendants, or be calculated to enable them, to pass such goods off on the trade and public as and for the goods of the plaintiffs.

The plaintiffs also claimed an enquiry as to the amount of the sales and the profits thereon of whisky by the defendants bearing any such label, brand, or mark as aforesaid; and delivery up of all the casks, bottles, or other receptacles, whether containing whisky or otherwise, bearing any of such labels, brands, or marks, and also all labels, wrappers, and brands which were an infringement of any of the plaintiffs' labels, wrappers, and brands, or so nearly resembling thereto as to be calculated to deceive or to enable

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the defendants to so get up their goods as aforesaid.

The plaintiffs desired that the writ should be served out of the jurisdiction under Order XI. rule 1, sub-s. *f*, on the ground that as the motion to expunge the defendants' trade mark was pending in this Court, the action could be more conveniently tried here; they were willing that the action and the motion should be heard together so as to save the expense of a double trial, and, as the witnesses were mostly merchants in London, the trial would be more conveniently held in London.

The defendants now moved to set aside the order of the 31st of March, 1890, on the ground that they had no place of business within the jurisdiction, and that there was a concurrent jurisdiction in Ireland, where their witnesses were for the most part resident.

Renshaw, Q.C., and *Whinney*, for the motion.—The jurisdiction is given by Order XI. rule 1 (*f*), and rule 2, but, by the latter rule, the Court will exercise a discretion, having regard to the cost and convenience of the trial in England. The balance of convenience in this case is clearly against service out of the jurisdiction. In *Marshall v. Marshall* (1), the Court of Appeal, in a similar case, refused the order on the ground that, as an injunction could only be enforced against the defendants' agents, the case was better left to the Scottish Courts. We have no property at all within the jurisdiction, but only supply our whisky to private customers, so that the case comes within *Marshall v. Marshall* (1), and not within *In re Burland's Trade Mark* (2), in which the defendants had property within the jurisdiction which could be sequestered. The plaintiffs say they have used the mark since 1875, and yet they lie on their rights for 13 years. There is a serious question whether there is an infringement within the jurisdiction at all. Can we be restrained from carrying on the business of selling Kinahan's V.O. Whisky, which we have carried on for 30 years? The question

can only be tried effectually in Ireland—Patents Act, 1883, ss. 90, 111, and 117.

Marten, Q.C., and *Willis Bund*, for the plaintiffs.—The defendants in supplying goods to private persons with our trade mark are passing off their own goods as those of another. They receive orders for this whisky from all parts of the world, and the addition of V.O. is only colourable, and was made after they ceased to be our agents. As the registration was in England, it is extremely doubtful whether the Irish Courts have jurisdiction to rectify. Section 111 of the Act does not confer the jurisdiction. In *Marshall v. Marshall* (1), North, J., refused to make the order; but that is not the same thing as discharging an order already made. Though we could not sequester any property of the defendants, we could stop their goods at the Custom House, and so come within the principle of *In re Burland's Trade Mark* (2).

Renshaw, Q.C., was not called upon to reply.

KEKEWICH, J.—This jurisdiction requires to be carefully watched and carefully exercised. I believe that every Judge is bound to do that which Mr. Justice Chitty tells us he did in the case of *In re Burland's Trade Mark*; *Burland v. The Broxburn Oil Company, Limited* (2), that is to say, to look carefully into the facts before him. But any one whose duty does not bring a consideration of these cases before him would be surprised to know how difficult it is to satisfy oneself on the affidavits which are presented whether the case is a proper one under Order XI. of the Rules of Court, 1883, or not, and how very seldom, notwithstanding that the affidavit is generally made by the plaintiff's solicitor, it strictly and satisfactorily complies with the exigencies of the order. In this particular case there is the extraordinary omission by the plaintiffs' solicitors of any plain, simple statement of the belief that the plaintiffs have a good cause of action. There is a statement which may be accepted as an equivalent, and was accepted as an equivalent; but the plain statement which ought to be there, and for the omission of which there really is no excuse, is not there.

(1) Law Rep. 38 Ch. D. 330.

(2) 58 Law J. Rep. Chanc. 591; Law Rep. 41 Ch. D. 542.

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Frequently other slips occur, and the duty of the Judge is extremely difficult for that reason. If, according to what I hold to be the most convenient practice, one simply endorses the application "insufficient," and sends it back, the deponent or his solicitor wants to know, and is not satisfied unless he is told, in what respect it is insufficient; and if he is told, he invariably supplies what is wanted, and one unfortunately cannot help thinking that he has just supplied it because it was wanted. I only mention these matters to shew how extremely difficult it is to deal with these cases, and to justify my remark that the jurisdiction requires to be carefully watched. I cannot doubt that it is right to review one's discretion if circumstances are brought before the Court which justify such reviewal. I entirely follow Mr. Marten's observation that a defendant coming here to challenge an order made on an *ex parte* application is bound to shew a good reason why the discretion before exercised should be reversed—that is to say, where it is a discretion on facts sufficient in the first instance to justify an order. I certainly think a Judge is bound to review his discretion on the additional facts, and Mr. Justice Chitty, although he upheld his order, took that course in the case of *In re Burland's Trade Mark* (2), and evidently with some care.

Here I have no doubt, on again reading through the affidavit, that I had no alternative but to allow the writ to issue. Now I have to consider whether on the additional facts the writ ought now to stand as issued for service out of the jurisdiction. The case is against a trader in Ireland—I will treat the two defendants as one—and carrying on business in Ireland, and the ground for service out of the jurisdiction is injunction. It is said that that is only a small part of the relief claimed, and that accounts of profits and so forth are likewise wanted, but all that relief flows from the granting of an injunction, and there is therefore a case so far falling within the order. But an injunction to restrain what? To restrain the sale of goods with a certain label or trade mark. Where are the goods sold? In England, Ireland, or elsewhere. That is, I think, an exhaustive

description of the world for trading purposes, and sufficiently accurate for the present purpose. I have it sworn distinctly that the defendants have no business premises and no agents in England, but, like many other traders carrying on business in England, Scotland, or on the continent—continents I may say—they do supply occasional customers in England, sending over such goods as such customers order. Beyond that, they have no business in England at all. I have evidence no doubt that they do a large business elsewhere—that is to say, out of England and Ireland. How that is done I cannot say, but I will assume that they do a large business in some such way, and undoubtedly they do a large business in Ireland.

Now, as regards the first, this small business done in England, it is not sufficient to justify the Court in issuing the writ for service on the defendants in Ireland. If it were their principal business, even if it were a large proportion of their business, the case might be different. But it is only a small portion which is done in the particular way I have described, and the particular way has, to my mind, a great bearing on the case. Mr. Marten says that the plaintiffs could enforce an injunction in this country. They could not enforce it against the defendants personally, treating the company for the moment as a person, because the company and the other defendant are both resident in Ireland, and there is no reason to suppose that they will in any way be found here. But he suggests that execution might be obtained against the defendants' goods in this country. As I understand the practice of the trade as appearing on the affidavits, no goods of the defendants ever come to this country at all. They execute orders for customers here and remit goods which come here as the goods of the customers, and it seems to me that there is nothing liable to execution by the plaintiffs against the defendants. That brings the case on the point directly within the case of *Marshall v. Marshall* (1) before the Court of Appeal. As regards the continental business, I think the only fair thing to do is to treat it as immaterial whether the action is in

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Ireland or in England. I see no reason why one should be more convenient than another. At any rate, I will not pause to examine whether it would be more convenient in one or the other. But as regards the Irish business it seems to me beyond doubt that it ought to be, and is, an Irish action and not an English action, and that the proceedings ought to be in Ireland and not here. In the first place consider the matter of witnesses. It may be that the plaintiffs would have to take some witnesses over to Ireland. On the other hand, if the action proceeds in England, the defendants would have to bring all their witnesses over here. Again, as regards the extremely important question in an action of this kind—namely, discovery. If discovery is to be had against the defendants it must be had somehow or other in Ireland. The only place in which the books can be seen is in Ireland, and the examination of the books, both for the purpose of the action and the trial, and still more for the purpose of account, if account is ordered, really goes to the root of the action. Therefore, there you have to my mind an extremely strong reason for proceeding in Ireland.

Is not that conclusive really on the question of convenience? I turn to rule 2, Order XI., and this is what I am to regard: "The comparative cost and convenience of proceeding in England, or in the place of residence of the defendant, or person sought to be served." I have not to regard the residence of the plaintiff, and though I think the rule does not by any means exclude regard to the convenience of the plaintiff, still certainly his convenience is not by any means to be the sole guide, for that would really be the equivalent for saying that he might choose his own forum. What the Court is to regard is the comparative cost and convenience of proceedings as regards both parties in reference to the general cost of the action, the cost to both sides. The convenience I think ought certainly to include despatch as distinguished from delay. Now, regarding it with reference to what I have already said about witnesses and about discovery, it seems to me that cost and convenience both point to Ireland and not to England. That is also

the residence of the defendants, which is a thing I am bound under the rule to regard. So that, whether I take it outside the rule on the general question, or according to the terms of the rule, I think this ought to be regarded as an Irish case and not an English case.

Then there is an answer to that which requires some consideration, and that is the motion to rectify the register. I cannot regard that as conclusive in the favour of the plaintiffs, because there was a motion of a like character in *Marshall v. Marshall* (1), and it was not there regarded as sufficient to overrule the general convenience of remitting the case to Scotland. It is true, as was pointed out here, that in that case there was a motion to put a mark on the register, and here there is a motion to take it off; but, as at present advised, there seems to me to be no substantial distinction between the two applications. I cannot therefore regard that as conclusive, but I am not at present sure that there is any reason why that application should be made here. I do not think I ought to decide that question. It is a question of jurisdiction arising on the Trade Marks Act which I had far better leave for decision when it really arises and calls for decision.

It is sufficient for me to say that I do not think the pendency of that motion, whether ultimately tried here or in Ireland, ought to interfere with the general convenience, the convenience resting on other grounds, of remitting the case to Ireland, or rather declining to have it tried here.

Therefore I must grant the defendants' application and discharge the order, and, as that will get rid of the action altogether so far as the defendants are concerned, I think they must have their costs.

Solicitors—Linklater & Co., for defendants;
Paddison, Son & Fullilove, for plaintiffs.

CHITTY, J. }
 1890. }
 April 26. }
 May 2. }

In re GEORGE (deceased).
 FRANCIS v. BRUCE.

Promissory Note—Bill of Exchange—Renunciation in Writing—Note payable on Demand—Maturity of Promissory Note—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 62, sub-s. 1, and s. 89.

A renunciation in writing of a bill of exchange or promissory note under the Bills of Exchange Act, 1882, s. 62, sub-s. 1, must be a record of an absolute and unconditional renunciation of the rights on the bill or note.

A holder of a promissory note when on his death-bed expressed a wish that the debt should be forgiven, and directed the note to be searched for and destroyed, and the note not being forthcoming, the nurse at his instance made a memorandum as follows: "It is by Mr. G.'s" (the holder's) "dying wish that the note for 2,000l. money lent to Mrs. F. be destroyed as soon as found." The memorandum was signed by the nurse, but not by the holder:—Held, that, apart from any question as to whether the renunciation should have borne the signature of the holder (which question the Court held entirely open), the memorandum did not operate as a renunciation of the note under the Bills of Exchange Act, 1882, s. 62, sub-s. 1, inasmuch as it was competent for the holder to have revoked his wish and orders with respect to the destruction of the note.

A promissory note payable on demand with interest is "at maturity" notwithstanding no demand has been made.

Norton v. Ellam (2 Mee. & W. 461; 6 Law J. Rep. Exch. 121) followed.

T. W. George, by his will dated the 6th of July, 1887, bequeathed to his niece, Mrs. Francis, the sum of 6,000l., and by a codicil bearing the same date as his will, after referring to the bequest of 6,000l., and stating that he had lent to Mrs. Francis the sum of 2,000l., and that he wished such sum to be considered as an advance on account of the 6,000l., the testator declared that if at his death the said sum of 2,000l., or any part thereof, or any interest thereon, should be due from

Mrs. Francis, then all such moneys so due should be deducted from the legacy of 6,000l., and the legacy of 6,000l. be reduced accordingly in satisfaction of the moneys due.

The sum of 2,000l. referred to by the testator was lent by him to Mrs. Francis in September, 1886, and Mrs. Francis at the same time signed and gave to the testator a promissory note, which was in the following words:—

"On demand I promise to pay to Mr. T. W. George, or his order, the sum of two thousand pounds, together with interest thereon after the rate of four pounds per centum per annum from the date hereof for value received."

Interest was paid on this note up to the 6th of March, 1889. On the 30th of August, 1889, the testator died. About two or three hours before his death the testator directed the promissory note to be brought to him that he might destroy it. The note was searched for, but could not be found. The testator then declared to Mrs. Francis, in the presence of two other persons, that he wished to give the 2,000l. to her, and to forgive her the debt. The nurse was then sent for, and the testator told her that he had lent Mrs. Francis 2,000l., and that he wished to forgive the debt, and that he ought to have destroyed the note, but it could not be found for that purpose; he then made the nurse give him a solemn promise that she would see the note destroyed, and that she would testify that it was his wish that it should be destroyed as soon as found, and he told her that she had better write this down. The nurse then and there wrote down on the back of a letter she had in her pocket, a memorandum as follows: "30th of August, 1889. It is by Mr. George's dying wish that the cheque (*sic*) for 2,000l. money lent to Mrs. Francis be destroyed as soon as found. Mr. George is perfectly conscious and in his sound mind. (Signed Nurse T.)" This memorandum the nurse stated was, with the exception of the last sentence, written at the instance of the testator. The story told by the nurse was corroborated by another member of the family, and otherwise. After the testator's death the note was found in a safe in the house.

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The present was an originating summons by Mrs. Francis against the executors of the will, raising the question whether there had been a renunciation of the note, it being admitted that the circumstances could not operate as a valid *donatio mortis causa*.

Romer, Q.C., and *Upjohn*, for Mrs. Francis.—By the Bills of Exchange Act, 1882, s. 62, sub-s. 1, it is provided that “when the holder of a bill at or after its maturity, absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor,” and by section 89 the provisions of the Act relating to bills of exchange are made applicable with the necessary modifications to promissory notes.

We submit in the first place that the note was not “at maturity” when the testator died, for there is no evidence of payment having been demanded, and the case, therefore, is governed not by the Act of 1882, but by the pre-existing law, under which a bill of exchange or promissory note could be waived by parol and without consideration—*Barough v. White* (1), *Foster v. Dawber* (2), and *Byles on Bills* (11th ed.), pp. 168, 196, 209, 304.

[CHITTY, J., referred to *Christie v. Fensick* (3), *Rumball v. Ball* (4), *Collins v. Benning* (5), *Norton v. Ellam* (6), and *Jackson v. Ogg* (7), as authorities shewing that the note was at maturity notwithstanding no demand made.]

After the authorities referred to by your Lordship, we admit our proposition to be untenable.

We, however, submit in the second place that the memorandum was a valid “renunciation in writing” within the words of the Act of 1882, section 62, sub-section 1. It was in writing, although the writing

was in the hand of an agent or amanuensis. Section 62, sub-section 1, does not say that such a renunciation must bear the signature of the holder. When the Act intends signature to be requisite it says so—e.g. section 17, sub-section 2 (a); and that an agent is in some cases contemplated is shewn by section 26, sub-section 1.

[CHITTY, J., referred to *In re Lewis* (8).]

Byrne, Q.C., and *Dunning*, for the executors.—Even had the memorandum been signed by the testator, it would have been insufficient. It disclosed, no doubt, an intention to renounce, but it was not a renunciation. What the statute speaks of is not evidence in writing, but an actual written renunciation—in other words, what is required to make an absolute and unconditional renunciation is a record of the renunciation. The memorandum merely declared the testator's wish that the note be destroyed when found. Until the note was actually destroyed, it was competent for the testator to revoke his declaration or direction.

Romer, Q.C., in reply.—The word “renounce” is not obligatory. All that is required is that the memorandum should state an absolute and unconditional intention to renounce. The testator stated it to be his “dying wish” that the note be destroyed—that was to say, that it was his final intention that the note be destroyed; and he also stated that the note was to be destroyed “as soon as found”—that was to say, should be destroyed forthwith. We submit, therefore, that the memorandum bore on its face an absolute and unconditional renunciation of the note, and that unless the statute requires the writing to be that of the holder, or to be signed by the holder, the note must be deemed to be cancelled.

CHITTY, J. (after stating the facts), continued:—The question is whether the note was destroyed in the lifetime of the testator. The argument for the plaintiff is, that this being a promissory note, at common law the debt could be waived, and that the Bills of Exchange Act, 1882, section 62, sub-section 1, has only made a

(8) 45 Law J. Rep. Q.B. 816; Law Rep. 1 Q.B. D. 724.

(1) 4 B. & C. 325; 3 Law J. Rep. (O.S.) K.B. 227.

(2) 6 Exch. Rep. 839, *per* Parke, B., 851; 20 Law J. Rep. 385, 390, 391.

(3) 1 Sel. N.P. (12th ed.), 399.

(4) 10 Mod. 38.

(5) 12 Mod. 444.

(6) 2 Mee. & W. 461; 6 Law J. Rep. Exch. 121.

(7) Johns. 397.

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limited alteration in the law, and does not apply to a waiver of a bill or note before its maturity, but only "at or after its maturity"; and seeing that the present is a note payable on demand with interest, it is said it was not "at maturity" when the testator died, and that therefore the case is not affected by the 62nd section. [After reading section 62, sub-section 1, his Lordship continued:] The first point, therefore, is, When is a note payable on demand "at maturity"? That question, though not exactly in this form, has been often considered: of the various cases which have been referred to in argument, I will take one only, *Norton v. Elam* (6). In that case there was a note payable with interest on demand, and the question was from what time the Statute of Limitations began to run. Baron Parke in giving judgment says (2 *Mee. & W.* 461, p. 464): "I entertain no doubt at all on this point; it is the same as the case of money lent, payable upon request, with interest, when no demand is necessary before bringing the action. There is no obligation in law to give any notice at all: if you choose to make it part of the contract that notice shall be given you may do so. The debt which constitutes the cause of action arises instantly on the loan." (The note I have before me was for money lent.) "Where money is lent simply, it is not denied that the statute begins to run from the time of lending. Then, is there any difference where it is payable with interest? It is quite clear that a promissory note payable on demand, with interest, is a present debt, and is payable without any demand, and the statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference, except that thereby the debt is continually increasing *de die in diem*." I mention this authority alone, though there are many decisions to the same effect, because it appears to me to be decisive on the point that was argued with reference to the 62nd section—namely, that this note was not at maturity when the testator died.

Then comes the question, whether there is a "renunciation in writing" within section 62, sub-section 1. I entertain no doubt of the integrity and trustworthiness

of the witnesses, and I entertain no doubt also that it was the testator's intention to forgive, or discharge this note in favour of the plaintiff. I am quite satisfied with the evidence on this point. Section 62, sub-section 1, says the renunciation must be in writing, unless the bill is delivered up to the acceptor; and, changing the language to suit the present case, that would be, unless the note is delivered up to the maker. The statute contains provisions for the cancellation of bills of exchange, and therefore of promissory notes also, so that it is quite clear that if this note had been in the testator's possession at the time, he would have had it destroyed; upon that point I entertain no doubt. I have, however, to deal with the statute, which is not confined, of course, to cases such as this, but is a statute as to bills of exchange, and has a wide operation among mercantile men; and I feel that I must be on my guard not to allow any sympathy I may have with the plaintiff on the facts of the case in any way to influence my judgment in construing this section; because I might, if I did give way on such a ground as that, be inflicting considerable injury upon merchants and others.

Now, it is plain that what must be in writing is an absolute and unconditional renunciation of rights. It is not necessary to put those words in; but that must be the effect of the document. Then the document is not to be a note or memorandum of the renunciation, or of an intention to do it; but it must be, itself, the record of the renunciation. I am not called upon to say whether the words "the renunciation must be in writing" involves the signature; and I do not propose to say anything which would tend to shew it was my opinion that the renunciation in writing need not be signed. I see great danger in holding that the signature is not required. I leave the point wholly undetermined. This section, as has been properly pointed out, does not, in terms, say that the writing must be signed by the holder of the bill or note; and it does not, in terms, say that the writing may be signed by anybody on his behalf—that is, by an agent; and no doubt there are other sections where

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signature is spoken of, and it must be the signature of the person himself, or there may be cases where it is signed by the agent, and provisions are made to that effect in the statute.

But now I take the document which I have before me and compare it with the statute. The facts are these: [His Lordship then stated the facts as to the writing of the memorandum by the nurse, and continued:] That memorandum was no doubt meant to be evidence of his intention. The document is signed by the nurse, and it was an authority to those concerned, if the note had been found, to destroy it in his lifetime.

But is that an absolute and unconditional renunciation in writing of the testator's rights on the note? The plaintiff's argument (to put it shortly) was this, that it is final, because it is stated it is Mr. George's dying wish; and that it is immediate, because the note was to be destroyed as soon as found. But the real question, I think, is this: Is the direction to destroy the note as soon as found an absolute and unconditional renunciation of the rights on the note? I put the proposition in that way, for I think it is the fairest way to state it in favour of the plaintiff. I am now assuming that this is a writing by the testator—an assumption that I am making in favour of the plaintiff.

The pertinent question is, could not the testator, after this paper had been signed by the nurse, have, if he had recovered, gone to the bank, or place where he supposed the note to be, to get it; or if it was found afterwards and brought to the testator, could he not have said, "I have changed my mind"? I think he could. I think I am bound in point of law to say that he could. Having examined the case with all the care that I think could be given to it, I am unable to come to the conclusion that this was an absolute and unconditional renunciation in writing such as is required by the statute.

Solicitors—E. K. Francis, for plaintiff; Bell, Brodrick & Gray, agents for Rawson, Best & Son, Leeds, for defendants.

KEKEWICH, J. }
1890.
June 28. }

LEWIS'S v. LEWIS.

Practice—Consent Order—Compromise by Counsel—Authority of Counsel.

The rule that parties are bound by terms agreed to by their counsel when the case is altogether in the hands of counsel, does not apply when, general terms of compromise having been contemplated by one of the parties and communicated to his legal advisers, counsel is instructed to arrange the specific terms of the compromise.

Matthews v. Munster (57 Law J. Rep. Q.B. 49; Law Rep. 20 Q.B. D. 141) distinguished.

The plaintiffs applied, upon notice of motion, that they might be at liberty to withdraw their consent to an order made in the action, and to renew their notice of motion upon which the consent order was agreed to.

On the 17th of May, 1890, a motion in the action for an interim injunction to restrain the defendant from using the word "Lewis's" as a trade name came on for hearing, but was adjourned until the 7th of June, 1890.

On the 24th of May, 1890, the defendant's solicitors wrote to the plaintiffs' solicitors as follows: "Our client is anxious for peace, and therefore will concede the use of the word 'Lewis's' either alone or jointly with any initials, and will consent to a perpetual injunction restraining him from using the word as above indicated, and will pay the legal costs." This letter was shewn to plaintiffs' counsel at the time.

In reply, the plaintiffs' solicitors suggested that minutes of the proposed order should be prepared and agreed to so as to avoid dispute.

On the 5th of June, 1890, the London agents of the plaintiffs' solicitors submitted certain draft minutes, to which, however, the London agents of the defendant's solicitors objected.

On the 7th of June, 1890, before the adjourned hearing of the motion was reached, the counsel for plaintiffs and defendant agreed to an order in the following terms: "By consent perpetual injunc-

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tion to restrain the defendant from trading under the style of 'Lewis's,' and also from using the word 'Lewis's' in his advertisements or otherwise in the course of his trade or business, without prefixing the initials J. M. or the names James or Mossop or both. Defendant to pay plaintiffs' costs of action."

The plaintiffs' solicitors objected to an order in that form, as soon as they were made acquainted with the terms; they contended that it did not carry out the terms of the letter of the 24th of May.

Warmington, Q.C., and *J. Cutler*, for the application.—The consent order was made upon a misconception as to the extent of counsel's authority. The matter was not absolutely in his hands, but only to the extent of arranging a compromise upon the terms of the letter of the 24th of May—*Harvey v. The Croydon Union Rural Sanitary Authority* (1).

Chadwyck Healey, for the defendant.—The offer of the 24th of May not being accepted, the matter became altogether remitted to counsel, who could deal with the case as they thought best in their clients' interests. They had an implied power to compromise. The Court will hold the parties to the compromise—*Matthews v. Munster* (2) and *The West Devon Great Consols Mine* (3).

KEKEWICH, J.—I regret that this case has come before me, and I regret that I am obliged to allow this application. I regret that the case has come before me, because it is impossible that a discussion of this kind should not do something to affect what is an extremely valuable power of compromising cases, which is placed in the hands of counsel. Valuable, I mean, not to counsel, but to the clients, and I regret that I am obliged to allow the application, because although I ought not, with my small knowledge of the case, to say I am satisfied, I cannot but entertain a strong opinion that the order indorsed on

counsel's briefs is a good settlement of the action.

However, I think that this case falls within the exception mentioned in what must now be treated, as far as the Chancery Division is concerned, as being the leading authority on the subject—namely, *Harvey v. The Croydon Union Sanitary Authority* (1). From that decision I do not understand the decision in *Matthews v. Munster* (2) to depart in the slightest degree. In the last-mentioned case, as was pointed out by all three Judges, what they had to consider was a compromise entered into by counsel without any instructions, without any authority other than such instructions and authority as are implied in the employment of counsel. The compromise in that case was made by counsel in exercise of that authority conferred on him as the advocate of the party to the litigation. The Judges there took care to point out—Lord Justice Fry putting it in the clearest terms—that the counsel did not act on instructions as to a compromise. In this case, however, it is reasonably obvious—whether counsel had the letter of the 24th of May before him or not—that they were endeavouring to the best of their ability to give effect to an intention to compromise which had been conceived by the parties themselves or their legal advisers in the country. They did not start fresh, but knowing that the parties wished to compromise, and having some general notions on the subject, they endeavoured to put them into the best terms, and I repeat I think they succeeded.

But I do not think it is a case in which it is possible to say that that is necessarily binding on a party who has not assented to those particular terms. I think that in that way the case differs entirely from *Matthews v. Munster* (2), and it seems to me that the Court would never direct specific performance of an agreement of this kind, to consent to a perpetual injunction or any other form of decree, under circumstances which would be an answer to a claim for specific performance, if the question were as to a contract for the purchase or sale of land. Here, I think, there was a misunderstanding—whether from want of information or any other

(1) 53 Law J. Rep. Chanc. 707; Law Rep. 26 Ch. D. 249.

(2) 57 Law J. Rep. Q.B. 49; Law Rep. 20 Q.B. D. 141.

(3) 57 Law J. Rep. Chanc. 850; Law Rep. 38 Ch. D. 51.

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cause it is immaterial to enquire. But I think there was a misunderstanding as to the intention of the parties, so I think I must allow the withdrawal of what is called a consent, but was a consent given under a misapprehension, which in law is really not a consent at all. I will reserve the costs of this application until the motion for injunction is disposed of.

Solicitors—Norris, Allen & Chapman, agents for North, Kirk & Cornett, Liverpool, for plaintiffs; Shaw, Tremellen & Kirkman, agents for Forshaw & Parker, Preston, for defendant.

NORTH, J. } *In re* WEYMOUTH AND CHANNEL
1890. } ISLANDS STEAM PACKET COM-
July 12. } PANY (LIMITED).

Company—Winding up—Shares fully Paid up—Shares issued at a Discount—Distribution of Surplus Assets.

The articles of association of a limited company contained no provisions as to the distribution of surplus assets on the winding up of the company. The company issued 2,917 shares of 10l. each, all of which were fully paid up in cash. Afterwards, pursuant to special resolution, the company issued 1,631 additional shares of 10l. each, "with the sum of 10l. as paid up thereon," at the price of 3l. per share. The certificates of these shares did not state that they were fully paid up. There were no creditors. The company was being wound up voluntarily, and there were assets for distribution:—Held, that these assets must be applied—first, in repaying 7l. per share to each of the original shareholders; and, then, in distributing the balance rateably between the two classes of shareholders.

Petition for directions.

The above-named company was formed in April, 1857, with limited liability under the Joint Stock Companies Act, 1856, with a capital of 40,000l. divided into 4,000 shares of 10l. each. The articles of association contained no provision with respect to the distribution of the surplus assets of the company among the shareholders in a winding-up.

Prior to the special resolution for the increase of capital hereinafter stated, the company issued 2,917 shares, all of which were fully paid up in cash.

The petition stated that, by the year 1861, the company had incurred heavy losses, and that the market value of its fully paid-up 10l. shares was then about 3l. per share.

By a special resolution of the company (passed at a meeting held in May, and confirmed at a meeting held on the 10th of July, 1861), it was resolved, amongst other things, that the capital of the company be forthwith increased by the creation of 2,016 additional shares of 10l. each, and that the directors be, and they are hereby authorised to issue and credit such additional shares with the sum of 10l. as paid up thereon, upon payment by the allottee of such additional shares of a sum being not less than 3l. per share.

A subsequent resolution provided that the holders of such additional shares were to receive interest at the rate of 6l. per cent. per annum upon the sum of 3l. in respect of each share for five years; and that at the expiration of the five years such shares should be treated with respect to dividend in the same manner as the original 10l. paid-up shares.

These meetings were duly convened by notice sent to every shareholder in the company. With the notice sent to each shareholder was enclosed a copy of the resolutions to be proposed.

Pursuant to the special resolution the company issued 1,631 shares, at the price of 3l. per share. Notices, offering these shares for subscription, were sent to every shareholder. Some of these 1,631 shares, allotted at a discount, were still held by the original allottees; but a large number of them had been transferred from time to time.

The certificates issued by the company in respect of the shares allotted at a discount were in the same form as the certificates for the shares issued at par. The material part of each certificate was as follows: "This is to certify that is the proprietor of the share number in the Weymouth and Channel Islands Steam Packet Company (Limited), subject to the rules, regulations, and

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orders of the said company for the time being in force."

Almost all the annual statutory returns made by the company, since the issue of the 1,631 shares at a discount, contained the statement that "there has been called upon 1,631 shares, at 3*l.* each, 4,893*l.*" One of the returns contained the following additional statement, "These to be considered as fully paid up."

Except by their distinguishing numbers, no distinction was ever made in transfers between the shares issued at par and the shares issued at a discount. The company had issued many certificates to transferees comprising shares of both classes, in no way, except by number, distinguishing the shares of one class from those of the other.

During the five years referred to in the special resolution, the holders of the shares issued at a discount received interest at the rate of 6*l.* per cent. per annum on the sum of 3*l.* per share.

In August, 1889, a special resolution was passed that the company be wound up voluntarily.

This was a petition presented by the voluntary liquidator, under section 138 of the Companies Act, 1862, which, after stating that the company had no creditors, that the assets of the company had been realised, and that there was a sum of about 25,000*l.* available for distribution among the shareholders, prayed that it might be determined upon what principles, and in what shares, as between the holders of the shares issued at par and the holders of the shares issued at a discount, these assets ought to be distributed.

Chadwyck Healey, for the liquidator.

Higgins, Q.C., and *Mulligan*, for original shareholders who had actually paid up 10*l.* per share.—The issue of the new shares at a discount was illegal. A company cannot "diminish the quantum of its shares, the money amount of its shares"—*per* Cotton, L.J., in *In re The Almada and Tinto Company* (1), *In re The New Chile Gold Mining Company* (2),

(1) 57 Law J. Rep. Chanc. 706; Law Rep. 38 Ch. D. 415.

(2) 57 Law J. Rep. Chanc. 1042; Law Rep. 38 Ch. D. 475.

and *In re The Railway Time Tables Publishing Company* (3).

In the distribution of the surplus assets, the holders of the shares issued at a discount should be treated as having only paid up 3*l.* per share.

The share certificates do not state that these shares have been paid up in full; there has been no representation by the company that these shares are to be treated as fully paid up; and, therefore, transferees of these shares are in no better position than the original allottees—*Burkinshaw v. Nicholls* (4) and *In re The London Celluloid Company* (5).

The holders of the fully paid-up shares are entitled to be repaid 7*l.* per share out of the surplus assets before the new shareholders receive anything, and then the balance will be divided rateably between both classes of shareholders—*In re Hodges's Distillery Company* (6), approved in *Birch v. Cropper* (7).

They also referred to the Companies Act, 1862, ss. 175 and 176, *In re The Eclipse Gold Mining Company* (8), *In re The Newtonwards Gas Company* (9), and *In re The Vulcan Iron Works Company* (10).

Cozens-Hardy, Q.C., and *Heath*, for the holders of the shares issued at a discount.—Here there are no creditors, and the evidence shews that every ordinary shareholder has had notice of the terms on which these shares were taken for nearly thirty years.

We admit that, as against outside creditors, the issue of these shares may have been illegal; but the arrangement for the issue of these shares at a discount was capable of being assented to as between the two classes of shareholders; and, after so many years, the Court will assume that

(3) 58 Law J. Rep. Chanc. 504; Law Rep. 42 Ch. D. 98.

(4) 48 Law J. Rep. Chanc. 179; Law Rep. 3 App. Cas. 1004.

(5) 57 Law J. Rep. Chanc. 843; Law Rep. 39 Ch. D. 190.

(6) 40 Law J. Rep. Chanc. 21; Law Rep. 6 Chanc. 51.

(7) 59 Law J. Rep. Chanc. 122; Law Rep. 14 App. Cas. 525.

(8) 43 Law J. Rep. Chanc. 637; Law Rep. 17 Eq. 490.

(9) Law Rep. Ir. 15 Ch. D. 51.

(10) Law Rep. W.N. 1885, p. 120.

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the arrangement was assented to by every shareholder. The original shareholders are now arguing that they are entitled to be repaid 7*l.* per share out of the very fund which has been, in fact, either saved or created by our payments of 3*l.* per share on the new shares. Under the circumstances, all the shares should be treated as fully paid up, and the surplus divided rateably between them. In *In re The Bangor and Portmadoc Slate Company* (11), though the contract for the issue of preference capital was somewhat illegal, yet, in the ultimate distribution of capital, effect was given to the contract.

[They also referred to the Companies Act, 1862, s. 38.]

Higgins, Q.C., in reply.—This was simply the case of a common mistake. The principle on which the Court acts, where there has been a mistake of law, is well shewn in *In re The Railway Time Tables Publishing Company* (3).

[He was then stopped.]

NORTH, J.—These shareholders, whom we have called the discount shareholders, are persons who applied for shares, and agreed to become members of the company, and they have remained members of the company for a great many years. Having regard to the principles laid down in two or three cases which have been referred to this morning, it is clear that it is now far too late for them to say that they are not shareholders, and that they are entitled to have their 3*l.* per share repaid in full on the footing of their not being shareholders. Then, what is their position? They have agreed with the company that, in consideration of paying their 3*l.* per share, they are to be the holders of fully paid-up shares; in other words, that on payment of 3*l.* per share the 10*l.* share is to be taken to be fully paid up. That, beyond all question, is illegal. It was a matter of doubt for many years; but in the last few years the matter has been settled, and there is no doubt what the law now is—that the issue of such shares is illegal, and cannot be supported.

Mr. Hardy's principal argument was this: that, although what was done was

(11) Law Rep. 20 Eq. 59.

perfectly illegal as between the creditors of the company and the contributories of the company, it was perfectly open to all the contributories to make an agreement of this sort *inter se*, and there is sufficient evidence to shew that, in point of fact, this was done. Mr. Hardy referred to one or two cases as looking in that direction; I do not think they go further than that. But I feel great difficulty in seeing how it would be possible to say that all the shareholders had assented to the issue of these shares at a discount, and were, therefore, bound by it. I am deciding the question now as between the two classes of shareholders, and not dealing with particular cases, or considering whether there might be equities for or against particular persons. As regards the argument that you need not look into the question of illegality, when you have satisfied all the creditors and outside claimants, I find it impossible to apply the case which was cited of *In re The Bangor and Portmadoc Slate Company* (11) as an authority for that proposition. In that case there was a surplus actually to be repaid, and the question arose in what way the repayment was to take place. It seems to me that the decision in *In re Hodges's Distillery Company* (6) is what binds me here, and that I have no choice but to follow that decision. It is a case that has long been acted upon on its own weight; and, in addition to that, it has been recently recognised by the House of Lords in *Birch v. Cropper* (7).

There will, therefore, be a declaration that the assets available for distribution amongst the shareholders are to be divided upon the footing of returning to the holders of the original capital a sum sufficient to place the holders of both capitals on an equality as to the amount actually paid up on the shares of each, and that the balance then remaining is to be divided rateably in proportion to the shares.

Solicitors—Pattison, Wigg & Co., agents for Andrews, Barrett & Andrews, Weymouth, for liquidator and discount shareholders; A. B. Chubb, for original shareholders.

STIRLING, J. } In re WARE. CUMBERLEGE
1890. } v. CUMBERLEGE-WARE.
June 5, 21. }

Power of Appointment given by Will—Objects designated Nominatim—Gift over to Objects Nominatim in Default—Death of some of Objects during Life of Donee of Power—Effect of, on Power—"Representatives"—Meaning of—Marriage Settlement—Covenant to settle Property vesting in the Wife—Property vested subject to being divested by Appointment.

Where power is given by will to appoint a fund among several persons designated nominatim, with a gift over in default of appointment to the same persons nominatim, or their representatives, and all the objects of the power survive the testator, the power is valid as to the whole fund, notwithstanding that some of the objects die during the life of the donee of the power.

The principle of Boyle v. The Bishop of Peterborough (1 Ves. jun. 299) applied.

A gift in a will to the "representatives" of a person is a gift to his legal personal representatives, in the absence of any context in the will shewing that the word is to have a different meaning.

In re Crawford's Trusts (2 Drew. 230; 23 Law J. Rep. Chanc. 625) followed.

A marriage settlement contained a covenant by the intended husband for the settlement of all personal estate which at any time during the coverture should come to or vest in him in right of his intended wife, or in her by bequest, gift, or otherwise:—Held, that a reversionary interest which during the coverture became vested in the wife, liable to be divested by the exercise of a power of appointment, was included in the covenant.

This was an originating summons by the plaintiff, the surviving executor and trustee of the will of the testator Samuel Ware, for a declaration, under Order LV. rule 3 of the Rules of the Supreme Court, as to who were the persons entitled to the investments representing two sums of 10,000*l.* bequeathed by the will, and for what interests, and in what shares.

The testator, who died on the 12th of December, 1860, by his will dated the 5th of July, 1859, bequeathed to each of the

persons thereafter named, to and for his or her own absolute use and benefit, the sum affixed to his or her name, except as thereafter limited—that is to say, to John Cumberlege, Anne Cumberlege, the plaintiff Samuel Cumberlege, and Catherine Cautley each 10,000*l.*; and he limited the above use and benefit of the capital sum of the legacies to the said John Cumberlege and Anne Cumberlege, "so that those sums may be left by them respectively after their deaths in such proportions as they may appoint to their brothers or sisters, Charles Cumberlege (who afterwards took the name of Ware), the plaintiff Samuel Cumberlege, and sister Catherine Cautley; in failure of appointment, to be equally divided between the three or their respective representatives." And he directed that the legacies given to Anne Cumberlege and Catherine Cautley were to be invested as his trustees should approve, and the interest therefrom to be in trust for them for their separate use. And in case either of them should become a bankrupt or insolvent debtor, or sell, assign, mortgage, or otherwise dispose of the annual interest bequeathed to her, the same should cease and fall into his residuary estate as though she were then actually dead, except in respect of Mrs. Cautley, whose legacy was to go to her children according to her appointment, and, in default, to them absolutely. The will contained a residuary devise and bequest.

Catherine Cautley died on the 9th of July, 1867. John Cumberlege, who died on the 6th of March, 1869, by a second codicil to his will, dated the 23rd of February, 1869, after referring to the death of Catherine Cautley, appointed one-third of his 10,000*l.* to his brother Charles Ware, and the other two-thirds to the plaintiff.

Anne Cumberlege, who died on the 17th of October, 1889, by her will dated the 10th of September, 1887, in exercise of the power given to her by the will of the testator, appointed her 10,000*l.* equally between her two brothers, the plaintiff and Charles Ware, as tenants in common.

Charles Ware predeceased Anne Cumberlege, having died on the 22nd of September, 1888. He left a widow and six children, and also grandchildren—children

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of a son who had predeceased him. The settlement dated the 12th of July, 1843, made on the marriage of Catherine Cautley, which was a settlement chiefly of reversionary property, contained a covenant by her husband for the settlement of all personal estate which, upon the marriage, or at any time during the coverture, should come to or vest in him in right of his then intended wife, or in her by bequest, gift, or otherwise.

The questions were, whether the appointments made by John and Anne Cumberlege respectively were valid, having regard to the fact that one of the objects of the powers given to them had predeceased John, and two had predeceased Anne; and also whether "representatives" meant legal personal representatives, or children, or next-of-kin; and whether, if legal personal representatives, the share which Catherine Cautley took in default of appointment was bound by the covenant to settle after-acquired property in her settlement.

Giffard, Q.C., and *Alfred Bailey*, for the plaintiff.—The power is exclusive—*In re Veale's Trusts* (1). But even if the power is not exclusive, the appointment made by Miss Cumberlege, at any rate, is valid, as it was executed after the passing of the Powers Law Amendment Act, 1874 (37 & 38 Vict. c. 37).

When a power of appointment is given by will, and all the objects of the power survive the testator, the death of one of them in the lifetime of the donee of the power does not defeat the power—2 *Jarman on Wills* (4th ed.), p. 265; *Sugden on Powers* (8th ed.), pp. 421–23; *Farwell on Powers*, p. 134; *Butcher v. Butcher* (2), *Boyle v. The Bishop of Peterborough* (3), *Woodcock v. Renneck* (4), *Paske v. Haselfoot* (5), and *Reade v. Reade* (6). The plaintiff is entitled to two-thirds of the

legacy of John Cumberlege, and a half of the legacy of Anne under the appointments, and also, in default of appointment, to a share of the moiety of Anne's 10,000*l.*, as to which her appointment failed by reason of the death of Charles Cumberlege Ware in her lifetime. [They also referred to *Doe d. Thorley v. Thorley* (7).]

Phipson Beale, Q.C., and *Cowell Davies*, for the executors and three of the children of Charles Cumberlege Ware.—The word "representatives" means "legal personal representatives"—*In re Crawford's Trusts* (8). In *In re Horner; Eagleton v. Horner* (9) the word was held not to mean legal personal representatives, but that was only under the circumstances of that particular case. Here there is nothing to shew that it was intended to have any but its proper meaning. The executors of Charles Ware are entitled, in default of appointment, to a share of the moiety of Anne's legacy which has lapsed.

Wace, for a grandson of Charles Cumberlege Ware.—"Representatives" means next-of-kin according to the statute, and I am entitled to share in this lapsed moiety—*Walker v. The Marquis of Camden* (10), *Walter v. Makin* (11), *King v. Cleaveland* (12), *Booth v. Vicars* (13), and *Stockdale v. Nicholson* (14).

Graham Hastings, Q.C., and *Lemon*, for the husband of Catherine Cautley.—We say that "representatives" means "legal personal representatives."

Mrs. Cautley's share in default of appointment is not bound by the covenant to settle after-acquired property in her settlement. "Vest" means indefeasibly vest, or vest in possession. This share during the coverture was always subject to the exercise by Ann Cumberlege of her power of appointment—*In re Jackson's*

(7) 10 East, 438.

(8) 2 Drew. 290; 23 Law J. Rep. Chanc. 625.

(9) 57 Law J. Rep. Chanc. 211; Law Rep. 37 Ch. D. 695.

(10) 16 Sim. 329; 17 Law J. Rep. Chanc. 488.

(11) 6 Sim. 148; 2 Law J. Rep. Chanc. 173.

(12) 26 Beav. 26, 166; 4 De Gex & J. 477; 28 Law J. Rep. Chanc. 74, 76, 835.

(13) 1 Coll.C.C. 6; 13 Law J. Rep. Chanc. 147.

(14) 36 Law J. Rep. Chanc. 793; Law Rep. 4 Eq. 359.

(1) 46 Law J. Rep. Chanc. 799; Law Rep. 5 Ch. D. 61, 596, 622.

(2) 9 Ves. 382; 1 Ves. & B. 79.

(3) 1 Ves. jun. 299.

(4) 4 Beav. 190; 1 Ph. 72; 11 Law J. Rep. Chanc. 110.

(5) 33 Beav. 135.

(6) 5 Ves. 744.

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Will (15) and *In re Mackenzie's Settlement Trusts* (16).

[STIRLING, J., referred to *Sweetapple v. Horlock* (17).]

This is a non-exclusive power. The words should be read "brothers and sisters," as only one sister is mentioned—*Ricketts v. Loftus* (18).

Buckley, Q.C., and *Butcher*, for the trustees of Mrs. Cautley's settlement.—The decision in *Woodcock v. Renneck* (4) was upon the words of the will there, which are not the same in the present case. The objects of the power were described *nominatim*; it was practically a power to appoint among three persons afterwards named, two of whom were brothers, and one a sister. The power is non-exclusive—*White v. Wilson* (19). The statute of 1874 does not affect the question. On the death of Mrs. Cautley the power to the extent of her share came to an end.

[STIRLING, J.—The text-books upon that point are against you.]

"Representatives" means legal personal representatives, and Mrs. Cautley's share is bound by the covenant to settle after-acquired property in her settlement. It became vested in her under the testator's will, though liable to be divested by the exercise of a power of appointment—*In re Jackson's Will* (15).

Austin Cartmell, for a son of Mrs. Cautley.—"Representatives" must be taken to mean children. There is an indication that it was so intended as regards Mrs. Cautley's share, for her legacy is given over in certain events to her children, and the word "legacy" would include her share in default of appointment, as well as her original legacy of 10,000*l.*

STIRLING, J.—As to part of this case I may dispose of it at once. The first question arises upon the meaning of the words, "their brothers or sisters Charles Cum-

berlege, Samuel Cumberlege, and sister Catherine Cautley." That sentence is not strictly grammatical. I assume, without thinking it necessary to decide it, that the gift is in such proportions as John and Anne may respectively appoint to those three persons. John and Anne have made appointments under that power, and the question is whether, under the circumstances of the case, those appointments are valid. In support of them has been cited the well-known case of *Boyle v. The Bishop of Peterborough* (3), followed, as it has been, by *Ricketts v. Loftus* (18); and it is said that those cases shew that the power subsisted, and was exercisable in favour of the survivors of the three persons who were named. A distinction was sought to be drawn between the present case and those to which I have referred, on the ground that in them the gift was to a class and in this it is to named individuals. But it is to be observed that no case has been cited which is a decision that the doctrine laid down in *Boyle v. The Bishop of Peterborough* (3) does not apply to a case where the objects of the power are designated by name, and not simply described as a class. The doctrine has been applied in the case of *Boyle v. The Bishop of Peterborough* (3) to a gift to children as a class. It was extended, or perhaps I ought not to say extended, but applied, in the case of *Ricketts v. Loftus* (18) to a gift where the objects of the power were all of them named, but described as the sons and daughters of a certain person by his wife; and I am asked at this time, after the passing of the Act of 1874, which abolished altogether the doctrine as to non-exclusive powers, not to extend it to a case where the persons who are the objects of the power are indicated by name, and not by description so as to constitute a class. I think I ought not to accede to that view. There is no authority that compels me to adopt that view, and it seems to me that it is inconsistent with the view which has been taken by the profession, as indicated by the three text-writers who have been referred to in the course of the argument—namely, Mr. Jarman, Lord St. Leonards, and Mr. Farwell. In Mr. Jarman's book the law is laid down thus (4th ed. p. 265):

(15) 49 Law J. Rep. Chanc. 82; Law Rep. 13 Ch. D. 189.

(16) 36 Law J. Rep. Chanc. 320; Law Rep. 2 Chanc. 345.

(17) 48 Law J. Rep. Chanc. 660; Law Rep. 11 Ch. D. 745.

(18) 4 You. & C. Ex. Eq. 519.

(19) 1 Drew. 298; 22 Law J. Rep. Chanc. 62.

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"Where a power is given by will to appoint property among several objects, and the subject, in default of appointment, is given to them individually (and not as a class) as tenants in common, a question sometimes arises whether by the death of any of the objects the power is defeated in respect of the shares of those objects. The established distinction seems to be, that if all the objects survive the testator, and one of them afterwards dies in the lifetime of the donee of the power, the power remains as to the whole. But, on the other hand, if any object dies in the testator's lifetime, by which the gift lapses *pro tanto*, the power is defeated to the same extent." Mr. Jarman apparently does not treat the doctrine as resting on the fact of the objects being described as a class, but indicates his opinion to be the contrary, because he refers to the subject in default of appointment being given to them individually, and not as a class. I have been unable in the course of the examination which I have given to the passages referred to in Lord St. Leonards' book to find any indication of his view being otherwise, and, when we come to the last writer of all, he apparently takes the view that the doctrine applies, whether or no the objects of the power are described as a class, or are named. In Mr. Farwell's book the law is laid down in this way (p. 134): "Where a power is given by will to appoint property amongst several objects, and the subject, in default of appointment, is given to them *nominatim*, and not as a class, as tenants in common, the death of any of the objects of the power before the testator will to that extent defeat the power and the devise over; the power and devise over will only remain as to the shares of the survivors." Then he goes on, "If, however, an object survive the testator, but die before the donee of the power, the power and devise over will remain." Seeing that there is no decision to the contrary, and seeing, as I gather from the text-writers, that the view that has been taken by the profession is that the doctrine extends to a case in which the objects of the power are described *nominatim*, as well as a class, I think I ought not to draw the line in the way which I am asked to do, especially having

regard to the fact that the Legislature has intervened, and by the Act of 1874 has really abolished altogether the doctrine on which the cases rest—namely, that where the power is given to appoint, as I hold here, to three persons, you must appoint something to each of them, otherwise the exercise of the power is bad. I think, therefore, that the exercise of the power by the wills of John and Anne is good.

That, however, does not quite exhaust the case. There is a lapse as regards part of the share of Anne, by reason of her brother Charles having died in her lifetime, and that raises the question how it is to go in default of appointment. The testator's will provides that her share is, "in failure of appointment, to be equally divided between the three or their respective representatives." Some questions arise upon what meaning is to be given to the word "representatives." Before determining them, I should like to read through the will again, and will, therefore, postpone giving my judgment on that part of the case.

STIRLING, J. (on June 21).—I have now to decide what is the true construction of the will of the testator with reference to the devolution of a moiety of the legacy of Anne Cumberlege, which goes as in default of appointment. The question turns upon what meaning is to be attributed to the words "their respective representatives" in the gift over of that legacy in default of appointment. The meaning of the word "representatives" was considered in a well-known case before Vice-Chancellor Kindersley—*In re Crawford's Trusts* (20). He there laid down that the word was to be taken, in the absence of any context to the contrary, as meaning the executors or administrators of the person represented—not the next-of-kin. That case has been repeatedly cited with approval, and it has been repeatedly followed, and the principles laid down in it would be binding on me whatever my own individual opinion about them might have been; but I desire to

(20) 2 Drew. 230; 23 Law J. Rep. Chanc. 625.

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say that, so far from feeling any doubt or desire to differ, I find myself, after having read the judgment most carefully, in entire accord with what is laid down there, and I cordially assent to every word expressed by the Vice-Chancellor in that judgment. That being so, all I have to consider is this—whether there is anything in this will which would lead me to infer that the testator used the word “representatives” in any other than its primary legal sense. In the first place, it is to be observed that the gift in which the word occurs is not an immediate gift, but one after the determination of prior life interests, and in default of appointment; and, as is pointed out by the Vice-Chancellor in *In re Crawford's Trusts* (20), there is no presumption under that state of circumstances that the testator used the word otherwise than in its primary meaning—namely, executors or administrators. The only circumstance which is in favour of an opposite construction in the present case is, that the testator has twice used the words “executors and administrators” in the course of his will. I cannot think that the mere appointment of executors is a circumstance to which any weight is to be attached at all. It occurred in the very case of *In re Crawford's Trusts* (20), and was disregarded by the Vice-Chancellor; but in that case, it is true, the word “administrators” did not occur. In the present case, the words occur, in the first instance, in connection with the word trustees, where the testator declares that his trustees, their heirs, executors, or administrators, shall only be chargeable for such moneys as they may respectively actually receive by virtue of the trusts; and, in the second instance, in the limitation of the testator's residuary real and personal property to the residuary devisee and legatee.

The Vice-Chancellor, in the case to which I have referred, says emphatically that he adheres to the principle laid down by Lord Cottenham in *The Attorney-General v. Melkin* (21), that slight circumstances ought not to be considered as affording sufficient evidence of the testator's intention to use the term which he has chosen to employ otherwise than in

its ordinary legal sense. In my judgment, although no case has been cited precisely on all fours with this, there is not sufficient on this will to afford any evidence that the testator intended to employ the words “their representatives” otherwise than in their ordinary legal sense, and I hold that by “representatives” in this will is meant the legal personal representatives of the persons referred to. A further question arises as to the share of the legacy in which Anne Cumberlege took a life interest, which, under the circumstances, was given to Mrs. Cautley. It is said that it ought to go to her children, under the clause in the will which directs that her legacy in certain events is to go to her children according to her appointment, and in default to them absolutely. The question, therefore, is whether the word “legacy” as used in that part of the will includes the share of each of the legacies which in default of appointment were given to “the three or their respective representatives.” I have read the will very carefully, and it seems to me that throughout, down to the passage in question, wherever the testator speaks of a legacy to Miss Cumberlege, or Mrs. Cautley, or John Cumberlege, he means the sum of 10,000*l.* in which those persons respectively take the limited interests which were conferred by the will. I see no reason to suppose that, when he directed the legacy of Mrs. Cautley to go to her children in the manner mentioned, he used the word in any other sense. I think, therefore, that this share of the legacy given to Anne Cumberlege does not go to Mrs. Cautley's children under the clause to which I have referred.

The next question that arises is whether this share is bound by the covenant to settle after-acquired property contained in Mrs. Cautley's marriage settlement. Is it, in fact, personal estate which at any time during the coverture came to or vested in Mr. Cautley in right of his wife, or in her by bequest, gift, or otherwise? What was the nature of the interest conferred by the will of Samuel Ware which I have read? It was plainly a vested interest, an interest which upon the death of the testator became vested in Mrs. Cautley, liable to be divested by the exercise of the power of appoint-

(21) 2 Ph. 64; 16 Law J. Rep. Chanc. 99.
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ment conferred on Miss Cumberlege. Does such an interest fall within the terms of the settlement? It did vest in Mrs. Cautley by bequest during the coverture, and I can see no reason for holding that the word "vest" in the settlement is used otherwise than in its strict legal sense, which means vest in interest, and not in possession. In my judgment, therefore, the share of Mrs. Cautley is bound by the covenant in the settlement, and goes accordingly. I may add that it seems to me that the case of *In re Jackson's Will* (22), although not on all fours with the present case, is an authority in favour of the conclusion to which I have come.

Solicitors—Baileys, Shaw & Gillett; Wade & Lyall.

KEKEWICH, J.)
(for KAY, J.)) *In re* THE BRISTOL JOINT
1890.) STOCK BANK.
April 19, 26.)

Company—Winding-up—Shareholder's Petition—Substratum of Company gone—Reserve Capital—Companies Act, 1879 (42 & 43 Vict. c. 76), s. 5.

A banking company, incorporated in 1884, had an issued share capital of 24,000*l.*, in 2,400 shares of 10*l.* each, 5*l.* being paid up, and the other 5*l.* being by virtue of the Companies Act, 1879, not capable of being called up except in the event, and for the purposes, of the company being wound up. The company had never earned a dividend, and from the last balance-sheet it appeared that all the paid-up capital except 337*l.* had been exhausted. The shares had been sold at a nominal price, and returned to the Inland Revenue as worthless, and the business was now carried on in humble premises with a very slender staff. A shareholder presented a winding-up petition, which was supported by 40 shareholders holding over 1,000 shares, and opposed by the company and shareholders holding over 600 shares. No

creditors appeared:—Held, that under the circumstances the subject-matter of the company had failed, and that a winding-up order ought to be made upon the shareholder's petition.

This was a winding-up petition presented by a shareholder holding fifty shares.

The company was incorporated in 1884 under the Companies Acts, 1862 to 1883, to carry on the business of bankers, and had a nominal share capital of 1,000,000*l.*, divided into 100,000 shares of 10*l.* each, half of which was, under the Companies Act, 1879, s. 5, not capable of being called up, "except in the event, and for the purposes, of the company being wound up." 2,400 shares had been allotted, on each of which 5*l.* had been paid.

The company commenced business as bankers in Bristol in 1884, but their operations had resulted in a loss, and in 1888 they surrendered the lease of their existing premises and retired to a small office in a side street, where the business was carried on by the chairman of the directors, with one clerk and an office-boy. There were two other directors, but they lived at a distance. The balance-sheet of the 7th of December, 1889, which is discussed in the judgment, shewed a surplus on paper of 337*l.* 1*s.* 9*d.*, but with this exception the whole of the called-up capital of 12,000*l.* had disappeared in preliminary expenses, which amounted to 3,800*l.*, and business losses. The directors, however, contended that the bad debts had been valued at too low a figure. The directors' fees were also in arrear to the extent of over 1,000*l.*, but it was now stated by counsel that they did not intend to ask for payment of any part of these fees unless the company were wound up. It appeared, too, that certain negotiations were in progress for the formation of a new bank having its head office in London, and for the fusion of the company in that undertaking. After the presentation of this petition on the 8th of March, 1890, a meeting of shareholders was called, when 27 shareholders attended, representing 3,275*l.*, and passed a resolution unanimously requesting the directors to oppose the petition.

(22) 49 Law J. Rep. Chanc. 82; Law Rep. 13 Ch. D. 189.

In re Bristol Joint Stock Bank.

Under the articles of association five shareholders were the number requisite to form a quorum at general meetings, and motions, except in certain cases, were to be decided by a simple majority of votes given thereon, and in the first instance by a show of hands. Article 125 provided for a declaration of dissolution at a special meeting when three-quarters of the paid-up capital should have been exhausted. Article 126 provided that the company might at any time pass a resolution for a voluntary winding-up by a majority of at least three-quarters in number and value present in person or by proxy.

By article 105, the directors were empowered to spread the preliminary expenses over a period of ten years.

No dividend had ever been declared, and the shares had been sold at 2s. 6d. each, and had been returned to the Inland Revenue as valueless.

Two previous petitions had been unsuccessfully presented by shareholders to wind up the company.

This petition was supported by 40 shareholders holding 1,019 shares. It was opposed by the company and 25 shareholders holding 605 shares. No creditors appeared.

Rigby, Q.C., and *Farwell*, for the petition, and *Renshaw, Q.C.*, and *Farwell*, for the shareholders, in support.—The substratum of the company is gone; and it is impossible for it to carry on the business of bankers. The possession of a reserve capital applicable only in the event of a winding-up does not alter the case.

Marten, Q.C., and *E. Ford*, for the company.—There are no debts except the directors' fees, which they will relinquish except in the event of a winding-up. There has been no demand for payment of debts, which is the true test of insolvency—*In re The Agricultural Insurance Company; ex parte Spackman* (1) and *In re The European Life Assurance Society* (2). The substratum of the com-

pany has not gone—*Baring v. Dix* (3) and *In re The Suburban Hotel Company* (4)—and the majority of the shareholders are opposed to the winding-up—*In re The Langham Skating Rink Company* (5) and *In re The Middlesborough Assembly Rooms Company* (6).

Haldane, Q.C., and *Oswald*, for shareholders opposing the petition.—The petition asks the Court to interfere with the domestic affairs of the company, which is able to pay its debts within sections 79 and 80 of the Companies Act, 1862, and has a reserve capital under the Companies Act, 1879. The question, therefore, is purely a domestic question, and a shareholder has no right to come to the Court. Negotiations are in progress for a transfer of the company's business to a new company. There has lately been a great reduction of expense, and there is all the unissued capital, in addition to the reserve fund of 5l. per share on the issued capital. Under these circumstances there is no precedent for a winding-up order supported by a minority of shareholders. The articles, which amount to a contract, provide that the majority shall bind the minority—*In re The Haven Gold Mining Company* (7) and *In re The German Date Coffee Company* (8).

In re Dale and Plant (9) and *In re The Diamond Fuel Company* (10) were also cited.

KEKEWICH, J.—I am of opinion that the winding-up order must be made. This is a petition presented by a shareholder, and supported by shareholders, and no creditor appears, at any rate in the character of creditor. The shareholders do not all appear. There are more appearing

(3) 1 Cox, 213.

(4) 36 Law J. Rep. Chanc. 710; Law Rep. 2 Chanc. 737.

(5) 46 Law J. Rep. Chanc. 345; Law Rep. 5 Ch. D. 669.

(6) 49 Law J. Rep. Chanc. 413; Law Rep. 14 Ch. D. 104.

(7) 51 Law J. Rep. Chanc. 242; Law Rep. 20 Ch. D. 151.

(8) 51 Law J. Rep. Chanc. 564; Law Rep. 20 Ch. D. 169.

(9) *Ante*, p. 180; Law Rep. 43 Ch. D. 255.

(10) 49 Law J. Rep. Chanc. 301; Law Rep. 13 Ch. D. 400.

(1) 1 Mac. & G. 170; 18 Law J. Rep. Chanc. 261.

(2) 39 Law J. Rep. Chanc. 329; Law Rep. 9 Eq. 122.

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in support of the petition than there are to oppose; but I must not assume from this that the majority of shareholders support. If the shareholders desiring a winding-up were a legal majority, they would no doubt obtain a winding-up in a different way from that of a petition presented here to the Court. I think, however, that I must take it that those who do not appear here, either to oppose or to support, are not sufficiently careful about the result to think it necessary to express any opinion at all; but, eliminating those, the substantial result seems to be as I have stated.

In all these cases—that is to say, in all cases where a contributory has petitioned for a winding-up—the Court has referred to two matters which must from first to last be kept in view. The first is the unwillingness of the Court to interfere with shareholders in the management of their own affairs—and in their own affairs have been included the questions whether the business shall be continued or not, and whether if the company is wound up at all, the winding-up shall be voluntary or by the Court. There are cases in which there has been no suggestion of any desire on the part of the shareholders that the winding-up should be voluntary, and where, therefore, the only question is whether there shall be a winding-up or a continuance of the business. That is the case here. Those who oppose the petition do not suggest that the company should be wound up voluntarily, but say that the business ought to be continued, and I have to deal with the petition and the opposition to it upon that footing. The other matter which the Court has kept in view, and apparently quite as much so as the unwillingness to interfere, is this, that there is jurisdiction in an extreme case to wind up a company at the instance of a contributory, and notwithstanding that he is not supported by a majority of the shareholders; and though the Court has expressed some considerable reluctance to exercise the jurisdiction, and has cautiously expressed the terms of its exercise, yet that right has been sufficiently asserted. It was asserted by Lord Cairns in the case of *In re The Suburban Hotel Company* (4), where he refers to it

more than once; he refers to it on p. 745, and again on p. 750; and it was referred to also by Vice-Chancellor James, as he then was, in *In re The European Life Assurance Society* (2), where it is expressly stated on p. 128. In the first case, and in several others to which there is no occasion to refer, the phrase used has usually been the “impossibility” of continuing the business. Lord Cairns says in the first passage to which I have referred: “If there be a complete impossibility of pursuing the partnership business which was contemplated at the time the partnership was made, the Court, in the case of an ordinary partnership, would dissolve it even without consent,” and he says this in reference to a joint-stock company. It is not so easy to say what is meant by “impossibility.” Several cases have come before the Court in which a conclusion has been arrived at as to the existence of the impossibility. I will take three as illustrations. The first is *In re The Suburban Hotel Company* (4) itself, in which Lord Cairns came to the conclusion that there did not exist a state of circumstances which made it impossible that the business of the company should be continued. The next case is *In re The Haven Gold Mining Company* (7), and the third is *In re The German Date Coffee Company* (8). In the first of these two cases the mine which the company was formed to work either did not exist, or at any rate was not possessed, and could not be possessed, by the company, so that the physical substratum, the subject-matter in respect of which the company was formed, was altogether gone. In the case of *In re The German Date Coffee Company* (8) there were patents in existence—a patent for making coffee out of dates; but the Court came to the conclusion that the company was formed in the first instance and essentially for working a German patent, and as the German patent had no existence, there again the subject-matter failed. So that we have in these two cases instances of either the physical substratum, or what was equivalent to the physical substratum, of the company being non-existent. But it is to be observed that in the case of *In re The German Date Coffee Company* (8), as also in

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the case of *In re The Suburban Hotel Company* (4), reference was made to *Barling v. Dix* (3), a very much older case, decided in reference to an ordinary partnership case, as stating the principle on which the Court proceeded, and there, notwithstanding the use of the word "invalid," in one passage in Lord Cairns's judgment in *In re The Suburban Hotel Company* (4), I collect from the report in *Cox* that the patent was an existing patent, one that at any rate had not been successfully attacked, but that, as the report says, "the invention totally failed, and was now entirely given up," and there the Court directed an enquiry before the Master whether "the co-partnership business could now be carried on according to the true intent and meaning of the said articles of co-partnership."

Therefore, I take the decision there to be that the entire failure of the patent, though still a patent in the eye of the law, was a ground for directing an enquiry whether there should not be a dissolution, with the intention that if the enquiry was answered by saying that there was no possibility of the partnership business being carried on, the dissolution should follow. I take it, therefore, that, notwithstanding that the instances with which the Court has had to deal, and which I have referred to as illustrations of the state of circumstances under which the Court has come to the conclusion that it was impossible to carry on the business of the company, have been cases in which that which either never existed or has ceased to exist has been the physical substratum of the company, or something equivalent to it, yet where the subject-matter of the company is gone, there the Court will wind up the company, not because some shareholders desire it and some not, but because that which the company was formed to do can no longer be done; and if the Court comes to the conclusion that that is the real state of the case, there it has jurisdiction, and is bound to exercise jurisdiction, to wind up the company.

Before considering that point with reference to this case, I must now advert to a matter to which I called Mr. Haldane's attention just now, and to which he re-

ferred, as did also Mr. Oswald, and which was mentioned by Mr. Rigby in the first few words of his address in opening the case. This is a case entirely different, so far as I am aware, from any other case which has yet been presented to the Court, because I am not aware, and counsel also are not aware, of any case in which a contributory has asked the Court to wind up a company possessing what is called a reserve capital. The chartered companies, which were formed on the principle of there being a certain amount of the original subscription available in event of liquidation, were wound up sometimes by the Court, but always, I believe, on the application of a creditor. The Companies Act, 1879, has not long been in existence, and I am not aware of any case in which a contributory of such a company came before the Court and said, "I decline to allow my credit to be further pledged as regards the amount which I am bound to subscribe to the liability of the company in the event of a winding-up."

The distinction drawn by the Court has been between a petition to wind up a limited company and one for the winding-up of an unlimited company; and, as I understand it, the distinction is this: that a shareholder is bound to contribute to the extreme limit of his limited liability to enable the business to go on, and that he cannot be heard to say that, because he would rather not pay up his shares in full, the amount which he has agreed to contribute shall not be contributed to assist those who do continue, in effecting their desire. It is part of his contract to pay up so much per share so long as the company continues, and he is bound to fulfil that contract. As regards unlimited companies, other considerations are allowed to intervene. I need not dwell upon those. But here I find an entirely different case. A shareholder is bound to pay up, and has paid up, 5*l.* per share, and he is bound to pay another 5*l.* a share if and when the company is ordered to be wound up. I think I must enquire what is the precise contract into which he has entered—not the contract with the creditors; about that there is no question—but the contract between the

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partner and his co-partners, whom he meets here, and who are concerned in the question whether the company should be wound up or not. The question of the shareholders' contract was discussed by Lord Cairns in the case of *In re The Suburban Hotel Company* (4), where he states the position of a shareholder as regards the case of a limited company not having this reserve capital. It was also discussed, if my memory fails me not, in *In re The European Life Assurance Society* (2) by Vice-Chancellor James; but it is to be observed that the contract there was with a policy-holder—that is, a creditor—and not by the shareholders *inter se*. I understand the contract of a shareholder with his partners as regards the reserve capital to be that the trade shall be conducted with a certain amount of capital, of which he is to contribute a fixed proportion, and on the faith of the credit attaching to his liability to contribute a further sum in the event of a winding-up. But it is said that the trade must be carried on notwithstanding that the capital is exhausted, and so as to bring on the shareholder this contingent liability. That seems to me to be putting the reserve capital on precisely the same footing as the original capital, and making it part of his contract that he shall allow the trade to be continued at all hazards whether he approve or not, and not for the purpose of paying existing debts, but for the purpose of enabling the company to incur debts to which he may be liable to contribute. To my mind that is not the contract into which he has entered. Mr. Marten referred to the articles of association, and particularly to article 126, in opposition to that view. Article 126 refers to the dissolution of the company in certain events, but that does not seem to me to exclude the jurisdiction of the Court if the case is made to fall within the Act of Parliament. In other words, it seems to me that if the contract is that which I hold it to be, then a shareholder is entitled to invoke the jurisdiction of the Court, notwithstanding that one of the terms of the contract is that, while the business is being continued, he cannot insist on the winding up except in the events mentioned in article 126. Here I have a state of things which seems

to me not only to justify me in exercising the jurisdiction, but to compel me to do so. I take the balance-sheet of last year. I have heard affidavits and comments on affidavits which suggest that that which has been represented by the directors to be the true state of things, is not true in this sense—that the assets are more valuable than is there stated. It is exceedingly dangerous to take explanations made for the purpose of this petition of what ought to have been a true statement to the shareholders at the end of last year; but, to my mind, there is a far more complete and satisfactory answer to all the arguments on this point than that. I have not heard a line of affidavit, I have not heard a statement of counsel speaking on instructions, of any intention of putting into an affidavit any statement that a single penny of these bad debts has been recovered since last year, and I take it that if Mr. Hale, the chairman, had been able to say, not merely as matter of estimate that a considerable sum might be recovered, but as a matter of fact that in the interval a considerable sum which it was not expected to recover had been recovered, he would have done so. I take it, therefore, that as regards the bad and doubtful debts, the statement made to the shareholders is true—as, of course, it ought to have been. Then, as regards the other assets, the only one about which there is any question to be made is that of preliminary expenses. It appears, according to one of the articles of association, that the directors were empowered to distribute the preliminary expenses over a series of years. That seems fair and reasonable, and is not objected to as provided by the articles of association. But the preliminary expenses of starting a business which is intended to be large are considerable; and there may be—I do not say there is, but there may be some unfairness in charging all those as against capital, and still more unlikely to be unfairness in charging them against the profits of any one year. It may be a fair bargain between the partners or shareholders to distribute them over several years so as to enable the company to declare a dividend in each of the years, if profits render it proper to do so; but the money is none the less gone because

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it is distributed over a series of years. The preliminary expenses are not the less paid because they are attributed to one year rather than another. The 3,800*l.* for preliminary expenses is no more an asset of the company, because some part of it may be properly treated as having been paid in the present year. The 3,800*l.* put down as preliminary expenses is positively gone, and cannot for any purpose be treated as an asset of the company. The result is that there is a surplus of about 300*l.*, or, speaking with precision, 337*l.* 1*s.* 9*d.*, on paper. Part of that consists of office furniture. That is a small matter, no doubt, but still it is only on paper. The cash is in the hands of agents, and may or may not be recoverable in its entirety. But, putting it at its best, there was at the end of last year a surplus of 337*l.* 1*s.* 9*d.* Now, until this morning I felt bound to consider that, as against that, there came a debt of something like 1,100*l.* or 1,200*l.* payable to the directors for their remuneration, which I have been told they do not demand, and for a very good reason. But I am also told this morning that they do not wish to insist on payment, unless the company is wound up. Previously it was stated to be in the alternative, or unless the company becomes successful, which, of course, is the only other event in which it was possible that they should be paid. But now they have gone further, and said that they do not wish to insist on their remuneration, unless the company is wound up. The result is, that no debt of the kind is now payable; it is now a debt which must be deemed to have been paid. I pass, therefore, over the subject of debts with this remark, that I cannot adopt Mr. Marten's argument, that inability to pay debts means not debts which are demandable, but debts which have been actually demanded. The Vice-Chancellor James, in *In re The European Life Assurance Society* (2), explains precisely what inability to pay debts means; but there is not a word in his judgment to justify the proposition that debts must not only be demandable, but actually demanded, in order to come within the term "debts" as mentioned in the Act of Parliament. This

particular sum is not at any rate now a demandable debt, but only a sum to be provided for in the event of the company being wound up. The company is entitled to the benefit of that to this extent, that at least on paper there is a surplus of 337*l.* 1*s.* 9*d.*, assets with which to continue the business. On the other hand, I find that the company never have really made any profits at all. There is a paper profit of a small amount, 86*l.* odd, last year; but it cannot be said that they have ever made a profit. It can, on the other hand, be said that they have been going on in this way from year to year. They have been in existence for six years, and on the average of the expenditure for the past years the surplus of 337*l.* 1*s.* 9*d.* will be gone in less than a third of a year—that is to say, it may fairly be treated as gone at the present time. But then I am told that there are two or three reasons why the company ought not to be treated as in hopeless insolvency. In the first place, it is said that there is the prospect of a transfer to another bank. It is hardly conceivable that any bank would give anything for a business which really does not exist, and nothing could be probably said of negotiations alleged to have taken place. Then I am told that they may carry on a better business in future, that they have up to this time done their best to reduce the expenses, that they have deserted a more expensive house, that they have dispensed with the original establishment, and the business is being conducted in a most economical way. No doubt it is. It is carried on in an office which appears not to be in a principal street, which is rented at 28*l.* a year, and with only a manager and a person who may or may not be properly described as an "office boy," as representatives of a bank established with a capital of 200,000*l.* But Mr. Oswald argued that there was a large capacity to issue capital, that there is a larger capital in reserve, and that this may be available for the extension of the business. It is drawing on one's imagination to suppose that a bank which has been in business six years, which has expended (with the exception of 337*l.* 1*s.* 9*d.*) the whole of its paid-up capital of 12,000*l.*,

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which has not yet made profits so as to declare a dividend, whose shares have been sold, it is said, for 2s. 6d. a share, but have been returned, on the authority of the chairman himself, to the Inland Revenue as worthless—that such a bank can issue further capital. The legal capacity to issue capital there no doubt is; practical capacity there certainly is not. Does then this state of circumstances bring the case within the principle to which I have referred? Is the subject-matter of the company gone? I am perfectly well aware that in answering that question in the affirmative I am going beyond the decisions in *In re The Haven Gold Mining Company* (7) and *In re The German Date Coffee Company* (8), but I believe I shall be deciding according to the views of Lord Cairns in *In re The Suburban Hotel Company* (4), and of the Vice-Chancellor James in *In re The European Life Assurance Society* (2), and according to the principle embodied in the short report of *Baring v. Dix* (3). I must not forget that this is a bank. I must not forget—one must know, does know—what are the essentials of carrying on a banking business satisfactorily. There may be a further struggle, but I cannot conceive it as possible—I say it is impossible—for this company to continue its business satisfactorily, because it has not that without which a banking business cannot be carried on. Then I am met by the consideration that many of the shareholders desire that it should be carried on. Several of them come here and oppose the winding-up petition. I have already referred to the unwillingness of the Court to interfere with shareholders in the conduct of their affairs. I do not for a moment wish to depart from anything I have said on the subject, but I say this is a peculiar case. The shareholders have entered into a contract of a peculiar kind, such as I have explained, a contract not of such an extent as is argued on behalf of those who oppose the petition. I think a shareholder is entitled to come here—certainly he is if supported by several other shareholders—I do not say that a single shareholder would be so entitled—and say, “I will not have this business carried on without any reasonable hope of success, in order that at some uncertain time hereafter my

further capital—the reserve capital—may be called up and used in payment of debts which ought not to be incurred.”

On these grounds I think that there must be the usual winding-up order.

Solicitors—Mackrell, Maton & Godlee, for petitioner; Meredith, Roberts & Mills, agents for W. H. Brown, Bristol, for company; Herbert F. Oddy, for shareholders.

STIRLING, J. }
1890.
June 3, 4, 28. }

In re RICHARDS.
HUMBER v. RICHARDS.

Equitable Mortgage—Real Estate—Priority—Notice.

R., a solicitor, in 1883 received money from a client for the purpose of investment, and represented to him that he had invested it upon the security of a particular mortgage. The mortgage, however, was one which *R.* had previously taken in his own name, and it was never transferred to the client. He afterwards deposited the title-deeds of the mortgaged property with his bankers to secure his overdrawn account, and paid interest on the mortgage to the client down to the death of the latter in 1885, and subsequently to his executors. *R.* died in 1888, his account being overdrawn to an extent exceeding the value of the mortgaged property, and the bank immediately gave notice of their claim to the mortgagors. The bank had no notice of the client's claim at the date of the deposit, and their notice to the mortgagors was prior to any notice given by the client's executors:—Held, first, that *R.* was a trustee of the mortgage for his client, and that neither the client nor his executors had been guilty of negligence so as to deprive them of their priority; and, secondly, that the principle of *Dearle v. Hall* (3 Russ. 1) did not apply, and therefore the bank were not entitled to priority by virtue of having given notice to the mortgagors before the executors.

Adjourned summons.

This was a summons taken out in an action instituted by a creditor to adminis-

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ter the estate of W. A. Richards, who during his life had been a solicitor practising in Nottingham. For the purposes of the summons the following facts were set out in a statement agreed to by all parties :—

By an indenture dated the 20th of November, 1882, J. H. Smalley and G. J. Allsopp mortgaged eight freehold messuages in Simpkins Street, Nottingham, to Richards to secure the repayment of 500*l.* and interest at five per cent.

By an indenture dated the 16th of June, 1883, J. H. Smalley and G. J. Allsopp further charged the same property to Richards, with repayment of the sum of 50*l.* and interest.

On the 9th of July, 1883, Richards received on behalf of a client, named William Frederick Horner, a sum of 300*l.*, being the amount due on a mortgage to Horner which was then paid off; and this sum was allowed by Horner to remain in Richards' hands for the purpose of re-investment.

On the 1st of September Richards received from Horner a further sum of 250*l.* for the same purpose. The letter in which the 250*l.* was remitted was as follows :—“ Enclosed I send you cheque for 250*l.* as promised, which, with the amount in hand, will complete the sum required (550*l.*) for the mortgage you mentioned to me.”

On the 1st of October, 1883, Richards wrote to Horner : “ On the other side I send particulars of the 550*l.* security as requested.” The particulars referred to were as follows :—“ Description—a piece of land with eight messuages thereon, situate in Simpkins Street, Blue Bell Hill Road, in the town of Nottingham, purchased by the mortgagors for 915*l.* Mortgagors, J. H. Smalley and G. J. Allsopp. Amount of mortgage money, 550*l.* Rate of interest, five per cent. per annum.”

On the 19th of December, 1883, Smalley and Allsopp repaid to Richards the sum of 50*l.*, and on the 22nd of December, 1883, Richards wrote to Horner as follows :—“ 550*l.* Allsopp and Smalley.—I have been from home, or yours of the 18th inst. should have had an earlier reply. The transfer to you will be dated the 1st of September last, but it is not yet completed, as the mortgagors are pay-

ing off 50*l.* so as to reduce the mortgage to 500*l.* Up to the above date interest on the 300*l.* will be paid, and thenceforward on the whole amount.”

On the 10th of May, 1884, Richards wrote to Horner :—“ Yourself and Allsopp.—I find that this 50*l.* was repaid on the 19th of December last, and enclosed I send you a cheque for that amount, the receipt whereof please acknowledge.”

On the 13th of May, 1884, Richards wrote to Horner :—“ 50*l.* Messrs. Smalley and Allsopp wish to know if you are willing to again advance the 50*l.* on mortgage of their property in Simpkins Street which was paid off by them in December last.”

On the 19th of May, 1884, W. F. Horner sent to Richards the sum of 50*l.*

On the 19th of May, 1884, Richards wrote to Horner :—“ I am in receipt of your cheque for 50*l.* to be advanced on mortgage to Messrs. Smalley and Allsopp, making in all 550*l.* so advanced to them.”

On the 21st of May, 1884, Richards paid the 50*l.* to Smalley and Allsopp, and took a receipt from them, and he regularly paid the interest on the 550*l.* to Horner during his lifetime, and to his executors after his death, which took place on the 20th of August, 1885.

On the 12th of November, 1888, Richards deposited the indentures of the 20th of November, 1882, and the 16th of June, 1883, together with a conveyance dated the 20th of November, 1882, of the premises included in the mortgage to Smalley and Allsopp, with the Nottingham and Nottinghamshire Banking Company, Limited, to secure his overdrawn account.

On the 21st of December, 1888, Richards died, his account with the bank being still overdrawn, and since the 12th of November, 1888, it had never been overdrawn to a less amount than 1,980*l.*

On the 28th of December, 1888, the bank gave notice in writing to Smalley and Allsopp of the deposit of the deeds. On the same day Smalley and Allsopp acknowledged the receipt of the notice, and stated that the sum of 550*l.* was still owing upon the security of the deeds.

The summons was taken out by the executors of Horner to determine, *inter alia*, the questions whether the bank as

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equitable mortgagees were entitled to retain possession of the deeds so deposited with them, and who was entitled to the benefit of the mortgage executed by Smalley and Allsopp to Richards.

Graham Hastings, Q.C., and *Levett*, for the summons.—This is a question between persons having equitable titles, and we are entitled to priority in point of date; and as there are no circumstances of negligence or fraud to postpone our equity, it must prevail—*Bradley v. Riches* (1). Where a solicitor has money of his client to invest on a particular security, and he does so, but takes it in his own name, he is a trustee of it for his client—*Harpham v. Shacklock* (2). We admit the bank gave earlier notice, but that does not give them priority over us.

Frank Wright, for the plaintiff.

Theobald, for the executors of Richards.

Swinfen Eady, for the bank.—Richards was not a trustee for Horner of this particular property—*Middleton v. Pollock* (3). The bank in this case gave notice of their charge to the mortgagee, and have thus obtained priority. It does not appear that in *Bradley v. Riches* (1) any notice was given by the subsequent mortgagee to the debtor. It is well settled that a mortgagee of a *chose in action*, by giving notice to the debtor, obtains priority over a prior mortgagee who has not given notice—*Dearle v. Hall*; *Loveridge v. Cooper* (4) and *Ryall v. Rowles* (5). There is no case which shews that that doctrine does not apply to a mortgage of real estate. The mortgage debt is a *chose in action*. Moreover, Horner and his executors have lost their priority by their negligence in leaving the title-deeds with Richards, and so enabling him to deposit them with the bank. The real transaction between the parties was not an investment on mortgage by Richards for Horner, but a purchase by Horner of a mortgage belonging to Richards, so that he ought to have seen that he got a proper transfer of the security to himself.

Graham Hastings, Q.C., in reply.—The doctrine of *Dearle v. Hall* (4) has never been applied in the case of a mortgage of real estate.

Cur. adv. vult.

STIRLING, J.—The question I have to decide is whether the executors of W. F. Horner or the Nottingham Bank are entitled to the benefit of the mortgage executed by J. H. Smalley and G. J. Allsopp to W. A. Richards, the testator in this action. The materials upon which I have to decide the case are set out in an agreed statement of facts. Both Richards and W. F. Horner are dead, and the materials are somewhat imperfect. [His Lordship then stated the facts as above set out, and after observing that it appeared that Richards had concealed from Horner the fact that he himself was the mortgagee, continued:] The question is whether the executors of Horner or the banking company are entitled to the benefit of the mortgage. The letter of the 1st of October, 1883, appears to have created a trust in favour of Horner. The case of *Harpham v. Shacklock* (2) is an authority for that. Under the circumstances I have mentioned it was contended on behalf of the executors of Horner that the title of both claimants being equitable, they rank according to priority of date; and that as Horner's title was the earlier, it must prevail over that of the bank. But it was said on behalf of the bank that Horner and his executors had been guilty of negligence such as to postpone their security to that of the bank; and further, that the bank had gained priority by having given notice before the executors. As to the first point, it must be observed on behalf of the executors that any person is entitled to vest property in another as trustee for himself, and to leave the title-deeds relating to the property in the hands of the trustee. That was decided in *The Queen v. The Shropshire Union Canal Company* (6), and the question was further considered in *Carritt v. The Real and*

(1) 47 Law J. Rep. Chanc. 811; Law Rep. 9 Ch. D. 189.

(2) Law Rep. 19 Ch. D. 207.

(3) 46 Law J. Rep. Chanc. 39; Law Rep. 4 Ch. D. 49.

(4) 3 Russ. 1.

(5) 1 Ves. sen. 348; 1 Atk. 165.

(6) 45 Law J. Rep. Q.B. 31; Law Rep. 7 E. & I. App. 496.

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Personal Advance Company (7). The latter was a very strong case; for there a solicitor took a mortgage in the name of his clerk, and left the deeds in the possession of the clerk; and it was held that he was not postponed to persons taking a title from the clerk. But it is said that the real transaction was a bargain by Horner for the purchase of Richards' mortgage, and reliance was placed upon the letter of the 22nd of December, 1883, and it is contended that Horner must be taken to have known the real nature of the transaction, and consequently that this was not the case of Richards making an investment for Horner, but the case of Horner purchasing from Richards and not seeing that he got a proper transfer to himself. If that could be made out, the argument might be well founded. But there is nothing in the letter to shew that Horner knew that Richards was a mortgagee of the property. Further than that, Richards was the solicitor of Horner, and was acting as such in reference to this matter; and it has been laid down in *Hunt v. Elmes* (8) that "clients in the ordinary course of business trust their solicitors, and negligence cannot be imputed where the ordinary course of business has been observed. If, indeed, we were to charge the plaintiff on this ground, the effect would be that in every case where a mortgage was taken by a client from his solicitor, the safety of the client would require that a separate solicitor should be employed on his behalf;" and further, in *Dixon v. Muckleston* (9), that clients are entitled to rely on representations made by their solicitors in the ordinary course of business. There is nothing in this case to shew that anything occurred to make Horner distrust Richards; and it appears to me that the letters shew that Horner was not trusting idly to Richards, but was making inquiries, and that the answers of Richards amount to a representation that the usual course of business was being followed. I accordingly hold that Horner was not guilty of negligence,

and that that point on behalf of the bank fails. The next point is as to notice, and the principle relied on is laid down in *Dearle v. Hall*; *Loveridge v. Cooper* (4), and it is said that there is no authority that a mortgage of real estate stands on a different footing from that of a *chose in action*. The particular point does not appear to have been decided; but in principle it is covered by decisions which have long been recognised. The principle on which those cases rest is laid down by Lord Lyndhurst in *Loveridge v. Cooper* (10), where he says, "Where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person who, in fact, is not the owner. This doctrine is not confined to chattels in possession, but extends to *choses in action*, bonds, &c. In *Ryall v. Rowles* (5) it is expressly applied to bonds, simple contract debts, and other *choses in action*. It is true that *Ryall v. Rowles* (5) was a case in bankruptcy, but the Lord Chancellor called to his assistance Lord Chief Justice Lee, Lord Chief Baron Parker, and Mr. Justice Barnett, so that the principle on which the Court thus acted must be considered as having received most authoritative sanction. These eminent individuals, and particularly the Lord Chief Justice and Mr. Justice Barnett, did not, in the view which they took of the question before them, confine themselves to the case of bankruptcy, but stated grounds of judgment which are of general application."

It is then laid down that the principle is the same as that which prevails as to simple contract debts and *choses in action*. Now in *Jones v. Gibbons* (11) the question arose whether *Ryall v. Rowles* (5) applied to mortgage debts, and Sir W. Grant, at p. 410, said, "It is then objected that with regard to the mortgage debts no notice has been given to the debtor, and the assignments of the mortgages were not registered in Jamaica; and the trustees admit

(7) 58 Law J. Rep. Chanc. 688; Law Rep. 42 Ch. D. 263.

(8) 2 De Gex, F. & J. 578; 30 Law J. Rep. Chanc. 11, 265.

(9) Law Rep. 8 Chanc. 155.

(10) 3 Russ. at p. 58; 2 Law J. Rep. (o.s.) Chanc. 75.

(11) 9 Ves. 410.

In re Richards.

the reason of not registering them was that it might have prevented his carrying on his trade. A mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment is absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor that the mortgage has been assigned in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore he who has the estate has, in effect, the debt, as the estate can never be taken from him except by payment of the debt. With regard to the mere bond or covenant, which perhaps may accompany the mortgage, it is said that all the ceremonies declared to be necessary as to debts in general ought to be observed. But it is difficult to say the mortgage passes and is well assigned to one person, and yet the debt remains in another. It is impossible that it can be so divided. Therefore, by the assignment of the mortgage, the debt necessarily passes as incident to it, and it is clear that, to constitute a valid assignment, notice to the mortgagor is not necessary. In *Walwyn v. The Assignees of Shepherd* (12) the bankrupt had deposited a mortgage and bond; and Lord Alvanley decreed that the assignees should execute a valid assignment, yet the mortgagor had no notice whatsoever of the deposit. It would be strange to say a mere deposit should be effectual against the assignees, and a valid and complete assignment should not. These mortgage debts, therefore, passed by the assignment of the mortgages, and the plaintiffs are not entitled to any account of them." That was a clear decision that the title of the particular assignee prevailed as against the assignees in bankruptcy. That was followed in *Ex parte Mackay*; in *re Wright* (13) and *Ex parte Barnett* (14). Those were all bankruptcy cases, but the same principle was recognised by Lord Hatherley in *In re Hughes' Trusts* (15). In that case, at p. 94, Lord

Hatherley takes notice of the difference between that case and the case of an equitable mortgage. He says, "The case of an equitable mortgagee is quite different. Suppose it is one mortgage, it is quite plain that it is different, because one mortgagee, if he has an equitable estate in the land of which he is the *cestui que trust*, may at any time require his trustees to convey that equitable estate to him. If it should happen that there are several mortgagees, if a single mortgagee could require to have the estate conveyed to him, it follows that if all the mortgagees concur they are tenants in common of the mortgage, and, all of them concurring, could have it either conveyed to themselves, in order to secure their several mortgage debts, or conveyed to trustees for them, they joining as one individual in making that request. They have a distinct estate in equity in the land itself, which is a case entirely different from the position of persons merely having an interest in the money which is to be produced by sale or mortgage, as they had in *Lee v. Howlett* (16), and as they had in *Foster v. Cockerell* (17)."

So that from the time of Sir W. Grant down to that of Lord Hatherley the rule has prevailed that as between the particular assignee and the assignee in bankruptcy the title of the particular assignee prevails. That being the state of the authorities, I hold in this case that the bank are not entitled to priority by reason of having given notice before the executors, and their claim therefore fails.

Solicitors—Warren, Gardner & Murton, agents for Watson & Wadsworth, Nottingham; Pontifex, Hewitt & Pitt, agents for Wells & Hind, Nottingham; Wilson, Bristows & Carpmal; Taylor, Hoare & Taylor.

(12) 4 Ves. 119.

(13) 1 Mont. D. & D. 550.

(14) 1 De Gex, 194.

(15) 2 Hem. & M. 89.

(16) 2 Kay & J. 531.

(17) 3 Cl. & F. 456.

CHITTY, J. }
1890.
July 30. }

In re EYTON.
BARTLETT v. CHARLES.

Mortgage—Fund carried to Separate Account—Stop-Order thereon by Incumbrancer—Claim thereto in the Action—Priority.

In an administration action under an order made in the presence of the plaintiffs, a fund was carried to the separate account of an annuitant and her issue, the dividends thereon to be paid to her for her life, and she charged her interest in favour of persons who obtained stop-orders thereon. She was afterwards found to be indebted to the estate, and the plaintiffs sought to have the dividends applied in satisfaction of her liability in priority to the charges she had created:—Held, that the effect of carrying the fund to a separate account being to release it from the general questions in the cause, the persons who had made the advances on the faith of the order were entitled to priority over the plaintiffs' claim.

Motion.

This was an action to administer the estate of Mr. P. Eyton. The testator had acted with Mrs. Charles as co-administrator of the estate of Mary Eyton, and in an action to administer her estate it was found by certificate of the 22nd of July, 1889, that Mrs. Charles, either alone or jointly with the testator, had received and left uninvested a part of Mary Eyton's estate, and, by order of the 9th of August, 1889, Mrs. Charles, as surviving administratrix, was ordered to pay the amount into Court. She failed to do this, whereupon an order was made in this action directing that 1,199l. 5s. 5d., representing the amount uninvested, with interest thereon, should be raised out of the testator's estate and carried over to the credit of the estate of Mary Eyton.

Mrs. Charles was entitled to an annuity under the will of the testator, and by an order on further consideration of the 12th of August, 1886, a certain sum was directed to be carried over to "the account of the perpetual annuity of the defendant Anne Parry Charles and her issue," with a further direction to invest

the same in consols and pay the dividends thereon to her for her life.

Mrs. Charles subsequently created charges on her interest in this fund in favour of incumbrancers, who, on the 16th of December, 1886, and on the 14th of February, 1887, respectively obtained stop-orders thereon.

On the 10th of June, 1890, the plaintiffs in the action, who were beneficially interested in the testator's estate, gave notice of motion for a declaration that the estate was entitled to be recouped by way of contribution one moiety of the sum of 1,199l. 5s. 5d. paid thereout as aforesaid, and that, notwithstanding the stop-orders, the dividends to accrue on the sum of consols standing to the credit of the above-mentioned annuity account might during the life of Mrs. Charles or until further order be applied in satisfaction of the claim, and for an injunction restraining her and her assignees or incumbrancers from receiving the same.

The motion was opened on the 13th of June, when it was ordered to come on as a non-witness action.

Whitehorne, Q.C., and *E. Ford*, in support of the application.—The right of the testator's estate to contribution is clear—*Birks v. Micklethwait* (1)—and her annuity is applicable in satisfaction of her liability.

E. Russell Roberts, for one incumbrancer, and *Maidlow*, for the other incumbrancer.—The effect of the order of the 12th of August, 1886, was to enable Mrs. Charles to deal with the fund carried over, free from any paramount claims. The order was made in the presence of the applicants, and it is too late now for them to bring forward any claim on the fund—*Rice v. Rice* (2).

Whitehorne, Q.C., in reply.—The respondents can only claim through Mrs. Charles, and ought not to stand in a better position than she does as against the applicants' claim.

CHITTY, J. [after stating the facts, continued:]—Unquestionably, Mrs. Charles, having subjected the estate of P. Eyton to

(1) 33 Beav. 409; 33 Law J. Rep. Chanc. 510.

(2) 2 Drew. 73; 23 Law J. Rep. Chanc. 289.

In re Eyles.

liability, is not entitled to take anything out of that estate without making good her share of such liability; so that, if this case had to be decided apart from the order carrying over the fund, the application would be well founded, and the applicants would be entitled to stop the payment of Mrs. Charles's annuity until her moiety of the liability arising from the breach of trust had been made good. Nor is it contested that, taking the order into account, it would not be too late for the applicants, as against Mrs. Charles, to stop the annuity. But it appears that on the faith of this order, which was made in the presence of the applicants, other persons have honestly advanced money, and they now contend that when doing this they were entitled to give credit to the Court's order, which not only carried over the fund to a separate account, but directed payment of the dividends thereon to Mrs. Charles, and that the fund ought to be held to be free from any paramount claim. And I think they are right in this contention. As said by Lord Langdale in *In re Servoise* (3): "Where a fund is carried over to a particular account, it is released from the general questions in the cause, and becomes marked as being subject only to the questions arising upon the particular matter referred to in the heading of the account," and he goes on to state some consequences which follow from this proposition. The respondents rely on this order of the Court, which is, in effect, a judgment, for, although it contained no declaration of right, it shewed a clear title in Mrs. Charles. I consider I should be introducing an evil practice if I did not accede to the argument on their behalf, against which no authority is to be found, and which, as I have shewn, is in accordance with general principles. It is notorious that bankers and other lenders of money are in the habit of dealing with persons on the faith of such orders as this—which I admit would not be of itself enough to justify them in so doing—but, in my opinion, they are right, especially when the order has been made in the presence of the persons who afterwards bring an adverse claim. The order is in substance a

res judicata, and any such claim should be brought forward when the order is made. The applicants' claim, therefore, although good as against Mrs. Charles, fails as against her incumbancers. I may add that the case of *Rice v. Rice* (2), although not in point on the present question, shews clearly the principle which governs priority as between equitable claimants to a fund, and in the present case the principle tells even more strongly in favour of the incumbancers, by reason of the existence of this order of the Court carrying the fund to a separate account. I, therefore, refuse the application, with costs.

Solicitors—Daubeny & Mead, agents for W. Smith & Sons, Weston-super-Mare; Kennedy, Hughes & Kennedy; Lickorish & Bellord.

KEKEWICH, J. { THE MUNICIPAL FREEHOLD
1890. LAND COMPANY (LIMITED)
June 20. v. POLLINGTON AND
OTHERS.

Company—Director—Resignation—Regulations of Company—Companies Act, 1862, sched. 1 (25 & 26 Vict. c. 89), s. 15—Table A, article 55.

The directors of a company have not power, in the absence of a special power under the regulations of the company, to accept the resignation of a member of the board.

A member of the board of a company which was regulated by the provisions of table A, purported to resign his office by a letter addressed and delivered to the board. Table A, by article 55, provides that the directors may exercise all such powers of the company as are not required to be exercised by the company in general meeting, but does not contain any direct provision for the resignation of a director:—Held, that the resignation was not effected until accepted by the company in general meeting.

The company was registered in February, 1881, under the Companies Acts, without articles of association, and consequently, by force of section 15 of the Companies

Municipal Freehold Land Co. v. Pollington.

Act, 1862, the regulations of table A became the regulations of the company.

By clause 55 of table A it is provided that the business of the company shall be managed by the directors, who "may exercise all such powers of the company as are not by the foregoing Act (Companies Act, 1862), or by these articles (table A), required to be exercised by the company in general meeting."

Table A contains no provision enabling the directors to accept the resignation of a member of the board.

By the present action the company claimed against Lord Pollington and others, the directors of the company from its formation, that they were liable to repay sums amounting to 8,000*l.*, which had been expended in payments upon false balance-sheets and in other ways alleged to amount to misfeasance.

On behalf of Lord Pollington it was claimed as a ground of defence that he was not responsible as a director for any of the acts of the board subsequent to the 15th of July, 1884. On that day a board meeting was held, at which the subject of a letter of resignation written by Lord Pollington, dated the 17th of June, 1884, was considered, with the result that the further consideration of the proffered resignation was reserved, and Lord Pollington was requested to retain his seat on the board. Ultimately, in November, 1885, the board accepted the resignation; but Lord Pollington had not attended any board meeting in the interval.

On the part of the company it was contended that the board had no power to accept his resignation, and that he was liable as a director until his resignation was accepted by the company.

Warmington, Q.C., and *H. Terrell*, for the company.

Neville, Q.C., and *Barrett*, for Lord Pollington.

Rigby, Q.C., and *Horsburgh, Levett*, and *Le Riche*, for other parties.

KEENEWICH, J.—I think before dealing with any other point I must get rid of this new point in respect of Lord Pollington's liability as a director after the 15th of July, 1884. I will not say that it is

not a point which has occurred to many of us at different times in one form or another; but, in the neat form in which it is now raised, I do not remember myself ever having known it raised in pleadings or in argument, and I am not aware of, and counsel has not been able to assist me by reference to, any decision which could be really cited as a guide—and I think that is not unnatural, and not the unlikely result of industry, because of late years table A has very seldom been adopted, and the common forms of articles of association generally contain specific provisions respecting the retirement or resignation of directors, as, of course, respecting many other things. The short facts necessary for my purpose are these. Lord Pollington, being a director, wrote a letter resigning his office as director—I prefer to use that phrase instead of saying "tendering his resignation"—on the 17th of June, 1884, after a board meeting held on that day—that is to say, he was present at that meeting—and there is no doubt he is liable as a director for everything that occurred until that meeting adjourned. That letter could not have been considered by the board until their next meeting, which probably Lord Pollington knew, and I think he must be taken to have known, would not be held until the 15th of July, 1884. At that meeting his letter was read and considered, and the subject-matter of it was directed to stand over. His colleagues were unwilling to part with him, and some correspondence, which I have not before me, ensued, the short result of which was that he was entreated to stay, and, at any rate, it appears from one entry that he was entreated to postpone his resignation until the following November. It was not until the year 1885 that his resignation was ultimately accepted by the board. Now he says, on the one hand, "I resigned when I sent in my resignation to the board;" he does not say, when he wrote his letter, when he posted it, or when he delivered it to some officer of the company, but when it came before the board—that seems the rational, intelligible time to fix—and nothing more was necessary. "I was a free agent. I had accepted this office as director voluntarily, and I had no contract to

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stay any longer than it suited me, and for reasons" (which he did not explain, and which he was not asked to explain) "I thought the time had arrived when I ought to resign, and I did resign. It was not accepted till afterwards. What matters that?" I think that is the effect of the evidence. "I never departed from my determination to resign then, and whether it was accepted or postponed, or directed to stand over or not, is perfectly immaterial to me." On the other hand, the company say, "The directors had no authority to accept your resignation, and therefore we are not careful to enquire whether they directed it to stand over, what entreaties they made, and whether they ultimately accepted it or not; you continued a director until you were released by the company." Those are the two positions, and I think those are two consistent and right positions. I mean that any intermediate position does not seem to me to be one of stability. The real legal question is, what was the contract between the parties—the contract of service between Lord Pollington on the one hand and the company on the other. Had he contracted to serve during his pleasure, or had he contracted to serve until he had resigned into the hands of the company, and they had accepted, the office which he had undertaken? It is not contended on the part of the company that they could have refused to accept the resignation, but they say that the office must have been resigned into their hands to accept. They do not place themselves in the position of the sovereign, who can, if the sovereign pleases, decline to accept a resignation of a minister or an officer. They only say, "The resignation must be made to us, and not to your colleagues." Now, on principle, that seems to be so. The directors are the agents of the company. Directors have been frequently called managing partners, and, bearing in mind that really the company law is only a phase of partnership law, modified by statute, I cannot but think that that is a good term. They are managing partners. Now, just let us turn our minds to a partnership firm of many members, all handing over the direction of affairs to two of their body as managing partners,

trusting them, and not meeting, except once or twice a year to balance the accounts and receive their quota of the profits, being content with their great intelligence, their industry, and their faithfulness. One of those managing partners says to his brother, "I am tired of this: I am going, and I leave you to manage the affairs of this partnership, and I am quit of it; I give no notice to my other partners, who will not be here for months to come, and do not know anything about it. I am off, and you will hear no more of me."

Is it conceivable, if that remaining managing partner puts into his pocket the moneys of the partnership which do not belong to him, that the retiring manager would not be liable?

How can he get off the duties which he has undertaken, by simply retiring in that way? and where is the difference between a director seceding from the board, and a managing partner seceding from the management of the partnership? I fail to see any difference at all—no difference, I mean, in substance; as I suggested in argument—but, of course, it is an extreme case, and it may be said to be an absurd case—suppose all the directors were willing to resign, there would then be one left. They might each resign, until there was one left, and that one would be left in charge (to reduce it to an absurdity), because he of them all could not resign, as there was no director left to whom he could make his resignation.

Now is there anything in the articles that goes against that?

I find no such provision as is to be found in the 89th section of the Companies' Clauses Consolidation Act, 1845. I find no such provision as is to be found in the articles of association set out in *The York Tramways Company, Limited v. Willows* (1). I find no mention at all in these articles of association—that is to say, Table A, which speaks of resignation, and after careful consideration I do not think there is anything which points to it.

The directors are entitled to fill up a casual vacancy. Such a casual vacancy might occur by death, it might occur also

(1) 51 Law J. Rep. Q.B. 257; Law Rep. 8 Q.B. D. 685.

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by disqualification, under the clause which is inserted for that purpose. It possibly might occur otherwise. But I see no reason for extending the provision, in the absence of any expressed words, to a vacancy by resignation; and it is to be observed that there is a special provision that a director coming in in that way—that is to say, by the election of the directors for a limited time—shall retain his office “so long only as the vacating director would have retained the same if no vacancy had occurred.” That is to say, he takes the place of the director who has gone.

He is responsible to the company precisely in the same way, and the result is that, when the proper time comes, he retires by rotation, and the company resume that control, which was only lost for the sake of convenience, in order that the board might be full during that time, whatever it may be.

Now, as against that view of the articles, there is only one remark to be made, and that is that, by the clause 55, the whole business of the company is to be given into the hands of the directors.

They are to manage the business, and they are to “exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by the company in general meeting.”

That might be held to imply that they were the company for all purposes not expressly excluded by the Act of Parliament or the words of the articles.

But it seems to me too strong a thing to construe that as meaning that, besides exercising all the powers of the company, which means the powers of effecting the objects as detailed in the memorandum of association, and working these out in detail in daily work, they should into the bargain be constituted the principal of the company as regards its agents, so as to maintain a direct relation between the company and its agents. Of course, one may construe general words strictly, and make them mean almost anything, but I think one ought to put a rational interpretation upon them, and I do not think it would be a rational interpretation to hold that those general words implied the

power of accepting on behalf of the company the resignation of their own officer.

The point is a new one, as I have already said—and I do not know that I ought to express a hope, but I certainly shall not be sorry if the matter is authoritatively discussed elsewhere, particularly in this case, remembering what Mr. Justice Stirling said in the case to which I shall have occasion to refer directly on another point—*The Leeds Estate Building and Investment Company v. Shepherd* (2)—that perhaps the law on this subject is not completely settled; but I think I must hold that Viscount Pollington could not, and did not, by resigning his office, quit himself of all liabilities to the company, and that, notwithstanding his absence, I must hold him responsible for that which as a director it was his duty to do.

Solicitors—C. A. Russ; Tatham, Oblein & Nash; G. Fletcher Jones; Frank Richardson & Sadler; Le Riche & Norman.

NORTH, J. }
1890. } BIGNOLD v. BIGNOLD.
July 30. }

Will—Legacy to Widow—Declaration that it is to be accepted in Lieu of Dower—Interest on Legacy.

A testator devised and bequeathed his real and residuary personal estate to trustees, upon trust to sell, and out of the proceeds to set apart and invest 2,000l., and permit his wife to receive the income during widowhood. And the testator declared that the provision made for his wife should “be accepted by her in lieu of all claim to dower or freebench”:—Held, that interest on the legacy was only payable from the end of a year from the death of the testator.

Further consideration.

William Atkins Bignold, the testator in the action, by his will dated the 29th of January, 1878, bequeathed to his wife Harriet certain furniture and household

(2) 57 Law J. Rep. Ohanc. 46; Law Rep. 36 Ch. D. 787.

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effects, and a legacy of 1,000*l.* to be paid to her within three months after his death. And he devised all his freehold estates, and bequeathed the residue of his personal estate, to his trustees, upon trust for sale and conversion. And he directed his trustees, out of the net moneys to arise from his real and personal estates, to set apart and invest in their names the sum of 2,000*l.* in manner therein mentioned, and to permit his wife to receive the annual income thereof so long as she should continue his widow, and, after her death or second marriage, to stand possessed of the same sum as part of his residuary personal estate.

And the will contained the following clause: "I declare that the provision hereinbefore made for my said wife shall be accepted by her in lieu of all claim to dower or freebench out of my said estates."

The testator died in the year 1884.

The action was brought for the administration of the testator's estate, and the question was raised, on further consideration, from what time the widow was entitled to interest on the 2,000*l.* directed to be set apart and invested.

It appeared from the chief clerk's certificate that the real estate had recently been sold, and the purchase-money, amounting to about 12,500*l.*, paid into Court.

Cozens-Hardy, Q.C., and *Chubb*, for the plaintiff.—The ordinary rule is that interest is only payable from the end of a year from the testator's death—*Turner v. Buck* (1); and the fact that the legacy is to be "accepted by her in lieu of all claim to dower or freebench" makes no difference—*Elton v. Montague* (2). The latter case is precisely in point.

Everitt, Q.C., and *A. J. Chitty*, for the widow.—Where a legacy is given in satisfaction of a debt, the Court always gives interest from the death of the testator—*Clarke v. Sewell* (3) and 2 *Williams on Executors* (7th ed.), p. 1424. And here the legacy is given in lieu of dower and freebench—that is to say, in satisfaction of an obliga-

tion of the testator. Interest is, therefore, payable on this legacy from the death of the testator.

Stokes, Whinney, and *Hadley*, for other parties.

Cozens-Hardy, Q.C., was not called upon to reply.

NORTH, J.—This is a new point. The testator has directed his trustees, out of the proceeds of sale of his real and personal estates, to set apart and invest a sum of 2,000*l.* It is directed to be raised out of the proceeds of sale.

The ordinary rule is that the sale must take place before the money becomes payable out of the proceeds of sale, and that a legatee can only claim interest from the time at which the sale might reasonably have been effected. And, for convenience, the Court has taken upon itself to adopt the rule applicable to legacies payable out of personal estate—namely, that legacies payable out of the proceeds of sale of real estate are deemed to be paid at the end of twelve months from the death.

Here, in my opinion, interest only became payable from the end of a year from the death of the testator. That seems to have been the decision in *Elton v. Montague* (2). In that case the widow elected to take the legacy (to be paid to her within three months after the death of the testator) in lieu of her jointure; and by the decree, interest was ordered to be paid to her from the time of the death. That was brought before the Court on a motion to vary, and the Vice-Chancellor, in giving judgment, said: "The Court intends that a testator means his widow to be provided for from the moment of his death, and, therefore, a legacy to her carries interest from that time. This, however, is a case, not of a simple legacy, but of election. The widow is provided for by her jointure; she is to make her election; and, in that election, the circumstance that the legacy is not payable till three months after the testator's death is one of the ingredients to be taken into the account." That decision appears to me to be precisely in point, and I must follow it.

The Vice-Chancellor said, in the first sentence of his judgment, that "the

(1) 43 Law J. Rep. Chanc. 583; Law Rep. 18 Eq. 301.

(2) 1 Law J. Rep. Chanc. (o.s.) 212.

(3) 3 Atk. 99.

Bignold v. Bignold.

Court intends that a testator means his widow to be provided for from the moment of his death, and, therefore, a legacy to her carries interest from that time"—or, in other words, that a legacy given to a widow had priority as such; but that has since been recognised not to be the law. However, that sentence makes the rest of the judgment even stronger than it would have been without it.

Solicitors — Thorneycroft & Willis, for plaintiff; F. A. & A. C. Doyle, agents for H. J. Mills, Norwich; and Blake & Heseltine, agents for E. A. Field, Norwich, for defendants; Eldred & Rignold, for the widow.

NORTH, J. }
1890. }
April 19, 26, } *In re THE CROWN BANK.*
29, 30. }
May 1, 6. }

Companies Act, 1862, s. 8, sub-ss. 1 and 3; s. 79, sub-s. 5—Construction of Memorandum of Association—Winding-up—Shareholder's Petition.

The name of a company is important in construing the objects for which the proposed company is to be established.

Where a company has ceased to carry on the business for which it was established, but is carrying on a business which is outside its powers, a shareholder may present a winding-up petition, and is not confined to his remedy by injunction.

A company was registered under the name of the Mid-Northamptonshire Bank (Limited). The objects for which the bank was stated to be established were divided into a number of heads of a very varied character. The first head related to the carrying on the business of banking in all its branches; other heads related to the investing and dealing in shares and securities, the acquiring and improving of land and buildings, and the promotion of companies. The company commenced business as a country bank in Northamptonshire, with an office in London. After a few months its name was changed to the Crown Bank (Limited); it gave up its country business, ceased to do banking business, and carried

on in London (in addition to some land speculation) the business of investing in shares and securities. On a petition by a shareholder to wind up the company,—Held, that the company was not carrying on a business authorised by the memorandum of association, and that it was just and equitable that it should be wound up.

Where minutes of an order for winding-up a company had been delivered out, but the order had not been passed and entered, the Court by consent dismissed the petition.

Petition.

The above company was registered on the 25th of January, 1888, under the name of the Mid-Northamptonshire Bank (Limited), with a capital of 250,000*l.*, divided into 25,000 shares of 10*l.* each.

The objects, as stated in the memorandum of association, for which the bank was to be established were divided into fifteen paragraphs, lettered from (a) to (o) inclusive. Paragraph (a) was as follows:—"The carrying on the business of bankers in all its branches, with all incidental matters and things connected therewith, and generally all banking and monetary operations, and either as principals or agents, and either alone or conjointly with any other company or person or persons, and for the purposes aforesaid, or in common with any of the said objects, the acquisition and holding or resale of real and personal estate, either by way of security, investment, or otherwise."

Paragraph (b) related to the discounting of bills and lending of money; and paragraph (c) to borrowing money.

Paragraph (d) was as follows:—"The investing, varying, and dealing with the moneys of the bank in or otherwise acquiring and holding any of the investments following (that is to say), the shares, stocks, bonds, obligations, debentures, debenture stock, scrip, and securities of any company, trust, or corporation formed under British, foreign, or colonial law, whether general or special, or of any government, state, or dominion, sovereign, province, municipality, or ruling or public authority, British, foreign, or colonial, or for the payment of the principal or interest of which the credit or any property

In re Crown Bank.

or revenue of any such government, state, dominion, sovereign, province, municipality, or ruling or public authority is pledged, charged, or made liable, and upon such other securities and in such manner as may from time to time be determined."

Paragraph (e) was as follows:—"The acquiring or leasing of land, buildings, and property in the county of Northampton and elsewhere, either in or out of England, of any tenure, or any easements or privileges, share or shares, or interests therein, and the erection and improvement of buildings thereon, and the using, letting, underletting, leasing, selling, managing, or otherwise dealing with the same property and buildings, and to sell, improve, manage, develop, lease, mortgage, dispose of, and turn to account, or otherwise deal with all or any part of the property of the bank."

Paragraph (f) related to the acting as agents in and guaranteeing the issue of shares and securities, and the payment of dividends and repayment of principal on such securities; paragraph (i) related to the formation and promotion of clubs, companies, and other societies. The other six paragraphs were of a general character, very wide in their terms, including a power to apply for Acts of Parliament.

In April, 1888, a prospectus was issued inviting application for shares. It was headed "The Mid-Northamptonshire Bank (Limited)." The first page contained the names of the officers of the company; gave the offices "London, 56 Cheapside; Rushden, 1 Bank Buildings, High Street"; and stated, "Branches will be opened in Northampton, Kettering, and other places."

The prospectus proceeded as follows:—"This bank has been formed for the purpose of extending banking facilities in the county of Northamptonshire, more particularly in the Parliamentary division of Mid-Northamptonshire, where, from the rapidly increasing manufacturing population in the boot trade, and other local circumstances, it is known there is a profitable field for further banking operations. There has been no new bank established in Northamptonshire for fifty-two years. The population was then 179,336; it is now over 277,035.

"Of all joint-stock undertakings, banks,

as a class, have been the most successful dividend-paying concerns, some paying over thirty per cent. on their share capital; and there can be no doubt of the success of an enterprise of this nature in this district, where, in addition to the numerous populous country towns and villages, and the usual agricultural population, the boot trade, the staple industry of the county, is largely on the increase, being carried on successfully by many small manufacturing firms, and amongst a population hitherto inadequately supplied with banking accommodation.

"Branches and agencies will be opened as favourable opportunities occur.

"A special feature will be that the bank, as a corporation, will act as executor to wills, also as trustee in all cases.

"Deposits will be received, and interest will be allowed thereon, at a rate to be agreed upon.

"Current accounts will be opened, and interest will be allowed and commission charged, proportionate to the character in which the account is kept.

"Good, permanent, and increasing dividends may be anticipated, having in view the profitable character of the business to be transacted, and the scope for extension afforded by the increasing commerce and population of the district. The directors will use their best exertions to pay ten per cent. the first year.

"The shares of the Northamptonshire Banking Company, 5*l.* paid, are now receiving a dividend of ten per cent. per annum, and are selling for 10*l.*, being a premium at the rate of 100 per cent.

"The shares of the Northamptonshire Union Bank, 8*l.* paid, are now receiving a dividend at the rate of 13½ per cent. per annum, and are selling for 25*l.*, being a premium at the rate of over 200 per cent."

Mr. Buckley, the petitioner, applied for ten shares on the faith of this prospectus. He was allotted ten shares in May, 1888, and he took ten more shares in July, 1888. 5*l.* per share had been paid on each of these shares.

The total number of shares allotted was 5,441; of these, 5,000 were allotted to a company called the Flag Building Society.

The directors of the Crown Bank recently made calls to the extent of the

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5l. per share unpaid. They had commenced an action against the petitioner for the 100l. unpaid on his shares; and he had paid the 100l. into Court.

It appeared from the evidence that the Mid-Northamptonshire Bank carried on business as bankers at Rushden from May, 1888, to January, 1889, with a London office at 56 Cheapside.

On the 11th of January, 1889, a circular was issued to the shareholders with reference to the then proposed removal of the business to London, containing the following sentence:—"The intention of the founders of this bank was that it should be primarily a local bank confined to Northamptonshire, and more particularly to the mid-Parliamentary division; it was incorporated in January, 1888, and thereupon commenced business in the county; but, after nearly a year's experience, the directors have decided that, owing to the lack of local support, they will put the bank on a broader basis, and thus be in a position to do business everywhere."

In January, 1889, the name of the company was changed, by special resolution, to that of "The Crown Bank (Limited)." The country premises were given up, and the entire business carried on in London.

From that time forward the banking business was entirely given up, and the business thenceforward carried on by the company consisted (in addition to some land speculation) of a speculative business in shares and securities.

The offices of the Crown Bank at 56 Cheapside were, at first, on the third floor, the first floor being occupied by the Flag Building Society, whose business was afterwards taken over by the Crown Bank; and the Crown Bank then removed their offices to the first floor. The two companies were promoted by the same person, and, to a great extent, had the same directors.

Higgins, Q.C., and *Duke*, for the petitioner, and *Mr. Curtis*, a holder of twenty shares.—The shareholders asking for a winding-up took shares in what they believed to be a genuine local bank; and they are outvoted by the holders of shares which are, in fact, fictitious shares.

The business of the company, as shewn by its name, the first paragraph of the objects stated in the memorandum, and the prospectus issued in April, 1888, was that of a provincial bank.

The case is *ejusdem generis* with the second head of circumstances, under which the Court will make a winding-up order, "Whenever the company suspends its business for the space of a whole year" (1). The present business of the company consists mainly in speculations, and is not a banking business at all; and the company has ceased to carry on its legitimate business for more than a year.

Lastly, it is "just and equitable" that the company should be wound up, because the whole substratum of the business which it was formed to carry on has gone—*In re The Suburban Hotel Company* (2), *In re The Haven Gold Mining Company* (3), *In re The German Date Coffee Company* (4), and *In re The British Oil and Cannel Company* (5).

Bramwell Davis, for ten shareholders holding altogether eighty-seven shares, in the same interest.

Cozens-Hardy, Q.C., and *Kirby*, for the company.

Everitt, Q.C., and *Chadwyck Healey*, for fifteen shareholders holding altogether more than 5,300 shares, in opposition.—This is a going concern, no creditor has taken any proceedings against the company. The company is carrying on a business, expressly authorised by more than one paragraph of the "objects," as defined by the memorandum, with the approval of the majority of the shareholders. The objects here are exceedingly wide.

The resolution of a majority of the shareholders (whatever their private motives may be) upon any question with which the company is legally competent to deal is binding on the minority; and the minority have no legal ground of complaint, because they are outvoted—*The North-West Transportation Company v.*

(1) Companies Act, 1862, s. 79, sub-s. 2.

(2) 36 Law J. Rep. Chanc. 710; Law Rep. 2 Chanc. 737.

(3) 51 Law J. Rep. Chanc. 242; Law Rep. 20 Ch. D. 151.

(4) 51 Law J. Rep. Chanc. 564; Law Rep. 20 Ch. D. 169.

(5) 15 Law Times Rep. N.S. 601.

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Beatty (6) and *The East Pant Du United Lead Mining Company v. Merryweather* (7).

If the company is acting *ultra vires*, the petitioner's proper remedy is to apply for an injunction, and he has no right to a winding-up order.

They also referred to *Peel's Case* (8).

Percy Wheeler, for creditors, also opposed.

Higgins, Q.C., in reply.

NORTH, J. [after referring to the prospectus of April, 1888, and the circular of January, 1889, continued:] Now that circular seems to me to be very important, for it contains a record made at the time of what I believe to be perfectly correct and accurate—the statement of what the intention of the company was when it was formed, and of the objects for which it was formed.

In point of fact, the conclusion I come to is this, that the banking had been definitely and absolutely given up about the year 1888 or the beginning of 1889; and that, from that time forward, they had started upon a totally different business, commencing with the taking over of the business which the Flag Building Society had carried on, and the carrying on of a similar business, which, though carried on in the name of the Crown Bank, is not a banking business of any sort or kind. The prospectus issued does not indicate any intention of carrying on this speculative business in stocks and shares which has been carried on since that time, and in my opinion the business which has been carried on since then is something entirely and absolutely outside the prospectus, which states (and I believe accurately, as does the circular of January, 1889) the purposes and objects for which the company was formed. That has been, in my opinion, definitely and entirely abandoned, and a totally different business embarked upon.

Then the question is, whether this different business is authorised by the constitution of the company. It is said that

(6) 56 Law J. Rep. P.C. 102; Law Rep. 12 App. Cas. 589.

(7) 2 Hem. & M. 254.

(8) 36 Law J. Rep. Chanc. 757; Law Rep. 2 Chanc. 674.

when the memorandum of association is looked at, the company had power to do everything which it has done since—that it is acting entirely within its objects as stated in the memorandum of association. It is necessary, therefore, to look at the memorandum. The memorandum states, first of all, that the name of the company is the Mid-Northamptonshire Bank (Limited), and then it goes on to state certain objects. Now the name in which the company is started seems to me a very important matter—the Mid-Northamptonshire Bank (Limited). It subsequently changed its name—and that it had power to do under the 13th section of the Companies Act, 1862; but the Act provides in terms that no such alteration of name shall affect any rights or obligations of the company, and the company is a company which starts under the name of the Mid-Northamptonshire Bank (Limited). Then section 8 provides what the memorandum of association is to state, and the third paragraph is that it is to state, among other things, the objects for which the proposed company is to be established. I take that to mean this, that certain objects must be specified as those in which business is to be done. If the memorandum were to state as the objects of the company that it was to carry on any business whatever which the company might think would be profitable to the shareholders, in my opinion that would not be a statement of the objects of the company as required by the Act of Parliament. The memorandum here says: "The objects for which the bank is established are"—and then follow a number of heads all lettered, and going down to (o).

I have been reminded several times that the bank here is simply the name of the company, and that, therefore, using throughout in the statement of the objects the name "the bank" is just the same thing as if the name of the company had been used, or as if it had said, "The objects for which the company is established are as follows." I quite agree that that is so—that it does not matter here whether you use the full name, or use a short name by way of reference; but it must not be forgotten that the company is the Mid-Northamptonshire Bank (Li-

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mitted), by whatever name you choose to call it afterwards—whether you call it a bank, or call it the company, or the society, or anything else; and it is the business of the Mid-Northamptonshire Bank (Limited) you now have to deal with. [His Lordship stated the objects of the company, as defined by the memorandum of association, and proceeded:]

Therefore, we have here the enumeration of things so large that when I put it to Mr. Cozens-Hardy whether he could say that it would not extend to authorise the company to establish and work a line of balloons passing backwards and forwards between the earth and the moon, he admitted that he could not say that it would not. There is only one other clause that I need refer to, clause (*m*), which is a clause which seems to me to have been wholly unnecessary on this construction; it is this: "To apply for any Act of Parliament for effecting any modification of the bank's constitution, or extending its objects, or for any other purpose which may seem expedient." How the parties thought that anything, even an Act of Parliament, could extend the objects in the memorandum as they construe it, I confess I do not understand. It would be ridiculous to attach to this memorandum the meaning which I am asked to give to it; it would be perfectly absurd; and, in my opinion, it would not be a statement of objects within the provisions of the Act of Parliament at all. In my opinion what the company have done is not authorised by this memorandum as it stands. There are very general powers taken that might give large powers for the purpose of carrying on the business contemplated by the company; and I find it shewn by the name of the bank itself, and the statements to which I have already referred, what the objects of the company are. I look at the prospectus, and I look at the circular, not as limiting the objects contained in the memorandum of association, but as putting a construction upon it, as shewing what the meaning of the parties was in the words they used; and I hold that this memorandum does not contain powers to do things which are utterly at variance in every way with the business of banking in the largest sense, and that it cannot be

construed to give them powers to do more than what is necessary for the purpose of carrying on a banking business such as was contemplated by them, as shewn by the name of the company and by the earlier transactions of that company. In my opinion, therefore, what they are doing now, and what they have been doing for more than a year past, is something entirely outside the objects contemplated by the company and for which they are authorised to carry on business.

Then it has been pressed upon me more than once, that if what they are doing is *ultra vires*, there is a well-known remedy open to the parties, and that what they should do is to apply to the Court to restrain the doing of what is beyond their powers, and that a winding-up petition is not the proper remedy to have recourse to. As a general rule, I do not dissent from the proposition so put forward; but it must be properly understood, and it must be limited. Supposing, by way of illustration, that a company is formed for the purpose of carrying on a line of steamers between Liverpool and Dublin, and the company embark upon it, and carry on a large and valuable business in that way; supposing that they think the convenient way of carrying it on is to land everything which they take over by their steamers at Kingstown, and for the purpose of carrying the same on to Dublin to purchase the railway existing from Kingstown to Dublin (that being, I assume, not a thing within their powers); if that were done, I think that the proper way of preventing it would be, not by a proceeding to wind up the company, but by asking for an injunction to restrain the laying out of its funds upon the acquisition of that railway, and that it would be wrong to attempt to prevent their continuing to carry on their legitimate business by giving such relief by way of winding up the company as a whole, instead of staying that part of the business which was beyond their powers. But then, supposing, on the other hand, that for some reason or another (either by reason of the state of politics, or by reason of the existence of a submarine railway, or anything else) the traffic could no longer be carried on by steamers between Dublin and Liverpool, in my opinion it

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would not be open to the company to say, "As we cannot employ our capital in this legitimate object, we will lay it out in the acquisition of that railway." If that state of things existed, in my opinion it would be right to apply the remedy of winding up the company, instead of the remedy by injunction to restrain them from doing acts which were beyond their powers. If, therefore, I found in this case that the company were carrying on a legitimate business, and, beyond that, were doing something which is not a legitimate business, I should decline to interfere by making a winding-up order; but when, on the other hand, I find that the business that they are doing is not legitimate—that even what I hold to have been the legal and authorised objects of the company can no longer be carried on—then I think it is open to a shareholder to come and ask to have the company wound up, and not the less so because he finds that in addition to being unable to carry on their legitimate business, or not carrying on their legitimate business, they are also carrying on a business that is illegitimate. Upon that ground I come to the conclusion that though the argument addressed to me is one applicable in a great many cases, it does not apply to a case where the company is not carrying on, cannot carry on, and has abandoned its legitimate business, and it is only doing business that is outside its powers. Under those circumstances the conclusion I come to is that the shareholder has established his right to have the company wound up.

A great many matters have been discussed before me, and other points have been raised which I do not intend to go into at all. I find that the ground upon which I am deciding the case is one specifically put forward by the petition itself; and I find also that the last paragraph of the affidavit of the petitioner runs thus: "I am advised, and verily believe, that it is just and equitable that this company should be wound up by this honourable Court; that the main objects of the company have failed; and that, unless the company is so wound up, the uncalled capital of the shareholders will, when paid, be employed in carrying on a business other than a legitimate banking business."

That is put forward as a summing-up of his case (though I agree it does not include the whole of his case), which I consider the legitimate ground for asking that the company should be wound up.

I cannot say that I look very favourably upon the conduct of the company. The case is one in which, in my opinion, the business which was contemplated, and with regard to the carrying on of which the shareholders were invited to come in and were requested to pay calls, has come to an end; and the petitioner is entitled to have the company wound up.

May 6.—*Everitt, Q.C.*, for the company, and the shareholders and creditors who had appeared in opposition to the petition. —An arrangement has been made, subject to the sanction of the Court, that two of the shareholders who wish the company to go on should out of their own moneys purchase all the shares of the petitioner, and the other persons who supported the petition, and take transfers of the shares; and that thereupon the petition should be withdrawn. Minutes of the winding-up order have been delivered out; but the order has not been passed and entered. As the order has not been perfected, the Court has jurisdiction to reconsider the matter—*In re St. Nazaire Company* (9).

Higgins, Q.C., referred to *In re Suffolk* (10).

Higgins, Q.C., and *Duke*, for the petitioner; and

Bramwell Davis, for the shareholders who supported the petition, consented to the proposed arrangement.

NORTH, J.—On the authority of the cases cited, I think I have jurisdiction; and I will, by consent, dismiss the petition.

Solicitors—*C. Curtis*, for petition; *C. Steele*, for shareholders supporting; *Godden Hare*, for company, and shareholders opposing; *G. Lincoln*, for creditors opposing.

(9) Law Rep. 12 Ch. D. 88.

(10) Law Rep. 20 Q.B. D. 698.

[IN THE COURT OF APPEAL.]

COTTON, L.J.

LINDLEY, L.J.

BOWEN, L.J.

1890.

May 1, 2, 5, 8.

July 14.

THE MARQUIS OF NORTH-
AMPTON v. POLLOCK.

Mortgagee and Mortgagor—Policy of Assurance—Stipulation that it should belong to Lenders in certain events—Right of Redemption.

The trustees of an assurance company advanced 10,000*l.* to C. on the security of a bond securing the principal and interest and premiums upon a policy, with a charge upon a reversionary interest in certain Scotch estates contingent on his surviving his father. By a document of the same date it was agreed that the terms on which the loan was made were that the lenders should insure the life of C. against the life of his father for 34,500*l.*, that they should pay the premiums for the next five years, and should allow the premiums and interest to accumulate for that period, and afterwards, if the premiums and interest were not paid by C., the lenders might pay them themselves and be entitled to proceed against C. and his estate, and it was provided that if C. should pay the principal and interest in the lifetime of his father the lenders should forthwith be bound to assign the policy to him, and certain provisions were made for bringing the policy moneys into account. By a third document it was agreed that, in case C. should predecease his father without having paid all the principal money and interest and premiums, the policy should belong to the lenders absolutely. C. died intestate in the lifetime of his father, without having made any payment for principal or interest or premiums. His father, as his administrator, claimed to be entitled to the policy less what was due to the lenders for principal, interest, premiums, and costs:—Held, by COTTON, L.J., and LINDLEY, L.J. (BOWEN, L.J., dissentiente), that the three documents constituting the charge must be read together, that upon the true construction the policy effected on the life of C. was part of the security given, and was subject to an equity of redemption, and that the attempt to confine the right to re-

deem to a certain event was against the well-established principles of equity.

Decision of NORTH, J., affirmed.

This was an appeal from a decision of North, J.

In or about May, 1879, an agreement was entered into between the defendants, the trustees of the National Life Assurance Society, and the late Earl Compton, that the defendants should advance to the earl the sum of 10,000*l.* on interest at the rate of 5½ per cent. per annum upon the security of a charge on his reversionary interest in certain freehold property in Scotland to which he was entitled in the event of his surviving his father, the plaintiff, and also upon the security of a policy of assurance for 34,500*l.* to be effected upon the life of the earl against the life of the plaintiff.

In pursuance of this agreement Lord Compton executed a bond and disposition on security in the Scotch form dated the 26th of May, 1879, whereby, in consideration of the sum of 10,000*l.* advanced and paid to him by the defendants, he bound himself, his heirs, executors, and administrators, to make payment to the defendants of the sum of 10,000*l.* at Martinmas, 1879 (with a fifth part more of liquidate penalty in case of failure), and the interest on the said sum at the rate of 5½ per cent. per annum from the date of the bond to the said term of payment, and thereafter half yearly during the non-payment of the principal sum, with a fifth part more of the interest due at each term of liquidate penalty on failure of punctual payment thereof. And he further bound himself, so long as the said principal sum or any part thereof should remain unpaid, to make payment to the defendants of the annual sum of 43*l.* 5*s.*, being the amount of the premium on the said policy of assurance, with a fifth part more of the said annual sum of liquidate penalty in case of failure in the punctual payment thereof and interest thereon at the rate aforesaid from the respective terms of payment until paid; and in case he should go beyond the limits of Europe at any time during the subsistence of the said policy, to pay the defendants such additional premiums

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as the insurance society should be entitled to require. And in case he should at any time not pay one or more of the said premiums as aforesaid, it should be in the power of the defendants to pay such premiums themselves, and in the event of their so doing they should be entitled to charge the amount so paid against him in like manner as was provided in respect of the said principal sum; and, in security of the personal obligation therein contained, he charged his interest in the said land in the manner therein mentioned.

By a minute of agreement bearing the same date as the bond and disposition, the security made between the defendants of the one part and Lord Compton of the other part, after reciting (*inter alia*) that at the date thereof Lord Compton (therein called the second party) had received an advance from the defendants (therein called the first party) of 10,000*l.*, in security for which the second party had executed a bond, and that it had been agreed between the parties that, notwithstanding the terms of the said bond and disposition in security, and without prejudice thereto in any manner or way, the terms on which the said advance of 10,000*l.* should be made should be as hereinafter mentioned, it was thereby agreed between the parties as follows:—

“1. The first party shall effect a policy or policies of assurance on the life of the second party as against that of the said most noble marquis his father, to the extent of 34,500*l.*, with such assurance company as they may select, and in such terms as to them shall be deemed advisable.

“2. The interest payable on the said advance of 10,000*l.*, and the premiums payable on the said policy or policies of assurance, shall be allowed to accumulate for a period of five years—that is to say, the term of Whitsun-day, 1884—and compound interest with half-yearly rests at the rate of 5½ per cent. per annum shall be charged thereon.

“3. On the expiry of the said period of five years, it shall be in the power of the first party, in the event of the said advance of 10,000*l.*, premiums of assurance, interest, and others accumulated as aforesaid not having been paid to them by the

second party as aforesaid, forthwith to exercise their full powers and privileges conferred on them hereunder or under the said bond and disposition in security, and in the event of their not exercising their powers and privileges they may continue to pay the said premiums and interest as before provided, and the principal sum, premiums, interest, and others may be allowed to accumulate as aforesaid, and that so long as the said first party may think proper to do so, and the first party shall be entitled to use all diligence against the person or estate of the second party for payment of the interest or premiums paid by them after the expiry of the period of the said five years, and that without prejudice to the powers and privileges in regard to any sum due by the second party before or otherwise.

“4. In the event of the second party not having paid to the first party the whole sums due by him to them before the death of the said most noble marquis his father, then the policy or policies of assurance effected by the first party as aforesaid shall belong absolutely to the first party, and neither the second party nor his representatives shall have any claim or right thereunder in any manner of way, and the first party shall be entitled to exercise their full powers and privileges under the said bond and disposition in security as if no such policy or policies had been effected.

“5. In the event of the second party paying the first party before the death of the most noble marquis his father the whole sums due to them, the first party shall be bound forthwith to assign the said policy or policies of assurance to the second party, but that always at his own expense.

“6. In the event of the second party predeceasing the said most noble marquis his father, and without having paid the first party the whole sums due to them, the first party shall prepare a statement . . . shewing the amount due as at the date of the death of the second party, and they shall be bound to impute to the amount as brought out in the said statement the whole sums of money they may receive in respect of the said policy or policies of assurance; and in the event of

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the said sums so received exceeding the amount due under the said statement, to account for and pay over the difference or excess to the representatives of the second party entitled to receive the same; and in the event of the sums so received being inadequate to meet the amount brought out in the said statement, then the first party shall have full right to exercise the powers and privileges conferred on them under the said bond and disposition in security to recover from the means and estate of the second party the balance due to them, after deducting all expenses and any excess interest which may be charged in respect of the said sums not being paid to the first party, until a certain time after proof of the death of the second party, and also of interest at the rate therein provided, in the event of the said amount being paid between terms."

In pursuance of the above-stated agreement a policy was effected in the names of the defendants with the National Life Assurance Society on the life of Lord Compton against the life of the plaintiff for the sum of 34,500*l.*, at an annual premium of 43*l.* 5*s.*, and the sum of 10,000*l.* was advanced to Lord Compton.

By an agreement dated the 14th of June, 1879, and made between the defendants of the one part and Lord Compton of the other part, after reciting (*inter alia*) clause 6 of the minute of agreement of the 26th of May, 1879, and that such last-mentioned clause did not accurately state the terms upon which the said advance of 10,000*l.* was agreed to be made, it having been agreed that the policy or policies to be effected upon the life of the said Lord Compton against that of the plaintiff, in the event of Lord Compton's predeceasing the plaintiff without having repaid all the principal money and interest and costs due to the defendants, should belong absolutely to the defendants, it was witnessed that, in consideration of the said advance being made to the said Lord Compton, it was thereby agreed and declared by and between the said parties thereto that "in the event of the said Earl Compton predeceasing his father the Marquis of Northampton without having paid all the principal moneys, interest, and costs due to the" defendants

"under or by virtue of the bond in the said recited agreement mentioned, that then and in such case the policy or policies and all moneys thereby secured shall belong absolutely to the" defendants, "or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns. And it is further agreed that, in consideration of the premises, the said Earl Compton shall, whenever called upon so to do, execute any further or other assurance for the purpose of carrying out at his own expense this agreement."

Lord Compton never paid anything for interest, premiums, or otherwise. The premiums were paid by the defendants. Lord Compton died intestate on the 5th of September, 1887, without having paid the defendants any part of the 10,000*l.*

Administration of his estate was granted to the plaintiff, who applied to the defendants for the amount of the insurance moneys, after deducting therefrom what was due to them for principal, interest, costs, and premiums. The defendants declined to pay, on the ground that they were absolutely entitled to the insurance moneys under the agreement of the 14th of June, 1879.

The plaintiff then brought this action, claiming a declaration that the defendants were entitled to the said policy of assurance and the sum or sums assured thereby as a security only for the sum of 10,000*l.*, with interest thereon at the rate of 5½ per cent. per annum, and for the amount of the premiums on the said policy paid by them, with interest thereon at the rate aforesaid; secondly, a declaration that the agreement of the 14th of June, 1879, was void, and that the same might be set aside.

North, J., held that the plaintiff was entitled to redeem the policy. The defendants appealed from this decision.

Sir Horace Davey, Q.C., Rigby, Q.C., and Edward Beaumont, for the appellants. —This is a very special case, dealing with an entirely contingent interest. Lord Compton, requiring a loan, entered into negotiations with the company, of which the defendants are trustees, and a loan of 10,000*l.* was arranged, and three documents were executed. The first was a bond by which

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Lord Compton charged his interest in certain Scotch estates; but that mortgage could only be effectual if he survived his father, and in the event which has happened—namely, his predeceasing his father—the mortgage, so far as the Scotch estates are concerned, had no effect at all. The second was a minute of agreement which stated that the advance was made to Lord Compton on the terms therein mentioned, and the first term was that the defendants should effect a policy of insurance for 34,500*l.* on the life of Lord Compton against the life of his father; it then provides that the interest on the sum advanced and the premiums payable on the policy shall be allowed to accumulate for five years, and that after that period the defendants are to have power to enforce payment against Lord Compton and his estate. The 5th clause of the agreement provided that if Lord Compton paid off the defendants in the lifetime of his father, the policy should belong to him. He did not do this. Then followed the 6th clause of the agreement, for which a third document was substituted, whereby it was expressly contracted that in the event of Lord Compton predeceasing his father without having paid all the principal money, interest, and costs, the policy should belong to the defendants. That is the contract out of which Lord Compton's right springs. The policy was not an assurance of Lord Compton at all, it was never his property, and therefore he could not charge it, and no equity of redemption remained in him. The contract was in the nature of a wagering transaction, insuring his life against his father's, and by the terms of the contract it was agreed that, in the event which has happened, the death of Lord Compton before his father, the policy should belong to the defendants. It is true that by the 5th clause of the 2nd document Lord Compton was to be entitled to the policy if he had paid off the principal and interest in his father's lifetime; but that only enabled him to acquire something which was not his in a particular way. He would have had an equity of redemption with regard to the Scotch property if he had survived his father, but he had no equity of redemption

with regard to the policy, and the doctrine of "once a mortgage always a mortgage" does not apply, and the defendants are entitled to the policy moneys. The third document constitutes the whole contract as to the policy, and we do not, if we retain the policy money, claim to have any right to proceed under the bond. In order to constitute a mortgage, the mortgage must be mutual; there cannot be a mortgage on one side only—*Cootie on Mortgages* (5th ed.), p. 26—although it is not necessary that one party should be able to foreclose only at the time when the other might redeem—*Talbot v. Braddie* (1) and *Brown v. Cole* (2). The power given to Lord Compton by the 5th clause to acquire the policy is in the nature of a conditional sale, and the same rights do not exist in the borrower under a conditional sale as under a mortgage—*Bonham v. Newcomb* (3), *Jennings v. Ward* (4), *Spurgeon v. Collier* (5), and *Toomes v. Conset* (6). This is a case where extraordinary risk had to be run, and therefore contracting for the payment of a larger principal sum than the money advanced is justifiable—*Fisher on Mortgages* (4th ed.), p. 230, *Potter v. Edwards* (7), and *Mainland v. Upjohn* (8). We submit, then, that the policy moneys, by the express terms of the contract, which did not relate to a mortgage, or interfere with the mortgagor's right to redeem, belong to the defendants. No hardship will thereby fall on the mortgagor; he received 10,000*l.* without having paid a penny for it, and his administrator is now seeking to obtain a further large amount. The policy must be treated in the same way as it would be if it had been effected in any office other than the defendants'. [They cited also *Drysdale v. Piggott* (9), *Holland v. Smith* (10), *Williams*

(1) 1 Vern. 395.

(2) 14 Sim. 427; 14 Law J. Rep. Chanc. 167.

(3) 1 Vern. 232.

(4) 2 Vern. 520.

(5) 1 Eden, 55.

(6) 3 Atk. 261.

(7) 26 Law J. Rep. Chanc. 468.

(8) 58 Law J. Rep. Chanc. 361; Law Rep. 41 Ch. D. 126.

(9) 8 De Gex, M. & G. 546; 25 Law J. Rep. Chanc. 878.

(10) 6 Esp. 11.

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v. Owen (11), *Courtenay v. Wright* (12), *Howard v. Harris* (13), *Goodman v. Grierson* (14), and *Morland v. Isaac* (15).]

Crackanthorpe, Q.C., and *Reginald Winslow*, for the respondents.—The principle that governs the case is that what was once a mortgage is always a mortgage. The first question is whether there was a mortgage of this policy; and if there was, whether it can ever be made irredeemable.

The fact that the trustees of the life office had power to pay the premiums on the policy, and add the amount so paid to their debt, shews that there was a mortgage of the policy—*In re Leslie*; *Leslie v. French* (16) and *Falcke v. The Scottish Imperial Insurance Company* (17). Lord Compton bound himself to pay the premiums on the policy so long as the principal of his debt remained unpaid. That also shews that there was intended to be a mortgage of the policy. A mortgaged property is always redeemable, and no agreement or stipulation between the parties can make it irredeemable—*Howard v. Harris* (13) and *Courtenay v. Wright* (12). Where personal property is mortgaged side by side with real estate, as a collateral security, the mortgagee cannot say at any time that it is irredeemable. The only way that the equity of redemption can be extinguished is by foreclosure proceedings—*Toomes v. Conset* (6), *Jennings v. Ward* (4), *Spurgeon v. Collier* (5), and *Holland v. Smith* (10). A mortgagee cannot stipulate for any advantage outside his security. He cannot get more than his principal, interest, and costs—*Broad v. Selje* (18), *James v. Kerr* (19), *Potter v. Edwards* (7), and *Mainland v. Upjohn* (8).

[BOWEN, L.J., referred to *The Protector*

- (11) 5 Myl. & Cr. 303.
- (12) 2 Giff. 337; 30 Law J. Rep. Chanc. 131.
- (13) 1 Vern. 190.
- (14) 2 B. & B. 278.
- (15) 20 Beav. 389; 24 Law J. Rep. Chanc. 753.
- (16) 52 Law J. Rep. Chanc. 762; Law Rep. 23 Ch. D. 552.
- (17) 56 Law J. Rep. Chanc. 707; Law Rep. 34 Ch. D. 234.
- (18) 11 W. R. 1036.
- (19) 58 Law J. Rep. Chanc. 355; Law Rep. 40 Ch. D. 449.

Endowment Loan and Annuity Company v. Grice (20).]

Wallingford v. The Mutual Society (21), *Field v. Hopkins* (22), *The Scottish Union Insurance Company v. The Marquis of Queensberry* (23), *Knox v. Turner* (24), and *Gottlieb v. Cranch* (25) were cases of an annuity. A policy to secure an annuity is on a different footing from one to secure a debt, where the debtor is charged with the premiums—*Morland v. Isaac* (15). Where that is so, the debtor can redeem the policy—*Drysdale v. Piggott* (9). Where, as here, there is evidence of a contract that the creditor has agreed to effect a policy and the debtor to pay the premiums, the policy will be held in trust for the debtor upon his payment of the debt—*Bruce v. Garden* (26). A mortgage must be mutual; if it is a mortgage for one party it must be for both—1 *Coot's Law of Mortgage* (5th ed.), p. 26, *Goodman v. Grierson* (14), and *Williams v. Owen* (11).

Rigby, Q.C., replied.

Cur. adv. vult.

COTTON, L.J. (on July 14).—In this case Earl Compton, now deceased, who was the eldest son of the plaintiff, the Marquis of Northampton, borrowed 10,000*l.* from the defendants, who are the trustees of an insurance office. When that loan was made he gave a bond to the defendants for payment of the principal and interest which he borrowed, and he thereby secured payment of the premiums on a policy of assurance that was effected on his life, and covenanted to repay to the defendants whatever they might pay in order to keep up that policy. That bond, if he had survived his father, would have consti-

(20) 49 Law J. Rep. Q.B. 247, 812; Law Rep. 5 Q.B. D. 121, 592.

(21) 50 Law J. Rep. Q.B. 49; Law Rep. 5 App. Cas. 685.

(22) *Ante*, p. 174; affirmed C.A. 25 Law J. W. N. 42.

(23) 1 Bell App. Cas. 183.

(24) 39 Law J. Rep. Chanc. 207, 750; Law Rep. 9 Eq. 155; 5 Chanc. 515.

(25) 4 De Gex, M. & G. 440; 22 Law J. Rep. Chanc. 912.

(26) 39 Law J. Rep. Chanc. 334; Law Rep. 5 Chanc. 32.

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tuted a security on his real estate in Scotland to which he would then have been entitled, but, as he predeceased his father, that part of the security is gone. Contemporaneously with the bond Lord Compton executed an agreement, which was afterwards amended, and thereby, after reciting that Lord Compton had at the date thereof received an advance from the defendants of 10,000*l.*, in security of which he had executed a bond, it was agreed, without prejudice in any manner or way thereto, that the terms on which the said advance of 10,000*l.* should be made should be as thereafter mentioned. Then the defendants (therein called "the first party") covenanted to effect a policy or policies of insurance on the life of Lord Compton as against the life of his father, the plaintiff—that is to say, if he died in the lifetime of his father, 34,500*l.*, the sum secured by the policy, would have to be paid. The money payable under that policy is the amount now in contest between the parties. The agreement then provided that the interest and premiums were to be allowed to accumulate for five years; and that after that period the defendants were to be entitled to use all diligence against the person or estate of Lord Compton for payment of the interest or premiums paid by them. The effect of that was, if they suspended their claims for premiums or interest for five years, not in any way to prevent them suing afterwards for the premiums or interest—it was in no way a release of the covenant to pay—but only provided that the interest and premiums might accumulate for a time. Then the fourth clause is material. [His Lordship read the fourth clause, and continued:] That is a curious provision, because if Lord Compton's father died in his lifetime there would be no force at all in the policy, because the policy is only to be paid in the event of the son dying in the lifetime of his father. Then we have to consider the fifth clause, which provided that if Lord Compton paid the defendants before the death of his father the whole sum due to them, the defendants should assign the policies to him. So far the agreement, I think, is pretty clear. But then we have to consider the subsequent agreement, which, I think, we may take

as entirely substituted for clause 6 of the former agreement—that is to say, we have not to see what one provides for and the other provides, but to see what was really the agreement constituted by the subsequent agreement. That agreement recites (*inter alia*) clause 6, and that it did not accurately state the terms on which the advance of 10,000*l.* was agreed to be made. [His Lordship read the recitals and operative part of the agreement, and continued:] Those were the instruments between the parties, and the question we have to determine is what they mean, having regard to the last clause in the agreement of the 1st of June, 1879. This is not the case of a policy effected by the lender simply for his own security, but it is a policy effected under a contract with the borrower, the borrower contracting that he will pay the premiums, or, if he does not, he shall be liable to be sued for them. Although this policy was effected in the office of which the defendants were trustees, we must consider it just as if it was a policy effected by them in another office. They might effect it, just as they pleased, either in their own or any other office.

Independently of the last agreement, and without reference to the 6th clause in the first agreement bearing on the same point, what would have been the rights with regard to the policy? The representatives of Lord Compton would have been entitled when the money was paid to have said to the defendants, "Account to us for the money received, and pay over to us any balance which there may be beyond the sum which was borrowed from you." That is in accordance with the principle laid down clearly in *Drysdale v. Piggott* (9). Of course, there are cases where there is no contract between the parties, and where the person lending the money chooses himself to insure the borrower's life. There he does that simply for his own benefit, and he can whenever he likes drop the policy; he can pick it up when he likes, but he does it simply as his own property and for his own benefit. But here the case is different. Unless effect is given to the last agreement between the parties (and of course there is no question as to what is the effect of it), Lord Comp-

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ton's representatives would have been entitled to get the balance of the 34,500*l.* after the money lent, premiums, interest, and costs had been paid, and they would be entitled to call on the defendants to account for it. But it is said that is altered by the last agreement. Now, I need not quote authorities to shew that Courts of equity never will allow the equity of redemption to be cut off, except by force of time or by the order of the Court. The mortgagor must be foreclosed only if he does not redeem; Lord Hardwicke says that as plainly as possible, and it has always been the rule established in Courts of equity. "This Court," says Lord Hardwicke in *Toomes v. Conset* (6), "will not suffer in a deed of mortgage any agreement in it to prevail that the estate shall become an absolute purchase in the mortgagee in any event whatsoever." He gives some reasons for that, which may not now be the only reasons, but that is the principle on which the Court of equity acts. How is this case said to be distinguished from that? It is said this is not like a mortgage of property of the borrower; that the policy was not the property of the earl, and therefore it is not preventing him from redeeming that which was his own. But is that so? As I pointed out, but for this last clause of the agreement he would have been entitled to an interest in the policy. He had such an interest in it that although the legal estate was—as is always the case, not only in mortgages of a policy, but in other mortgages—in those who lent the money, yet he could call on those who had got the money to account and pay over to him any residue.

There was another point raised on behalf of the appellants which I ought to deal with: that the last agreement does not contain the whole of the 6th clause of the original agreement; and that the only thing that is changed there is the policy moneys, and that in the events which have happened the policy moneys shall belong to the insurance office and not to Earl Compton's representatives. But I cannot agree with that contention; and if that is not so, then we are in this difficulty, that the defendants, the trustees, can exercise their bond, because the agreement is to be

without prejudice at all to the securities which they already have—the security on the bond—and then they can get the whole money, and at the same time exercise their right under the bond if any part of this sum of 10,000*l.*, or any part of the premiums, is not paid. That, of course, rather shocked the mind, and it was said they never would sue—and they certainly would not sue if only a small sum still remained due and owing. Then it is said that Lord Compton would have every reason for getting back the policy and paying off the money, which he could do during the lifetime of his father, and then put an end to the whole matter. But the question is, what are the rights of the parties purported to be given by the last agreement? As I understand it, this fresh memorandum really contains the whole of the agreement between the parties as regards the policy moneys in the events which have happened. It is very true that in the original agreement there was an express proviso, which I have read, that the balance of the policy moneys shall belong to the earl, and that he should be liable to be sued in the event of the policy moneys not being sufficient, yet there is nothing to confine the right to sue to the events which have not happened—namely, the policy moneys being insufficient. As it is, there are policy moneys amply sufficient to pay all that is due; but the defendants say—and that must be their contention—"We are not bound in any way to account for the moneys to the earl or his representatives, and, moreover, as the memorandum of agreement expressly says it is to be without prejudice to our rights under the bond, we can (that must be the consequence although they do not say so) sue the earl." It is very true they have lost the security of the real estate, but there still remains the bond, which is good security against his means and effects, and against anything which his representatives may have from him.

The principle of the Court of equity is not to allow the equity of redemption to be prevented from being exercised. The whole principle of a mortgage is that the contract is absolute at law in favour of the mortgagee, yet the Court of equity says: We know what it is; it is merely meant,

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and ought to be treated, only as security for the money advanced; and at any time, if the mortgagor comes and says, "Here is your money, and here are your costs," then the mortgagees must reconvey to him his estate, which by law is absolute. Although it is true this policy is not a property which formerly belonged to the earl, yet, by the effect of the contract and the way in which the premiums were to be supplied, in my opinion it did belong to the estate of the earl, and the Court of equity ought to look to this policy as equitably intended as security only for the money advanced, and ought not to allow any stipulations here which would enable the trustees, the defendants, to take this without liability to pay the balance of the money which has been insured by the earl thereunder. Therefore, in my opinion, this clause cannot be allowed to stand, and cannot interfere with what would otherwise be the rights of the parties.

It is very true that there are cases, as I pointed out, where the policy is effected by the mortgagee—there it belongs to him. But here, from the way in which this policy was created, in my opinion the mortgagor had just as much interest in it as if it had been a policy originally belonging to him. By the terms of the creation of the policy the earl had an interest in it—he had, that is to say, a right to get the surplus of it after paying all the moneys which he had borrowed. It is true that some cases were quoted by the appellants—one case in particular, where there was an agreement that, although a smaller sum was advanced, the mortgage should be only redeemable on payment of 1,000*l*. But the question there was whether 1,000*l*. was a reasonable sum to be paid when only 700*l*. was advanced—whether there had or had not been a hard and unfair bargain on the borrower; but when that was wiped away, when that was not established against the mortgagee, then the right to redeem still remained, though it was redeeming on payment not of the sum really advanced, but of the sum which the parties agreed, and, it had been held, fairly agreed, was worth the mortgagor's while to pay, in order to get a

smaller advance when he was in want of money.

In my opinion this case comes within the principle which regulates mortgages in this Court, and we ought to hold that the marquis is right and is entitled to have an account of his policy money, and to have the balance, after paying the principal, interest, and any premiums which the office may have paid in order to keep this policy up. In my opinion the appeal fails.

LINDLEY, L.J.—The rights of the parties in this case turn on three documents, which, as they stand, are not easily understood. They must be construed together. The Scotch bond binds the borrower to repay the loan and interest and the premiums on a policy payable in the event of his dying before his father, and if the borrower survives his father and so becomes entitled to the property mentioned in the bond, that property is charged with the repayment of the loan, and the interest and the premiums. The second document contains six clauses, but the sixth is replaced by the third document. The effect of the second and third documents is to render it obligatory on the lenders to effect a policy, payable in the event above mentioned, and to keep it up for five years, and not to require payment either of interest on the loan or of the premiums during that time. After that time the lenders were under no obligation to pay the premiums or to forbear payment of interest. Pausing here for a moment, it is plain that if there were nothing more in the documents the policy would belong to the borrower, subject to the payment of all moneys due to the lenders. But the documents do not stop here. Clause 4 of the second agreement says that unless the borrower pays off the lenders in the lifetime of his father the policy is to be the lenders', and they are, at the same time, to be "entitled to exercise their full powers and privileges under the bond"—that is, to enforce all the borrower's obligations under that instrument. This fourth clause, in terms, applies whether the borrower predeceases his father or not; but, in fact, it can have no operation unless he

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dies before his father, for in no other event can the policy money become payable to any one. So that, unless the lenders are paid off before the father dies, the policy-money (if payable at all) will belong to the lenders, and yet the assets of the borrower will be liable under the bond to repay the principal and interest and all the premiums on the policy. The third document only makes this more plain in the event of the borrower dying before his father without having paid off the lenders, which is the event provided for in it. Whether the third document is read as in substitution for the whole of the sixth clause of the second document, or whether it is read as replacing only part of this sixth clause, the fourth clause of the second document is untouched, and the effect is what I have stated. The fifth clause of the second agreement provides that if the borrower pays off the lenders in the life of his father he is to have the policy. The borrower died before his father without having paid the lenders anything. The policy has fallen in, and the question is, whether the lenders can keep the policy-money, or whether they must account to the legal personal representatives of the borrower for the excess of the policy-moneys over the amount due to the lenders on the bond. The lenders disclaim all right to keep the policy-money, and also to obtain payment of the principal, interest, and premiums under the bond. They also suggest that the borrower would have had some right to get back any premiums he might have paid. But I cannot adopt this suggestion. I am of opinion that the true effect of these documents is either to entitle the lenders to keep the policy-moneys, and also recover the principal, interest, and premiums, or to entitle them to no more than recover their principal and interest and premiums. I cannot adopt the construction which entitles the borrower to the policy only if he pays the lenders off in the lifetime of his father, and deprives him of all interest in it if he fails to do this, and yet leaves him liable to be sued on the bond. Neither can I see that in the events which have happened the borrower is discharged from liability although he has lost all right to the policy-money.

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The fourth clause of the second agreement is, in my opinion, opposed to this view. I can come to no other conclusion than that the transaction was a loan on security. The lenders were to have, as a security, either the land or the policy, as the case might be. The right to redeem the land if the borrower had ever become entitled to it would have been plain enough. The right to redeem the policy before it became payable is conferred by the fifth clause of the second agreement, and the attempt to confine that right in point of time is, I think, opposed in principle to a long series of authorities which I am not at liberty to question. I agree with Lord Justice Cotton; and, for the reason given by him and those above stated, I am of opinion that this appeal must be dismissed, with costs.

BOWEN, L.J.—With respect to what was to become of this policy in the event which has happened, the intention of the parties and the meaning of the bargain which they made are admittedly clear. A supplemental memorandum, executed for the especial purpose, provides, in the plainest language, that on the contingency that has occurred this policy and all moneys secured by it were to belong absolutely to the defendants. The question is whether this distinct and deliberate compact is to be set aside as repugnant to any rule of equity. The principle invoked by the plaintiff is summed up in the epigrammatic formula, "once a mortgage always a mortgage." Whenever a transaction is in reality one of mortgage, equity regards the mortgaged property as security only for money, and will permit of no attempt to clog, fetter, or impede the borrower's right to redeem and to rescue what was, and still remains, in equity his own. The plaintiff contends that the bargain made as to the policy is at variance with this wholesome doctrine, and it is on this ground that Mr. Justice North has adjudged to the representatives of the borrower what must be admitted to be a considerable windfall. The defendants, on the other hand, maintain that, so far as affects this policy, there never was a mortgage, or anything that can be termed a mortgage transaction; that the

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policy never was Lord Compton's, that the term "redemption" is inappropriate as applied to it, and that the term "security" is one which begs the question at issue. All, the defendants say, that was provided was that the borrower was to be at liberty at any time before his death to purchase the policy and to make it his own. He has not, they say, done so, and a contingency, therefore, has occurred upon which the policy was always intended to belong to the lenders. Is it true, as suggested by the plaintiff, that the transaction between the plaintiff and the defendants was merely one of mortgage, of which the arrangement as to the policy was only an incident? An accurate analysis will, I think, shew that the stipulations as to the policy cannot accurately be so described. In the event which has happened—namely, the death of Lord Compton in the lifetime of his father—there has been, so far as regards the Scotch estates, no mortgage which can take effect at all, or which can require the benevolent intervention and protection of this Court. No doubt, in the event which has not happened—supposing, that is to say, that Lord Compton had survived his father—there would have been an effectual mortgage of the Scotch estates. But Lord Compton did not profess to, and could not, mortgage those estates, in case of his own death, against the heirs of entail. In the contingency, therefore, that has occurred, the mortgage of them had no effect at all, and was never intended to have any. For the security of the office of the defendants against the mischance which has, in fact, occurred—the failure, that is to say, of all mortgage on the Scotch estates—the policy now in question was called into existence: in what manner and on what terms has to be considered. Instead, therefore, of regarding the transaction as from first to last one of mortgage, I think it would be safer, up to this point in the discussion, to describe it as one of loan—a loan to be secured, in the event which has not happened, by an effectual mortgage, but to be protected, in the event which has happened, by an arrangement as to a policy to cover the failure of a Scotch mortgage transaction. The nature

of the contract for this policy has to be decided in this appeal, but we do not really get nearer to a correct appreciation of its character by treating its provisions as if they could be affected by, or could possibly affect, a defunct equity of redemption in a mortgage of estates which has come to nothing. This brings us to what seems to be the true and crucial question. Was this policy ever Lord Compton's mortgage? Had he ever an equity of redemption in it? If the answer is in the negative, what mortgage transaction or what equity of redemption is this Court asked to protect—the mortgage of the Scotch estates, which is extinct, or an equity of redemption in the policy which Lord Compton never had? In the view taken by Mr. Justice North and my learned brethren in this Court, that the matter must be dealt with precisely as if there had been an actual policy effected with, and actual premiums paid to, some other office than the defendants' own, I entirely concur. Nor am I influenced by the consideration that, if the plaintiff succeeds, Lord Compton's estate will have received from the defendants a large sum of money without paying anything at all—except, perhaps, so far as the possibility of such a result may throw light on the discussion whether the policy and its produce were meant to be the property of Lord Compton at all events and in all circumstances. The first and most important matter to be weighed is no doubt, in fact, that the premiums, though advanced by the defendants' office, were to be charged in account against the borrower. If this stood alone, a presumption would arise, based on reasonableness and justified by authority, that the policy, on coming into existence, was to be the borrower's in any event, though mortgaged to the defendants for the advance. But such a presumption is a mere inference of fact to supply the place of better information. It cannot displace express convention between the parties. In the clear light of a distinct agreement upon the point the presumption pales its ineffectual fire and disappears. Lord Compton's right to the policy is not a matter of presumption. It arises under a written contract which is explicit on the point, and it is to this

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written contract we must turn if we wish to discover the law of the being of this policy in the event that has occurred. So far as the policy is concerned, I cannot see that this is a case of a borrower mortgaging his own property, and then consenting to fetter his own right to redeem. It seems to me rather the case of a loan protected in a particular event, not by a mortgage, but by a wagering and speculative bargain to take the place of and to act upon the defeasance of a mortgage. The policy was not an ordinary policy of insurance against a death, but a wager of one life against another. The premiums were to be charged against Lord Compton as a special term of the bargain, but without any reference to the question to whom the policy was ultimately to belong. That was to depend on a contingency. Lord Compton was to have a right on payment of his debt to buy it, and so far only it was to be a security for his debt. But in no other sense was it a security, and the use of this term, except as so defined and limited, is fallacious. The clauses which gave Lord Compton a right to acquire it are not provisos for redemption, but only provisos for purchase, and the use of the term redemption again becomes misleading. Pecuniary adventures regulated by an express provision such as is contained in the final deed of the 14th of June are not in substance mortgages any more than they are mortgages in form, nor are they within the mischief struck at by the equitable rule. The term which it is sought to reject as inequitable is of the gist of the arrangement, and must have affected the calculations of the defendants' office. Totally different considerations arise when it is a question of depriving a man of what is his own, and of refusing to countenance a formal surrender of his right to rescue his own property even at the eleventh hour from the jaws of a money-lender. Here it is a question rather of withholding from a borrower the benefit of a windfall, for which he has never bargained. There is no authority for extending the equitable doctrine invoked by the plaintiff to such an arrangement, and such an arrangement would not give rise to the evils which the equitable doctrine was designed to prevent. The plaintiff's counsel urged upon

us the apparent hardship which might, on the defendants' contention, arise if Lord Compton's estate were to be liable to be deprived of the property in the policy, simply because Lord Compton might have repaid some small fraction of the debt or costs. No doubt there would be such a hardship if the policy had been Lord Compton's and if his estate were to lose it by his non-payment of a trifling bill of costs. But it would be an ocular illusion still to regard such a result as a hardship, after it has been once ascertained that the policy never was his, and was only to become his if he had exercised an option, which in truth he did not exercise. To prove that the contract as to the policy was in substance one of mortgage, the plaintiff's counsel further relied upon the proposition that the final deed contained no provision for any release of the penal obligation of the debtor on his bond, or for the extinction of his debt, even in the case of the handing over of the policy to the defendants. But I do not so read the provisions of the final deed. The substituted agreement as to the policy only displaced, I think, so much of the clauses of the previous deed, and in particular of clause 6, as was inconsistent with it. The language of clause 4 in this preceding deed would, if it stood alone, be ambiguous; but clause 4, the clumsy draughtsmanship of which is apparent on other grounds, must be read by the light of clause 6. Taking both together, I think they provide sufficiently for the extinguishment of the debt; and this result is left undisplaced by the new agreement, which is intended, I think, only to dispose of surplus. The more reasonable view seems to me to be that to the extent of the produce of the policy the debt was to be extinguished; and in case the question were to arise, I think the Court would so have held. In conclusion, I have found no case that is in point. The present problem is not governed by authority. My view is that, as regards this policy, the transaction was not one of mortgage, but of a wagering and speculative bargain to replace a mortgage which in the event that has happened would have been defunct—a bargain in which it was clearly intended and expressly agreed that the policy in

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the contingency that has occurred never was to become Lord Compton's. The rule of equity applied by Mr. Justice North does not, therefore, in my opinion, become appropriate. My brothers, however, think differently, and as their knowledge and experience are better than mine, I see no reason to be dissatisfied that I am in a minority and that their view prevails.

Appeal dismissed.

Solicitors—Wilde, Berger & Moore, for appellants; H. T. Doodle, for respondent.

KAY, J.
1890.
June 10, 11, 19. } TAYLOR v. RUSSELL.

Mortgage—Priorities—First Equitable Mortgagee—Negligence—Title Deeds—Trustee—Legal Estate—Getting in after Notice of Prior Equity—Costs.

By indenture dated the 15th of February, 1883, T. mortgaged freehold land to the plaintiffs, purporting to make a title under a forged deed of conveyance from Smithsons' trustees dated the 3rd of November, 1882. T. had previously mortgaged other property in the same neighbourhood to the plaintiffs under a genuine title from Smithsons' trustees, and the plaintiffs' solicitor, who acted for the plaintiffs on the former occasion, and who on this occasion acted for both parties, and believed in T.'s honesty, required no other abstract of title than that of the forged conveyance, and made no requisition as to identity of the property. The property in 1882 in fact belonged to Surtees' trustees, subject (together with other property of greater value) to a legal mortgage made by them in 1862 to Legard's trustees; but Surtees' trustees, by indenture dated the 30th of January, 1883, conveyed it to T. as if free from incumbrances, and the title-deeds, which, notwithstanding the mortgage to Legard's trustees, had remained in the possession of Surtees' trustees, were then handed over to T. In 1887 T. mortgaged the property to the defendants, concealing the plaintiffs' mortgage, and hand-

ing over the genuine title-deeds to the defendants. In 1888 the defendants, having heard of the plaintiffs' mortgage, induced Legard's trustees to reconvey the legal estate in the property to Surtees' trustees, who, in turn, reconveyed it to the defendants.—Held, that the plaintiffs, who had obtained a good equitable title under their security, had not been guilty of negligence sufficient to postpone that security to the defendants' security. Held also, that the defendants could not, under the circumstances, rely on the legal estate got in after notice of the plaintiffs' security. Held also, that the title-deeds must be delivered to the plaintiffs.

The negligence necessary to postpone the first equitable mortgagee, in such a case, must be so gross as to render him responsible for the fraud committed upon the second mortgagee. Mere carelessness or want of prudence is not enough.

The Northern Counties of England Fire Insurance Company v. Whipp (53 Law J. Rep. Chanc. 629; Law Rep. 26 Ch. D. 482) explained.

The costs of each party were ordered to be added to their debts, but without interest.

This was an action by mortgagees to enforce their security. The plaintiffs claimed priority as first equitable mortgagees. The defendants, on the other hand, sought to postpone the plaintiffs' security—first, on the ground of negligence; and, secondly, by virtue of the legal estate now vested in the defendants.

The material facts of the case were thus stated by Kay, J., in his written judgment:—"In 1881 Toward had mortgaged to the plaintiffs certain property at New Shildon, in the county of Durham, which he had purchased from the trustees of the will of a person named Smithson. On that occasion the title was investigated, and amongst other requisitions was one as to the identity of the property with property held by Smithson. This was answered rather vaguely by a statement to the effect that it was matter of notoriety in the neighbourhood that it had been Smithson's land.

"In January, 1883, Toward applied to the plaintiffs for a further advance of 2,500*l.* on the security of other property

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at Old Shildon, not quite a quarter of a mile distant from that he first mortgaged, and he brought to the plaintiffs' solicitors, who had acted in the matter of the former mortgage, an abstract of his title, which purported to be a conveyance of the 3rd of November, 1882, by Smithson's trustees to himself. On that occasion Toward stated that he was content that the plaintiffs' solicitors should act for both parties, and they accordingly examined the abstract with the deed, and having before dealt with Toward, and believing him to be perfectly honest, they did not make any requisition as to the identity of the property. The transaction of this mortgage was carried out by a deed dated the 15th of February, 1883, which described the property accurately, and was a conveyance by Toward as beneficial owner, and referred to the plan on the deed of the 3rd of November, 1882, which deed was handed over to the plaintiffs as mortgagees. In fact, the deed of the 3rd of November, 1882, was a forgery. The property never belonged to Smithson or his trustees, but it had belonged to the trustees of a person named Surtees. Those trustees had mortgaged it with other property on the 19th of November, 1862, by a legal mortgage to the trustees of one Legard for 9,000*l.*, but Toward had purchased it from Surtees's surviving trustee, and it had been conveyed to him on the 30th of January, 1883, by a deed of that date, which recited a contract to sell to him the fee-simple free from encumbrances, and contained the usual covenant that the trustee conveying had not encumbered the property. The conveying trustee was one of those who had mortgaged the property on the 19th of November, 1862. This deed, therefore, vested in Toward the equitable fee-simple, with a right to call upon Surtees's trustees for the legal estate free from encumbrance. Whatever estate and rights in respect of the property Toward had when he made the mortgage of the 15th of February, 1883, of course would pass in equity by that deed to the plaintiffs.

"The defendants' title is under a deed of the 20th of October, 1887, by which Toward mortgaged the same property to

them for 2,500*l.* On that occasion the real title under Surtees' trustees was disclosed, and the title-deeds were handed over, but Legard's trustees did not join, and therefore nothing passed except an equitable estate. Later, the defendants, having become aware of the mortgage to the plaintiffs, induced Legard's trustees on the 21st of November, 1888, to re-convey this plot of land to Surtees's trustees, they being satisfied with the security of the rest of the property comprised in their mortgage, and on the 26th of the same month Surtees's trustees, knowing of the plaintiffs' mortgage, voluntarily conveyed this property to the defendants."

To these facts it may be added that the explanation of the way in which the title-deeds had remained in the possession of Surtees' trustees, notwithstanding the mortgage to Legard's trustees, appeared to be that the property was not originally intended to be included in the mortgage to Legard's trustees, but had been so included inadvertently; and though so included, the title-deeds had remained with Surtees' trustees, and were thus handed over to Toward when he purchased the property in 1883, the fact that the property was included in the mortgage to Legard's trustees escaping notice at that time.

Haldane, Q.C., and Levett, for the plaintiffs.—By their mortgage of the 15th of February, 1883, the plaintiffs, though the real title was not disclosed to them, acquired all the estate conveyed to Toward on the 30th of January previous—that is to say, the equitable fee-simple, subject only to the mortgage to Legard's trustees. The plaintiffs, as first equitable mortgagees, are, therefore, entitled to priority. They or their solicitors were not, under the circumstances, guilty of any negligence in trusting to Toward—*Roberts v. Crofts* (1), *Hunt v. Elmes* (2), *Dixon v. Muckleston* (3), *Lloyd's Banking Company v. Jones*

(1) 2 De Gex & J. 1; 24 Beav. 223; 27 Law J. Rep. Chanc. 220.

(2) 2 De Gex, F. & J. 578; 30 Law J. Rep. Chanc. 255.

(3) 42 Law J. Rep. Chanc. 210; Law Rep. 8 Chanc. 155.

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(4), *The Union Bank of London v. Kent* (5), and *Hewitt v. Loosemore* (6). The defendants cannot strengthen their later equitable title by obtaining the legal estate from Surtees' trustees, who were trustees of it for the plaintiffs, after notice of the trust—*Harpham v. Shacklock* (7), *Sharples v. Adams* (8), and *Saunders v. Dehew* (9). The plaintiffs, being entitled to priority, are also entitled to the possession of the title-deeds—*Newton v. Newton* (10).

Renshaw, Q.C., and *J. Scott Fox*, for the defendants.—The plaintiffs were guilty of negligence in taking no other abstract of title than that of the forged deed of conveyance, which only purported to be three months old, and in not making proper enquiries as to the identity of the property. Had they insisted either on a proper abstract of the earlier title, or on proper evidence of identity, they would have discovered that the property had never belonged to Smithson, but to Surtees, and the forgery would have come to light, and no mortgage would ever have been made to the plaintiffs. As it was, the plaintiffs got their equitable title by mere accident, and not under the forged deed which they trusted; while the genuine title-deeds were left under the control of Toward, who was thus enabled to commit a fraud on the defendants. This negligence would, we submit, have sufficed to postpone a prior legal estate; but it is certainly enough to postpone a prior equitable estate, which will be postponed for a degree of negligence less than would be required to postpone a prior legal estate, as, for instance, on the ground of mere carelessness or want of prudence—*The Northern Counties of England Fire Insurance Company v. Whipp* (11), *Rice v. Rice* (12),

Layard v. Maud (13), *The National and Provincial Bank of England v. Jackson* (14), *Farrand v. The Yorkshire Banking Company* (15), *Hewitt v. Loosemore* (6), *Hunt v. Elmes* (2), *Colyer v. Finch* (16), *Kettlewell v. Watson* (17), *Dixon v. Muckleston* (3), and *Keate v. Phillips* (18). The possession of the title-deeds under these circumstances will turn the scale in favour of the holder—*Rice v. Rice* (12), *Layard v. Maud* (13), and *Lloyd's Banking Company v. Jones* (4). Secondly, the defendants are entitled to rely on the legal estate, though got in after notice of the plaintiffs' claim and without consideration, according to the doctrine of tacking—*Edmunds v. Povey* (19), *Sadler v. Bush* (20), *Saunders v. Dehew* (9), *Belcher v. Butler* (21), and *Goleborn v. Alcock* (22), where an outstanding term, which was got in after action and without consideration, was held to be a protection. The doctrine is recognised by the Court of Appeal in *Filcher v. Rawlins* (23), and by the Privy Council in *Blackwood v. The London Chartered Bank of Australia* (24). A legal mortgagee releasing part of the property comprised in the security to a second equitable incumbrancer is not a trustee for a prior equitable incumbrancer within the authority of *Harpham v. Shacklock* (7). That exception to the general rule, therefore, does not apply to this case.

Haldane, Q.C., in reply.—First, the suggested distinction between the degrees of negligence sufficient to postpone a legal and equitable mortgagee respectively is unsound—*Cory v. Eyre* (25). Secondly, this

(13) 36 Law J. Rep. Chanc. 669; Law Rep. 4 Eq. 397.

(14) Law Rep. 33 Ch. D. 1.

(15) 58 Law J. Rep. Chanc. 238; Law Rep. 40 Ch. D. 182.

(16) 5 H.L. Cas. 905.

(17) 51 Law J. Rep. Chanc. 281; Law Rep. 26 Ch. D. 501.

(18) 50 Law J. Rep. Chanc. 664; Law Rep. 18 Ch. D. 560.

(19) 1 Vern. 187.

(20) 2 Vern. 30.

(21) 1 Eden, 523.

(22) 2 Sim. 552.

(23) 41 Law J. Rep. Chanc. 485; Law Rep. 7 Chanc. 269, 268.

(24) 43 Law J. Rep. P.C. 25; Law Rep. 5 P.C. 92, 111.

(25) 1 De Gex, J. & S. 149.

(4) 54 Law J. Rep. Chanc. 931; Law Rep. 29 Ch. D. 221.

(5) 57 Law J. Rep. Chanc. 1022; Law Rep. 39 Ch. D. 238.

(6) 9 Hare, 449; 21 Law J. Rep. Chanc. 69.

(7) Law Rep. 19 Ch. D. 207.

(8) 32 Beav. 213, 216.

(9) 2 Vern. 271; *sub nom. Sanders v. Deligne*, Freem. 122.

(10) 38 Law J. Rep. Chanc. 145; Law Rep. 4 Chanc. 143.

(11) 53 Law J. Rep. Chanc. 629; Law Rep. 26 Ch. D. 482.

(12) 2 Drew. 73; 23 Law J. Rep. Chanc. 289.

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is not a case of tacking. Surtees' trustees, having obtained the legal estate from Legard's trustees, were trustees of it for the persons who had the best right to call for it—that is, the plaintiffs—and the defendants, having notice of this trust in the plaintiffs' favour, could not better themselves by obtaining the legal estate from the trustees, even if the latter had not themselves had notice also—*Allen v. Knight* (26).

KAY, J.—The plaintiffs and defendants are innocent persons, one or other of whom must suffer for the fraud of a man named Toward. [His Lordship stated the facts as set out above, and continued:] The property not being sufficient to pay both mortgages, the question which is to be first is important. It was contended that the plaintiffs' security must be postponed to that of the defendants, not because of any act done by the plaintiffs, but because they were guilty of negligence, which, it was urged, was sufficient to deprive them of their *prima facie* right to priority. The argument rested mainly on a distinction between the position of a first mortgagee who has an equitable estate, and that of a mortgagee whose estate is legal. In the latter case the doctrine of the Court is thus stated in *Plumb v. Fluit* (27): "Nothing but fraud or gross and voluntary negligence in leaving the title-deeds will oust the priority of the legal claimant." This doctrine was accepted by Lord Eldon in *Evans v. Bicknell* (28), and was restated in like terms by Lord Justice Turner in *Hewitt v. Loosemore* (6), and has always been recognised as the undoubted law on the subject. In the last-mentioned case Lord Justice Turner says, in effect, that such negligence will be imputed to the legal mortgagee if he omits all enquiry as to the deeds; but not if he has enquired, and a reasonable excuse is given for their non-delivery. But it was argued that a much smaller amount of negligence was sufficient to postpone a mortgagee whose estate is only equitable.

That proposition, stated in other terms, is that a Court of equity would deprive a mortgagee of an advantage which is less than the legal estate, much more readily and easily than it would deprive him of the legal estate. From the mortgagee's point of view it is difficult to see any justice or reasonable principle for this. He says: "I want my money; whether you take from me the legal estate, or only an equitable estate, the effect is to me precisely the same; you take from me the money I have advanced. If I have the legal estate, equity will not deprive me of my money on the ground of negligence, unless it be 'gross and wilful.' Why should it deprive me of it for less negligence when I have the first equitable estate, which *prima facie* entitles me to priority as much as the possession of the legal estate would do?" The doctrine, however, it was contended, is settled by authority; and reference was made to the judgment of the Court of Appeal in *The Northern Counties of England Fire Insurance Company v. Whipp* (11), where it is said, "The question is not what circumstances may, as between two equities, give priority to the one over the other, but what circumstances justify the Court in depriving the legal mortgagee of the benefit of the legal estate;" and at page 494, "the Court will not postpone the prior legal estate to the subsequent equitable estate, on the ground of any mere carelessness or want of prudence on the part of the legal owner."

From these words, and an observation during the argument that the case of *Waldron v. Sloper* (29) was a contest between equitable incumbrancers, the conclusion has been drawn by the defendants' counsel that it was the view of the Court of Appeal that gross negligence must be proved in order to postpone the legal mortgagee, but that a much less amount of negligence, such as "mere carelessness or want of prudence," would suffice to postpone the first of two equitable mortgagees. I do not think that this is the true meaning of that judgment. The Court was not dealing with a contest between two equitable mortgagees, nor

(26) 5 Hare, 272; 15 Law J. Rep. Chanc. 430; 16 Law J. Rep. Chanc. 370.

(27) 2 Anst. 440.

(28) 6 Ves. 173.

(29) 1 Drew. 193.

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attempting to define the amount of negligence necessary in such a case, but merely emphasising the fact that the estate which it was called upon to displace was legal, and not equitable. No doubt Courts of equity have always manifested great reluctance to deprive a mortgagee or other purchaser of the legal estate; but so they have also when the attempt has been to displace the first of two equitable mortgagees. I have not found any case of authority in which this has been done on the ground of negligence that was not "gross"—that is, so great as to make the prior mortgagee responsible for the fraud committed on the subsequent mortgagee. This seems to me to be the accurate statement of the rule as between two equitable mortgagees; and for this view of the law there is positive and very high authority.

In *Cory v. Eyre* (25) Lord Justice Turner says: "Questions of priority between equitable incumbrancers (and the incumbrances both of the plaintiff and of the defendants in this case are equitable, the legal estate being, as has been stated, outstanding) are in general governed by the rule *Qui prior est tempore potior est jure*, and in determining cases depending on the rule we must of course look at the principle on which the rule is founded. It is founded, so I conceive, on this principle, that the creation or declaration of a trust vests an estate and interest in the subject-matter of the trust in the person in whose favour the trust is created or declared. Where, therefore, it is sought, as in the present case, to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced. No doubt, there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it. A vested state or interest ought not to be disturbed upon any light grounds."

In *The Shropshire Union Railways and Canal Company v. The Queen* (30) Lord Cairns says: "But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that in order to take

away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced."

In *Roberts v. Crofts* (1), Lord Cranworth, dealing with a contest between two equitable mortgagees, says that "the former, when she took her security, acquired a right which was good against all other merely equitable claimants, unless she was guilty of gross negligence enabling the mortgagor to commit a fraud by holding himself out as unincumbered holder of the property."

In *Dixon v. Muckleston* (3), Lord Selborne treats the rule, that negligence to postpone the mortgage must be "gross and wilful negligence which in the eye of this Court amounts to fraud," as applicable between two equitable mortgagees, and he says in effect that where deeds were deposited which were stated in writing by the mortgagor to be the title-deeds of a certain property and to be deposited as security, whether those were all the deeds or only part of the deeds, or "had not been truly deeds relating to that estate at all, as between the mortgagor who had signed such a statement and those claiming under him" on the one side, and the mortgagee on the other, a good equitable security would be created which they "would be estopped from at any time whatever disputing;" and for this his Lordship refers, amongst other cases, to *Hunter v. Elmes* (2), *Colyer v. Finch* (16), and to the statement of the law in *Hewitt v. Loosmore* (6), all of which were cases of legal mortgages. These are not *obiter dicta*, but the carefully worded reasons on which some of the most eminent of modern Judges based their decisions in the cases I have referred to in the Court of Appeal, in Chancery, and in the House of Lords. Nothing short of a decision of the House of Lords can overrule the law so laid down.

Great reliance was placed in argument upon the judgment in *Rice v. Rice* (12), where Vice-Chancellor Kindersley says

(30) 45 Law J. Rep. Q.B. 30; 7 Law Rep. E. & L. App. 507.

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that "in a contest between persons having only equitable interests priority of time is the ground of preference last resorted to." In that case the claimant was a vendor, who had conveyed the estate without receiving his purchase-money, and was seeking to establish an equitable lien for it against a subsequent mortgagee by deposit of the conveyance, which had upon it a receipt for the purchase-money, signed by the vendor, who had thus armed the purchaser with the means of committing a fraud upon the depositor. No one can object to the decision, but the doctrine as above stated by Vice-Chancellor Kindersley has not been accepted. The case was cited in each of those from which I have just quoted, and the language used by Lord Justice Turner in *Cory v. Eyre* (25) seems expressly addressed to answer the observations of Vice-Chancellor Kindersley. It has also been remarked upon in *In re Vernon Evans & Co.* (31) and in *The Union Bank of England v. Kent* (5). In the last-mentioned cases many of the decisions in contests between two equitable mortgagees are discussed and explained. In each of those decisions in which a prior equitable mortgagee was displaced for negligence, the negligence was such as, according to the definition given in the cases I have referred to, would have been sufficient to postpone a mortgagee who had the legal estate.

I conclude, therefore, that the negligence necessary to postpone the first equitable mortgagee in such a case as the present must be so gross as to render him responsible for the fraud committed upon the second mortgagee.

The question is, was there sufficient negligence in this case on the part of the plaintiffs? They intended to have, and had every reason to believe they were obtaining, a perfectly good legal mortgage. If the legal estate had passed it would have been impossible, I think, to deprive them of it at the instance of the defendants. The negligence of which they are accused was omitting to make a requisition as to the property having been at one time owned by Smithson. If they had done this, it is said the forgery of the deed of

the 3rd of November, 1882, would have been discovered. But would it? If by requisition is meant exhausting all means of information by applying to Smithson's trustees, enquiring in the neighbourhood, and the like, that might have been the result. But the requisition which a purchaser usually makes is a question asked of the vendor or his solicitors; unless he has reason for suspicion, it is not usual to do more, and if he gets a satisfactory answer he does not enquire further, and he cannot be truly said to be guilty of gross negligence if he is so satisfied. In this case the mortgagor had not a separate solicitor; the question, if asked, must have been asked of him. But it was anticipated, so far as he was concerned, by production of the forged deed, which he produced as genuine, and which the plaintiffs' solicitors had no reason in the world to doubt. Therefore, to my mind this, if negligence, was not gross negligence—was not such negligence as would have postponed the plaintiffs if the legal estate had passed to them by the deed of mortgage; and was not such negligence as made them responsible in the view of a Court of equity for the fraud subsequently committed by the mortgagor upon the defendants.

Lord Selborne, in *Dixon v. Muckleston* (3), held that an equitable mortgagee receiving a parcel which the mortgagor stated in writing to contain the title-deeds of the estate upon which he by that writing contracted to give security, could not be postponed to a subsequent mortgagee by deposit of the real title-deeds. Even if the parcel did not contain any of the title-deeds, and he, trusting to the mortgagor's statement, never examined, such negligence would not be sufficiently gross to postpone him. That would be greater negligence than can be imputed to the plaintiffs in this case.

I think myself bound by principle and authority to hold that the plaintiffs cannot be postponed on the ground of negligence.

Then, does the possession of the title-deeds confer upon the defendants an advantage in respect of which they are entitled to plead that they are purchasers for value without notice?

(31) 56 Law J. Rep. Chanc. 12; Law Rep. 33 Ch. D. 408.

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There has been some fluctuation of opinion on this point. Lord Cranworth in *Colyer v. Finch* (16) says that the principle is not confined to cases where the person who sets it up has the legal estate.

In *Thorpe v. Holdsworth* (32) Vice-Chancellor Giffard thought the question a difficult one; but, having established the priority of the first equitable mortgagee, he directed a sale to raise his charge, and that the second mortgagee who had the deeds should produce them for the purpose of such sale.

But in *Newton v. Newton* (10), where the claim was to have a trust fund of 2,000*l.* raised out of an estate in priority to an equitable mortgage by deposit of the mortgage-deed by which the fund had been secured to the trustee who had advanced the trust money to the mortgagor, the Lord Chancellor held that where the equitable right was established against the defendants having the deeds, the decree should go on to order them to be delivered up, distinguishing *Walwyn v. Lee* (33) and like cases, on the ground that the sole object in them was to recover the deed and not to determine the right to the estate, but when the right to the estate was decided it would confer the right to the possession of the deeds.

Another point insisted upon was that the legal estate which the defendants have got in will protect them against the plaintiffs' claim. But if this was obtained from some one who was trustee for the persons beneficially interested, and who knew of the plaintiffs' claim, it is quite clear it will not protect the defendants. I have pointed out that by the conveyance by Surtees' trustees to Toward of the 30th of January, 1883, it appears that the contract with them was to convey the fee-simple free from incumbrances.

When Surtees' trustees obtained the legal estate after this conveyance, there was a duty incumbent upon them to convey it to Toward, or to the assign of Toward, who had the best right to call for it. In that sense they were trustees for such assign. Any conveyance by them to

another person would be a breach of trust. I have spoken of trustees—I believe, in fact, there was only one trustee at the time of these transactions.

In *Harpham v. Shacklock* (7) copyholds had been mortgaged in 1850 by conditional surrender without admittance to one Peck. In 1876 the owner of the equity of redemption mortgaged to Pritchard. In 1877 Peck and the owner mortgaged to Shacklock, Peck being paid off. Shacklock deposited this mortgage and the documents obtained from Peck with his bankers to secure an advance, and about the same time he handed some of the other title-deeds to the plaintiff, for whom Shacklock was trustee of the mortgage of 1877. After they knew of the plaintiff's claim the bankers procured Peck to be admitted under his conditional surrender of 1850, and he surrendered to them, and they were admitted. In the Court of Appeal Sir G. Jessel said: "Then, as regards the legal estate, nothing is better settled than that you cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from the bare trustee after you have received notice of a prior equitable claim. If Peck knew of the claim, it was a wilful breach of trust in him to surrender to the bankers; if he did not know of it, the banker did, and knew that they were inducing him to commit a breach of trust by getting him to hand over the legal estate. The appellants' case therefore fails, and the appeal must be dismissed, with costs." I must, therefore, hold that the plaintiffs are entitled to priority.

With reference to costs, the case is a very hard one, and I do not think it right to do more than to allow each party to add his costs to his debt, without interest upon such costs.

There must be a declaration that the plaintiffs have the first charge, the usual accounts, a decree for sale, and a direction that the costs be added to the debt, but without interest, and that the title-deeds be delivered to the plaintiffs.

Solicitors—C. & S. Harrison, for plaintiffs; Iliffe, Henley & Co., agents for Russell & Mackay, York, for defendants.

(32) 38 Law J. Rep. Chanc. 194; Law Rep. 7 Eq. 139.

(33) 9 Ves. 24.

NORTH, J. }
 1890. }
 May 23. } *In re BRYANT AND MAY (LIMITED) (application for registration of a trade mark).*
 August 7. }

Trade Mark—Registration—Essential Particular—Claim in Application—Prize Medal—Distinctive Device—Distinctive Label—Patents, Designs, and Trade Marks Acts, 1883 to 1888, s. 64.

In order to support an application for the registration of a trade mark, it must be shown, not merely that the trade mark consists of or contains an essential particular, as defined by section 64 of the Patents etc. Acts, 1883 to 1888, but that such essential particular has been claimed as such in the application in accordance with the same section.

A representation of an exhibition prize medal is not such a "distinctive device" as to be capable of constituting an essential particular, even though no other similar medal was granted for the same class of goods at the same exhibition.

Semble, that a label which contains only elements which are themselves incapable of constituting essential particulars is not, as a whole, a "distinctive label" within the Act, even though those elements are combined and arranged in a manner which is new and has been used by no other trader.

Motion.

Messrs. Bryant & May (Limited), having obtained for their matches the only gold medal awarded for that class of goods at the exhibition at Barcelona in 1888, designed and adopted a label for use on their boxes of matches intended for sale in Spain. This label consisted of a slip of paper intended to fold round the small boxes of matches, with printed matter on three sides and nothing on the fourth side. The upper portion of the label, meant to cover the front of the box, had on it two representations of the Barcelona medal, obverse and reverse, surmounting a curved fillet with the words "Medalla de Oro," and underneath the fillet were the words "Exposicion Universal de Barcelona." The second portion of the label, meant to cover one of the narrow ends of the box, had on it the words "Agente, Diego Martin Martos, Malaga." The

third portion of the label, meant to cover the back of the box, had on it the words "Bryant and May's Royal Wax Vestas, London," arranged in four lines. Each of the three portions of the label was surrounded by a slight ornamental border, and had on it other small details of ornament. The fourth portion, a narrow one, was left blank.

The label soon became the subject of imitations in Spain, and it was found that these could not be prevented without registration of the label in Spain, which, again, could not be obtained without previous registration in England, the country of origin. Accordingly, on the 6th of February, 1889, Bryant & May (Limited) applied to register the label as above described (except that the words on the second portion of it, referring to the agent, were struck out) as their trade mark for "wax vestas," in class 47, under the No. 86,178. The application, after amendment, stated that "the essential particular of the applicants' 'trade mark' is 'Bryant & May's,' and the general arrangement of the label. They do not claim any right to the exclusive use of any of the words."

The application was opposed by Messrs. R. Bell & Co., Limited, match-manufacturers, the material ground of opposition being that "the proposed trade mark does not contain the essential particulars required by the statutes, and is not distinctive." To this the applicants replied by counter-statement that the mark was "a distinctive label within the meaning of the Patents, Designs, and Trade Marks Acts, 1883 and 1888." The evidence was to the effect that no other match manufacturer was using a label similarly arranged.

The matter was heard by the Comptroller, who decided against the applicants, whereupon they appealed to the Board of Trade, who referred the appeal to the Court, and the case was now heard on motion by the applicants that the Comptroller might be directed to proceed with the application.

Cozens-Hardy, Q.C., and Carpmael, for the applicants.—The trade mark ought to be admitted to registration, for it is within the definition contained in section 64 of the Patents Act, 1883, as amended by the

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Act of 1888. It is a "distinctive label," both by reason of the presence in it of the unique gold medal of the Barcelona Exhibition, and also as being, in the arrangement and collocation of its parts, distinctive. It is not the duty of the Comptroller, in dealing with applications for registration, to look at the elements only of the trade mark and to disregard the whole combination. The proper course is to look at the entire label, and if that is different from all others, then there is a distinctive label within the Act—*In re Christiansen* (1), *In re Hudson* (2), and *Orr-Ewing v. The Registrar of Trade Marks* (3).

Bousfield, for the opponents.—There is nothing in this label which complies with the terms of the Act. The medal is a common device, the words are all common, the name is not printed in a distinctive manner, the borders are of the most ordinary description, and there is nothing which can make the label a "distinctive label"—*In re Price's Patent Candle Company (Limited)* (4).

[NORTH, J.—Is there any evidence that other match-manufacturers are using labels similarly composed?]

Not that they are using labels which contain similar arrangements of the same elements. But that is not necessary. It is immaterial whether other makers are or are not using similar labels, if the label applied for is not distinctive *per se* and apart from any comparison.

Ingle Joyce, for the Comptroller.

Cozens-Hardy, Q.C., in reply.—What distinctiveness is required has already been decided by the Court of Appeal in *In re Wood; Wood v. Lambert* (5), where it was laid down that this distinctiveness must consist in differentiating the goods of one maker or selector from those of all others, so that, if no other maker is using a similar label, this must be distinctive.

In *In re Price's Patent Candle Company (Limited)* (4), there was no combination of numerous parts as here, but only words themselves not registrable, which did not become so by being placed on a so-called label.

NORTH, J. (on August 7) [after stating the facts and reading section 64 of the Act of 1888, proceeded:—The application is not within clause 1 (a), because, although the name "Bryant and May's" does appear, it is in the most ordinary type possible, and there is nothing distinctive about the way in which it is printed. The only clause under which the case may come is clause 1 (c): "a distinctive device, mark, brand, heading, label, or ticket." Now, is this a distinctive device, mark, brand, heading, label, or ticket? One must bear in mind, first of all, that if a trade mark contains matters which are not essential, the applicant is bound, in his application for registration, to state what the essential particulars are, and to disclaim the others. Now, all that the applicants have stated to be the essential particulars in their application are—first, the name, which I have pointed out is not within the section at all, because the name is not printed in any particular or distinctive manner; and further, "the general arrangement of the label." There is not a reference there of any sort whatever to what is put forward in the evidence as the particular special feature—namely, the obverse and reverse of a particular medal, one only of which was granted in this class at a particular exhibition. That is an entirely new claim, and the description and disclaimer required by the Act do not refer to it. It is clear that to support the application on the ground of the label containing this medal is to support it on the ground of the label containing something which has not been described as an essential particular in accordance with the Act. But, as I pointed out, the only thing shewn on the face of the label itself which could be in any way distinctive is this gold medal with the words below it; but it is notorious that in trade marks generally medals are the commonest things possible—and, from the exhibits before me, I have

(1) 3 Pat. Rep. 54.

(2) 55 Law J. Rep. Chanc. 531; Law Rep. 32 Ch. D. 311.

(3) 48 Law J. Rep. Chanc. 707; Law Rep. 4 App. Cas. 479.

(4) 54 Law J. Rep. Chanc. 210; Law Rep. 27 Ch. D. 681.

(5) 55 Law J. Rep. Chanc. 877; Law Rep. 32 Ch. D. 247.

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no doubt that they are extremely common in this particular trade. In my opinion, there is nothing whatever distinctive in the back and front view of the medal, or the descriptive words "Gold Medal, Universal Exhibition of Barcelona," which accompany it; and I think that the Comptroller was quite right in saying that there were no such distinctive particulars. Further, I find this, that the very things upon which the applicants now rely as being distinctive are not referred to in any way in the application itself. In my opinion the Comptroller was quite right, and the appeal from him must be dismissed.

Solicitors—Wilson, Bristows & Carpmael, for applicants; Ingle, Cooper & Holmes, for opponents; Solicitor to Board of Trade, for Comptroller.

CHITTY, J. } *In re* ANDERTON AND MIL-
1890. }
August 5. } NER'S CONTRACT.

Lease—Usual Covenants—Proviso for Re-entry—Conveyancing Act, 1881, s. 14.

The rule that under an agreement for the grant of a lease, to contain the usual and proper covenants, the proviso for re-entry by the lessor is to be limited to breach of the covenant for payment of rent—Hodgkinson v. Crowe (44 Law J. Rep. Chanc. 680; Law Rep. 10 Chanc. 622)—is unaltered by the Conveyancing Act, 1881, s. 14, although the Court is thereby enabled to relieve against forfeiture of leases for breach of covenants other than for the payment of rent.

Adjourned summons.

By an agreement of the 19th of February, 1890, made between Anderton of the one part and Milner of the other part, Anderton, in consideration of 230*l.*, agreed to grant to Milner a lease of certain houses for a term of seventy years at an annual ground-rent of 12*l.* 12*s.*, "and, subject to the usual covenants, to insure from loss by fire, repair, and pay rent and all outgoings that may be charged on

the property and ground, and the lease shall contain the usual and proper covenants hereinbefore mentioned."

The lessor inserted in the lease the covenants mentioned in the contract—namely, to pay rent, clear of land tax, tithe, and other rates; to repair, keep, and deliver up in repair, and permit the lessor to enter and view the state of repair, to insure against fire, and to register with the lessor all assignments and other dispositions, with a proviso for re-entry in case of non-payment of the yearly rent, and in the event of any breach being made in all or any of the clauses, covenants, conditions, and agreements thereinbefore contained on the part of the lessee to be observed and performed.

The lessee objected to the proviso for re-entry extending to any of the covenants other than for the payment of rent, whereupon the lessor took out this summons for the settlement and determination of the form of, and the covenants in the lease to be granted pursuant to the contract.

The matter having been referred to one of the conveyancing counsel to the Court, he made the proviso for re-entry to extend to the breach of any of the covenants in the lease, giving as his reason for so doing that the decision in *Hodgkinson v. Crowe* (1), limiting the proviso for re-entry to non-payment of rent, was based on the fact that the Court was then unable to grant relief against forfeiture on breach of covenant except for payment of rent, whereas now, by the Conveyancing Act, 1881, section 14, relief could be granted in the case of all the covenants contained in this lease.

Percy Wheeler, for the lessor.—The lease should stand as settled by the conveyancing counsel, for the reasons given by him.

He referred to *Wilkins v. Fry* (2) and *Hampshire v. Wickens* (3).

D. L. Alexander, for the lessee.—The law as decided in *Hodgkinson v. Crowe* (1) is unaltered by section 14 of the Con-

(1) 44 Law J. Rep. Chanc. 680; Law Rep. 10 Chanc. 622.

(2) 1 Mer. 244.

(3) 47 Law J. Rep. Chanc. 243; Law Rep. 7 Ch. D. 155.

In re Anderton and Milner's Contract.

veyancing Act, 1881. Both in the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), s. 2, and in the Settled Land Act, 1882, s. 7, the proviso for re-entry is to be only upon non-payment of rent.

[He was stopped by the Court.]

CHITTY, J.—The question in this case is as to the frame of a proviso for re-entry in a lease, which has been referred to the conveyancing counsel to be settled in accordance with the contract between the parties. The contract is for a lease of some house property for seventy years at a ground-rent of 12*l.* 12*s.*, with the additional consideration of 230*l.* paid by way of premium—in other words, the contract is in part one of a purchase of the term, and in part a taking at a rent. The property is to be held “subject to the usual covenants to insure from loss by fire, repair, and pay rent and all outgoings that may be charged on the property and ground, the lease to contain the usual and proper covenants hereinbefore mentioned.” It is plain, therefore, that the parties here have defined in more or less precise language what are to be considered to be usual covenants, and beyond these no covenants are to be inserted. The contract does not contain any mention as to a proviso for re-entry; consequently the proviso to be inserted in this lease must be reasonable, and one which, according to the course of practice prevailing among conveyancers, is usually inserted in leases of this class.

Now this question came before the Court of Appeal in Chancery in the case of *Hodgkinson v. Crowe* (1). The agreement there was to grant a mining lease, and the lessor insisted on the insertion of a proviso for re-entry upon breach of any of the covenants or agreements in the lease; but it was held that he was entitled to it only on non-payment of rent. The decision was on a mining lease, but the judgment proceeded on the general principle that the form of proviso claimed was neither usual nor reasonable in leases.

It is true that among the grounds for so holding which were given by Lord Justice James in his judgment one is that for the breach of many covenants other than that for payment of rent a Court of equity could not relieve. This decision

was in 1875, and, so far as I am aware, no practice has arisen since then which renders the insertion of a proviso for re-entry on breach of any covenant usual. Such a practice might, in process of time, arise, but the lessor, on whom the burden lies of proving this, has not done so. But the learned conveyancing counsel to whom the matter was sent suggests that the insertion of the proviso in this form is now proper by reason of the alteration in the law made by the Conveyancing Act, 1881, s. 14, by which the right of re-entry for breach of covenant is enforceable only after notice to the lessee, and after giving him an opportunity of making compensation for the breach, and, subject to certain excepted cases which are for the present purpose immaterial, the Court is empowered to grant relief. In this state of the law a different practice might conceivably have arisen with respect to the proviso for re-entry, and may do so in the future; but that is not the question now; it is whether this change in the law made by the Conveyancing Act makes any difference to the existing law on the subject of this proviso. I think it does not.

Lord Justice James refers in his judgment to the fact that the requirement as to a proviso for re-entry contained in the Leases and Sales of Settled Estates Act is limited to the non-payment of rent. There is a similar requirement in the Settled Estates Act, 1877, s. 4, and again in the Settled Land Act, 1882, s. 7—which is subsequent in date to the Conveyancing Act. It appears, therefore, that the Legislature considered a proviso for re-entry on non-payment of rent to be usual in leases, and therefore required its insertion in leases by limited owners. I may add that where, as in this case, a premium is paid, which is, in fact, a purchase *pro tanto* of the term granted, it would be a strong act to allow the insertion of a proviso for re-entry such as would enable the lessor to destroy the term he has granted.

Solicitors—J. C. F. Barfield, for respondent;
Godden S. Hare, for applicant.

NORTH, J. }
 1890. } *In re THE CROWN BANK (LI-*
 April 30. } *MITED). In re O'MALLEY.*
 May 1. }

*Practice—Contempt of Court—Pending
 Petition for winding up a Company—
 Newspaper Comments.*

When a petition has been presented for the winding up of a company, and, with knowledge of this fact, comments on the case from the point of view of one of the litigants are published in a newspaper, a contempt of Court has been committed, and the responsible parties are liable to fine and imprisonment, even though the comments would not be likely to affect the decision of the Court on the petition.

Motion.

On seven occasions in January and February, 1890, articles were published in the *Star* newspaper reflecting on the status and management of the Crown Bank, Limited, formerly the Mid-Northamptonshire Bank, Limited. Shortly afterwards a petition was presented by a shareholder for the winding up of the company, on the ground that the main objects of the company were gone. The petition was mentioned to North, J., on Saturday, the 19th of April, and was ordered to stand over for a week in order that the chairman of the company and one of the directors, named Mr. Gilpin, might attend for cross-examination.

On Monday, the 21st of April, the following paragraph appeared in the *Star*:—

“The Crown Bank—Letting Light in.

“We have repeatedly directed attention to this so-called bank, and we have not hesitated to describe it as a fraudulent concern. Neither Mr. Gilpin nor any other person connected with it has thought fit to challenge that description, and we observe with much satisfaction that the matter has now come before the Courts. On Saturday a petition for winding up the bank was discussed in Mr. Justice North's Court. The petition is ordered to stand over till next Saturday, when the chairman of the bank and Mr. Gilpin are directed to attend for the purpose of being examined. If they are compelled to

make a full statement as to the affairs of the bank, we shall have some interesting revelations.”

The Court was now moved, on behalf of the Crown Bank, Limited, that Mr. W. O'Malley, the publisher of the *Star*, might be committed to prison for contempt in publishing the paragraph on the 21st of April, while the winding-up petition was pending. Mr. O'Malley made an affidavit, whereby he stated that his remarks had been published in the public interest, that he had no intention of prejudicing the hearing of the petition, and that he was not aware that by so doing he might be committing a contempt of Court. If the Court considered that he had committed a contempt, he offered a humble apology.

Cozens-Hardy, Q.C., and Chadwyck Healey, for the motion.—This is a case in which the publisher should be committed to prison—*Tichborns v. Mostyn* (1) and *In re The Cheltenham and South Swansea Railway Carriage and Waggon Company* (2).

Wurtzburg, contra.—The respondent acted *bona fide*, his remarks could have no effect on the mind of the Judge; he has apologised, and it would be a departure from ordinary practice to commit him to prison—*The Plating Company v. Farquharson* (3) and *The Metropolitan Music Hall Company v. Lake* (4).

Cozens-Hardy, Q.C., in reply.

NORTH, J., stated the facts, and continued:—No one can read the paragraphs which appeared in the *Star* previously to the presentation of the petition without seeing that the editor was put in motion by the applicant, and that he was not expressing the independent opinion of an impartial newspaper, but was taking a part which he knew to be that of one side against the other. So far, however, as the earlier paragraphs published before the petition was presented are concerned, their publication might be the subject of

(1) Law Rep. 7 Eq. 55n.

(2) 38 Law J. Rep. Chanc. 330; Law Rep. 8 Eq. 580.

(3) 50 Law J. Rep. Chanc. 406; Law Rep. 17 Ch. D. 49.

(4) 58 Law J. Rep. Chanc. 513.

In re Crown Bank.

an action for libel, but could be no contempt of Court. But when, with notice that the petition had been presented, the newspaper deliberately took one side in the controversy, and took on itself to foretell what the result would be, there was, in my opinion, a gross contempt of Court. It was doing what might interfere with the course of justice. Whether it actually would so interfere in any case I do not know. Whether there is any person with a mind so constituted that he would be influenced by such a paragraph in a newspaper of this sort I cannot tell. The only object for which such a paragraph could be inserted must be to influence persons who might read it, and induce them to take one side. It was not, therefore, an impartial statement—even if that could be allowed—but it was a deliberate adoption of the view of one of the parties. I do not think it necessary to refer at length to the two authorities cited in support of the motion. I will take a passage, cited in both, from an earlier decision by Lord Hardwicke—*Roach v. Hall* (5)—in which he said: “Nothing is more incumbent upon Courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard. It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced.” That view has, both before and since, always been taken by the Courts, and, in my opinion, ought to be acted upon in this case. The case before me is one entirely different from the cases relied upon by Mr. Wurtzburg, such as where a newspaper had inadvertently admitted advertisements, being ignorant of the existence of legal proceedings, which have no application to a case where what is done is done deliberately. Under the circumstances of this case there has, in my opinion, been a gross contempt of Court; and I should send the publisher to prison if it were not that I do not wish to give him the prestige which some foolish

persons would attach to a man upon whom such a sentence is passed. I order him to pay a fine of 50*l.*, and the costs of these proceedings as between solicitor and client.

Whatever the conduct of the company may have been in other respects, I think that they were quite right in bringing this matter before the Court.

Solicitors—Goddens Hare, for the motion;
Shaen, Roscoe & Co., for respondent.

[IN THE COURT OF APPEAL.]

LORD ESHER, M.R.

LINDLEY, L.J.

BOWEN, L.J.

1890.

August 1.

In re LORD EGMONT'S
SETTLED ESTATES.

Settled Land Acts Amendment Act, 1887 (50 & 51 Vict. c. 30), s. 1—Improvement Rentcharge—Redemption—Bonus to compensate Owner of Rentcharge for reduced Rate of Interest on Re-investment—Application of Capital Money in Payment.

Where a rentcharge has been created upon settled land in pursuance of an Act of Parliament, with the object of paying off money advanced to defray the expenses of improvements authorised by the Settled Land Act, 1882, the trustees of the settlement may, upon the true construction of the 1st section of the Settled Land Acts Amendment Act, 1887, out of money in their hands which is applicable as capital money arising under the Settled Land Act, 1882, properly pay, in addition to the amount of the unpaid principal money, a reasonable sum by way of bonus such as is necessary to redeem the rentcharge.

In re Lord Sudeley's Settled Estates (57 Law J. Rep. Chanc. 182; Law Rep. 37 Ch. D. 123) disapproved.

Appeal from an order of North, J.

By an indenture of settlement dated the 10th of February, 1870, the Earl of Egmont became entitled, on the 2nd of August, 1874, to an estate for life in the lands thereby settled.

By virtue of various absolute orders of

In re Lord Egmont's Settled Estates, App.

the Inclosure Commissioners for England and Wales, made in pursuance of statute and of subsequent date to the 2nd of August, 1874, Lord Egmont charged the settled lands with terminable rentcharges for the purpose of repaying with interest sums of money borrowed by him from the Lands Improvement Company and the Land Loan and Enfranchisement Company, and expended upon the lands in the erection and alteration of farm buildings, the drainage of farm lands, the making of farm roads, the grubbing up of inconvenient and wide hedgerows, and the erection of permanent iron fencing, and in the payment of the architect's fees, the Inclosure Commissioners' fees, and other sundry payments in respect of these works.

The rentcharges were payable by yearly instalments during fixed terms of years. Each instalment consisted in part of principal and in part of interest, and the tenant for life was bound as between himself and the remainderman to pay the yearly instalments during the continuance of his interest.

The trustees of the settlement had in their hands money which was liable to be laid out in the purchase of land, and which, therefore, under the 33rd section of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), was applicable as capital money arising under that Act, and might under the 21st section be expended in payment for any improvement authorised by the Act.

In these circumstances Lord Egmont became desirous of redeeming the rentcharges under the provisions of the 1st section of the Settled Land Acts Amendment Act, 1887 (1), and for this purpose

(1) The Settled Land Acts Amendment Act, 1887 (50 & 51 Vict. c. 30), provides by section 1, "Where any improvement of a kind authorised by the Act of 1882 (*i.e.*, the Settled Land Act, 1882, 45 & 46 Vict. c. 38) has been or may be made either before or after the passing of this Act, and a rentcharge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rentcharge or otherwise providing for the payment thereof, shall be deemed to be

opened negotiations with the owners of the rentcharges, who agreed to their redemption upon the payment of the unpaid principal moneys, together with a bonus representing the difference between the interest at the rate of four per cent. per annum which was by the agreement payable upon the amount of the principal money from time to time remaining unpaid until the termination of the rentcharge, and the smaller rate of interest they would be able to obtain upon re-investment.

The total sum so required for redeeming the rentcharges having been ascertained, Lord Egmont applied by originating summons that it might be declared that the above-mentioned charges upon the settled lands were rentcharges within the meaning of the 1st section of the Settled Land Acts Amendment Act, 1887 (1), and that any money from time to time in the hands of the trustees of the settlement, being capital money arising under the said Act, or applicable as such, might properly be applied by the trustees in the redemption of such charges and the balance remaining due thereon by payment of the total sum required for redeeming them.

Upon this summons an order was made in chambers that the trustees or trustee of the settlement for the time being might properly, out of moneys from time to time in their hands, being capital money applicable as capital money arising under the Settled Land Act, 1882, redeem or otherwise provide for payment of so much of the instalments accruing and to accrue due of the rentcharges as represented, or, by the tables annexed to the respective orders of the commissioners creating the rentcharges, was appropriated to the repayment of capital sums.

Lord Egmont, having obtained a certificate that North, J., did not, as the matter had been fully argued before him, desire to hear further argument, and had made an order whereby he declined to accede to the application so far as related to the redemption of so much of the rentcharges as was appropriated to interest, thereupon appealed.

applied in payment for an improvement authorised by the Act of 1882."

In re Lord Egmont's Settled Estates, App.

Crackanthorpe, Q.C., and *Reginald Winslow*, for the appellant.—The case of *In re Lord Sudeley's Settled Estates* (2) is not in point. In that case the trustees had not in hand a sufficient amount of money to redeem the rentcharges, and it was not proposed to redeem them, but to proceed under the alternative power given by the section and “otherwise provide for” them by paying the instalments as they became due. As, however, each instalment became due, that part of it which consisted of interest became a debt immediately payable by the tenant for life, and upon that ground, it may be, could not properly be paid out of capital money. Here, however, it is proposed to redeem the rentcharge, and so once for all extinguish the interest, and it is submitted that the bonus, without the payment of which redemption cannot take place, is properly payable out of capital. If this be not the true construction of the section, the Act will be rendered wholly inoperative.

It is to be observed that in *Lord Sudeley's Case* (2) the summons did not ask for the payment of the interest out of capital, and in these circumstances it is doubtful whether the point, although certainly mentioned, was fully argued.

Onslow, for the trustees of the settlement.—The trustees desire the opinion of the Court as to whether the bonus may properly be paid out of the capital money in their hands. It is suggested that the word “redeem” in the section means “redeem in respect of the capital sum,” and that the effect of the payment of the bonus would merely be to relieve the tenant for life during the next few years.

[BOWEN, L.J.—That argument would be of great weight if it were certain that the tenant for life would remain the same during those years. It must be borne in mind that he may not live to be relieved from a single payment.]

LORD ESHER, M.R.—In this case Lord Egmont, the tenant for life of certain settled estates, has borrowed money to defray the expenses of improvements made upon them, and which, it is not disputed,

are of a kind authorised by the Settled Land Act, 1882. To pay off the money so advanced, terminable rentcharges were created, in pursuance of the Improvement of Land Act, 1864, and other Acts, consisting of yearly payments extending over fixed terms of years, each payment being, as to part thereof, a repayment of a certain amount of principal money, and as to the remainder a payment of interest, so as in time to pay off the whole amount. Lord Egmont has for a series of years paid these rentcharges, but now desires to have them redeemed by the trustees of the settlement under the 1st section of the Settled Land Acts Amendment Act, 1887 (50 & 51 Vict. c. 30), out of money in their hands applicable as capital money. The trustees are not unwilling to accede to his wishes, but they have doubts as to whether they can properly redeem the rentcharges on the terms proposed, and consequently ask the advice of the Court upon the point. Mr. Justice North allowed the redemption as far as he considered he had power to do so, but he thought himself restrained to some extent by the decision of Mr. Justice Kay in *In re Lord Sudeley's Settled Estates* (2); and so decided that the trustees might properly redeem so much of the instalments of the rentcharges as represented capital sums, but declined to allow the payment of a further sum, which has been called a bonus. The Land Commissioners are satisfied with the security which they hold, and have no desire for redemption; but they are willing to accept immediate redemption upon the payment of a sum or bonus representing the difference between the amount of interest they would receive if the money were paid by annual instalments, and the interest they are likely to get if they take the money now and invest it in other securities. In other words, this means that they are willing that the rentcharge should be redeemed at a certain price. The words of the 1st section of the Settled Land Act, 1887, are that “any capital money expended in redeeming such rentcharge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorised by the Act of 1882.” Now this

(2) 57 Law J. Rep. Chanc. 182; Law Rep. 37 Ch. D. 123.

In re Lord Egmont's Settled Estates, App.

money, including the bonus, is the money which the person to whom the rentcharge is payable will take to redeem it; and in my judgment, therefore, taking the words in their ordinary meaning, it is money which has to be expended in redeeming the rentcharge, if it is to be redeemed; and the case falls directly within the words of the section.

Was, however, Mr. Justice North correct in saying that he was restrained from allowing the trustees to pay this money by the case of *In re Lord Sudeley's Settled Estates* (2). I think not. That was not a case of redemption at all. There the tenant for life asked—not in the summons, but by counsel appearing for him upon the summons—that the trustees might pay the instalments as and when they became due, and Mr. Justice Kay was of opinion that that was equivalent to asking that the interest should be paid when it had become due, and was already a debt payable by the tenant for life. This he did not think it right that the trustees should pay; but whether he was right or not in that conclusion does not affect this case. I am inclined to think that Mr. Justice Kay took, perhaps, too strict a view of the Act of Parliament, and that, if what he was requested to do did not come within the meaning of the word “redeem,” it might possibly have been brought within the purview of the alternative words, and be considered to be “otherwise providing for the payment thereof.” The decision is, I think, one with which, if it came before me, I could not agree; but whether that be so or not, it does not affect this case at all. I think, therefore, that Mr. Justice North had power to allow, and should have allowed, the trustees to pay that part of the redemption money which consisted of bonus.

If the trustees desire to have the amount to be paid decided, the summons must be referred back to Mr. Justice North's Court for the chief clerk to enquire into that matter.

LINDLEY, L.J.—This case turns upon the construction of the 1st section of the Settled Land Acts Amendment Act, 1887 (50 & 51 Vict. c. 30). That Act was passed to remedy a defect disclosed in the Settled Land Act,

1882, by the case of *In re Knatchbull's Settled Estate* (3), in which it was decided that incumbrances affecting the inheritance created under the Lands Drainage and Improvement Acts could not, under the Settled Land Act, 1882, be paid off out of the capital of the settled estates. The words of the Act of 1887 are very wide. No distinction is drawn between rentcharges which are redeemable by contract and those which are not. The section applies equally to both. In this case we are asked to apply it to one which is not redeemable by contract, so that the lender of the money is not obliged to take it back again except, as agreed upon, by annual instalments. In order to redeem the rentcharge, therefore, it is necessary to come to terms with the lender. He is quite willing to accept redemption, but stipulates, quite reasonably, to be paid something for the loss which he will suffer by not being able to put out his money again on such advantageous terms. If the lender wants to extort an unreasonable sum on this ground, it would of course be the duty of trustees to refuse to entertain the matter. If they are in doubt, then they can come to the Court and ask its sanction. But if the lender asks a reasonable sum, then, as the object of the section is clearly to enable capital moneys to be expended in redeeming rentcharges, that reasonable sum must be paid, unless the section is to remain a dead letter.

But it is said that this view is not in accordance with the decision in *In re Sudeley's Settled Estates* (2). That case is rather peculiar, because there the summons did not ask for more than the payment of that part of each instalment which represented capital; and it was only in the course of the argument that the larger order for the payment of each instalment in full was asked for, and I agree with the Master of the Rolls in thinking that Mr. Justice Kay took too limited a view in that case. The section speaks of “otherwise providing for the payment thereof”—that is, of the rentcharge. But the rentcharge consists of the payment of a certain sum yearly, and

(3) 54 Law J. Rep. Chanc. 1168; Law Rep. 29 Ch. D. 588.

In re Lord Egmont's Settled Estates, App.

it is, in my opinion, too limited a view to take of the Act to say that it does not authorise the application of capital money to provide for the payment of this yearly sum. I think, therefore, that this appeal must be allowed, and that we ought to say that a reasonable sum by way of bonus—such as is necessary to redeem the rent-charge—is properly payable out of the capital money in the hands of the trustees. In case the parties differ as to what is a reasonable sum, that matter must be referred to chambers for determination.

BOWEN, L.J.—I am of the same opinion.

Appeal allowed.

Solicitors—H. T. Boodle, for applicant; Frere, Forster & Co., for trustees of settlement.

NORTH, J.
1890.
July 3, 8, 9, 10. } THE ATTORNEY-GENERAL
August 6. } v. MORGAN.

Royal Mine—Gold Mine—Mines of Copper, Iron, or Lead—Rights of Crown—1 Will. & Mary, c. 30. s. 4; 6 Will. & Mary, c. 6. ss. 2 and 3.

Section 2 of the Act 6 Will. & Mary, c. 6, provides that the owner of any mine, wherein any ore shall be found or wrought, and in which there is copper, iron, or lead, may hold and enjoy, and continue in possession of, and dig and work the same mine and ore, notwithstanding that such mine or ore shall be claimed to be a royal mine. Section 3 of the same Act provides that the Crown may have the ore of any such mine, paying to the owner of the said mine wherein such ore shall be found, within thirty days after the said ore shall be raised and laid upon the banks of the said mine, and before the same be removed from thence, for all ore "washt, made clean, and merchantable," where there is copper, iron, or lead, certain specified rates per ton. And, in default of payment of such respective sums, it shall be lawful for the owner of the said mine

wherein such ore shall be found, to sell and dispose of the said ore to his own uses:—Held, that the true object of the Act was to secure to the subject the copper, iron, and lead ores found in his soil, or the full value thereof as fixed by section 3; and, at the same time, to secure to the Crown (if it chose to take it) all the gold and silver found in the mine, paying the value of the copper, iron, or lead ores, which accompanied it, at the specified rates.

The defendant was the owner of a mine in Wales, which he was working for gold, and which he claimed the right to work without paying any royalty to the Crown. The defendant had never worked the mine as a copper, lead, or iron mine; and no one had ever so described it:—Held, first, that the defendant, therefore, was not within the protection of the Act; secondly, that, even if he was, as he had only offered to the Crown quartz rock in the rough state, and not ore "washt, made clean, and merchantable," there had been no default of the Crown in payment of the statutory price; and that the defendant, therefore, was not entitled "to sell and dispose of the ore for his own use" without paying a royalty.

Action with witnesses.

On the 20th of October, 1887, the defendant, Mr. Pritchard Morgan, M.P., took from Mr. Chidlaw Roberts, the owner of Gwynfynydd Farm, in the county of Merioneth, a lease of the mines, veins and seams of copper ore, lead ore, gold and gold ore, and other metal ores and minerals on the farm for a term of thirty years, subject to the rights of the Crown, and the rents, royalties, and covenants mentioned in the lease; and he soon afterwards began to work and develop the Gwynfynydd mine, spending considerable sums of money in providing the necessary plant and machinery.

On the 26th of April, 1888, the writ in this action was issued.

On the 4th of May the Court granted an interlocutory injunction restraining the defendant from removing gold from the Gwynfynydd mine, and from certain other lands (known as Cwmhesian and Dol-frwnog), without the licence of the Crown; but the order was not to prevent the defendant from bringing the quartz rock

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to the surface, and doing what was necessary to extract the ore therefrom.

On the 7th of May the Morgan Gold Mining Company (Limited) was registered, of which the defendant was the promoter, and in which he is a very large shareholder.

On the 8th of June the Crown granted a lease or licence to Mr. Chidlaw Roberts, authorising him to work the gold at a royalty of one thirtieth. That was afterwards assigned to the company; and the company had been ever since working under it, paying to the Crown the amount payable, by way of royalty, in respect of gold subsequently produced. Shortly afterwards the defendant assigned all his interest in the Gwynfynydd mine to the company.

On the 10th of January, 1889, the statement of claim was delivered. It alleged that the defendant was, and had for some time previous to the commencement of the action been working the Gwynfynydd mine; that the gold was found in quartz rock; that some thousands of tons of quartz had been raised by the defendant in his mining operations, part of which had been crushed, and the rest was stacked awaiting treatment; that a considerable quantity of gold had already been extracted and removed from the works; and that the operations were still proceeding. It also alleged that the mines so being worked by the defendant were royal mines, and as such were, with all gold and silver found therein, the property of her Majesty the Queen in right of her Crown; and that no licence to work any part of the mines had, up to that date, been granted by the Crown to the defendant. And it claimed an injunction to restrain the defendant, his agents, servants, and workmen, from raising, getting, selling, or removing from the Gwynfynydd mine (and certain other named mines) any gold or gold ore or quartz or other substances containing gold, the produce of the said mine or lands, without the licence of the Commissioners of her Majesty's Woods and Forests. It also claimed an account and payment by the defendants of the value of all gold got by the defendant from the mine since the 31st of December, 1887.

On the 18th of March, 1889, the state-

ment of defence was delivered. The defendant did not admit that the mines were royal mines, or that they were, with all gold and silver found therein, the property of her Majesty in right of her Crown. "The defendant is a subject of the Crown, and is, or was, when working the mine, the owner or proprietor of the mine aforesaid, and within the said mines gold and silver or one of them has been discovered, and there is also copper, iron, and lead, and the defendant is entitled to hold and enjoy and work the same, whether such mines are royal mines or not, in accordance with the provisions of the statutes in that behalf made and provided. The defendant has always been, and is now ready and willing, and hereby offers to permit the Crown to have all gold and silver ore raised and laid upon the bank and not yet removed on payment of the sums in that behalf provided by the said statutes. The defendant, before action brought, offered to let the Crown have the said ore upon the terms aforesaid. As to any ore raised and laid upon the bank and heretofore removed, the defendant says that the Crown did not pay, or offer to pay, for the same within thirty days after the same had been raised and laid upon the bank." The last paragraph of the defence was as follows: "The defendant denies that any gold or silver removed or about to be removed by the defendant from the mines aforesaid is the property of her Majesty, or has been or will be taken by the defendant without any lawful authority."

In the opinion of the Court the evidence shewed that the substance brought up from the Gwynfynydd mine was quartz rock worked in lodes or veins; that the principal vein in the mine averaged about 15 feet in breadth; that in some places the quartz was extremely rich in gold, that in other places the gold was disseminated through the quartz in visible specks or grains; but that in the greater portion of the quartz rock the gold was too small in quantity to be detected by the naked eye. The evidence shewed that the quartz also contained small quantities of galena or sulphuret of lead, of copper and iron pyrites, of blende or sulphide of zinc, and various other minerals.

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When the quartz was brought to the surface it was often stacked upon the land for some time before being sent to the mills; but it was sometimes sent there at once, and there dealt with by the methods ordinarily adopted for gold mining.

Section 4 of the Act 1 Will. & Mary, c. 30, is as follows: "Provided also, and be it further enacted by the authority aforesaid, that no mine of copper, tin, iron, or lead shall hereafter be adjudged, reputed, or taken to be a royal mine, although gold or silver may be extracted out of the same." The rest of the Act was repealed by the Statute Law Revision Act, 1867.

The sections of the Act 5 Will. & Mary, c. 6, entitled "an Act to prevent disputes and controversies concerning mines," on the true construction of which the argument in great measure turned, are fully stated in the judgment.

The Attorney-General, Higgins, Q.C., and Vaughan Hawkins, for the plaintiff.—In the time of Queen Elizabeth, the right of the Crown extended not only to all gold and silver, but also to all baser metals containing any gold or silver even in the lands of a subject—*The Case of Mines* (1). In that case it was held that a mine which was indisputably a copper mine, and workable only as such, belonged to the Crown, because there was in the ore some portion of gold and silver (2).

In the year 1640 the law was that wherever the gold in a mine exceeded in value the expense of getting, it was a royal mine; and the baser metal as well as the gold belonged to the Crown—"opinion of fifteen leading counsel" (3). Where the real object of working a mine is to procure gold, and where gold is being procured, the mine is a gold mine, and as such a royal mine, although the ore may contain in addition to gold one or more of the baser metals.

It is clear on the evidence that the Gwynfynydd mine was worked by defendant for the sole purpose of getting gold, and was not worked for other minerals.

They referred to *Stephen's Blackstone* (3rd ed.), vol. 2, pp. 533 and 534.

(1) 1 Plowden, 310.

(2) Bainbridge on Mines (4th ed.), p. 127.

(3) *Ibid.* p. 129.

The defendant in person.—The plaintiff's evidence admits that all the ore found in this mine contains one or more of the four specified base metals, at any rate in small quantities; and, therefore, on the true construction of the Acts of Will. & Mary, this cannot be a royal mine. Section 2 of the later Act provides that an owner of any mine "wherein any ore now is, or hereafter shall be discovered," "and in which there is copper, iron, or lead," may hold and enjoy the same mine and ore—that is to say, shall be owner of the mine and whatever is found there, be it gold or silver, "notwithstanding such mine shall be pretended to be a royal mine."

Then comes section 3, as a redemption clause, to enable the Crown to buy back the mine (if it should prove exceedingly rich) at a certain fixed price per ton, being the market price of the day for the four specified ores.

[NORTH, J.—That is for ore "washt, made clean, and merchantable," not for simply washing a piece of quartz rock and raising it to the surface.]

He also referred to *Johnson's Dictionary*, "Ore," *Professor Crookes on Gold Ores*, and *Calvert's Gold Rocks of Great Britain and Ireland*.

T. L. Wilkinson watched the case on behalf of the company.

Higgins, Q.C., was only called upon to reply as to the construction of the two Acts of Will. & Mary.

Higgins, Q.C., in reply.—The general intention of the second Act was to deal with copper, tin, iron, or lead mines, and with no other mines. By section 2 no mere claim of the Crown by virtue of its prerogative was to disentitle a person from working what was fairly (say) a copper mine, although gold might be extracted from it. Then the plain meaning of section 3 is this: It is the duty of the subject to make the ore "washt, made clean, and merchantable;" and then, if the Crown think it worth while to come in, the Crown can do so and pay for the copper ore at the price fixed by the section, and if there were a considerable quantity of gold the Crown would have the benefit of the gold.

At the close of the argument, judg-

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ment was reserved; and on the 6th of August, NORTH, J., gave judgment as follows:—

The only question to be decided in this action is by whom the costs have to be borne, as the defendant has, since it commenced, sold all his interest in the principal mine to a company, which has from the first held a licence from the Crown, and has duly paid and is paying royalty thereunder. But for this purpose it is necessary to consider the points in dispute between the Attorney-General and the defendant with regard to the mines of gold and silver, or royal mines as they are called. The existence of gold in this country has long been known, and for many centuries the search for it has been prosecuted from time to time in various parts of England, Scotland, Wales, and Ireland, with more or less success among the gold-bearing districts. The neighbourhood of Dolgelly, in Merionethshire, has long had a high reputation, the presence of auriferous lodes or veins there has been distinctly ascertained, and gold has been sought there by various adventurers from time to time, though, if we may judge from the intermittent character of the workings, without any great commercial success. Various sums of money are proved to have been paid from time to time to the Receiver of the Crown in respect of gold so worked. Among such workings are those known as the Gwynfynydd mine, in a farm of that name in the Mawddach Valley, in the county of Merioneth. The defendant, in a letter of the 22nd of April, 1888, states that this mine has been worked for gold by the Mawddach Gold Mining Company for a great number of years. In the years 1864, 1865, and 1870, various small sums were paid to the Crown Receiver as royalty for gold obtained there. The defendant had known the country in question for many years; and, not daunted by the failures of his predecessors, he entertained a confident hope, which the results seem to justify, that gold could be got there in remunerative quantities; and on the 20th of October, 1887, he took a lease from Mr. Chidlaw Roberts of the Gwynfynydd mine for thirty years, subject to the rights of the Crown; and he commenced forthwith

to work and develop the mine and spend considerable sums in so doing, and providing the necessary plant and machinery. This having been brought to the notice of the Commissioners of Woods, Forests, and Lands Revenue, in whom all the hereditary revenues of the Crown are now vested for the use of the public, a correspondence ensued to which it is now necessary to refer.

[His Lordship, after referring to the correspondence which passed between the defendant and the officials of the Woods and Forests department between the 6th of January, 1888, and the issue of the writ; and particularly to a letter of the 2nd of February, 1888, from Mr. Sowray, of that department, to the defendant, in which he says: "The Crown Receiver for Wales will be instructed to apply to you for the Crown royalty, which will be 1/30th of the value of the gold"; and to another letter from Mr. Sowray, of the 21st of April, 1888, in which he says: "You state that you are desirous that the position of the Crown and yourself in regard to the working of the Gwynfynydd gold mine should be thoroughly defined; you, in effect, deny the right of the Crown or its officers or servants to have access to the mine, and you request Mr. Culley to instruct Mr. Bowen (the Crown Receiver) to make a formal demand to enter upon your land so as to enable you to fight the question as to whether or not the Crown would be trespassing upon your property. Mr. Culley quite agrees with you that it is time the position of the Crown and yourself in regard to the Gwynfynydd gold mine was settled; but he thinks that there is more to settle than the mere question of access for the Crown and its tenants, &c.; there is the question of whether, in the absence of any authority from the Crown, you are justified in persisting in raising, extracting, and removing from your property gold which does not belong to you but to the Crown," and, after referring to the nature of the quartz brought up from the Gwynfynydd mines, and describing the methods adopted by the defendant for obtaining the gold, continued:] In the result it is quite clear that there has not been, and is not, any mining or working for lead, copper, or

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iron; and that none of these metals has been obtained, except in such very small quantities as to be entirely without value. On these facts, I have no difficulty at all in coming to the conclusion that the mine is a gold mine, and nothing else. The defendant himself paid a royalty to the Crown for working it. He sold it as a gold mine to the company which he had promoted to purchase it. The company so formed to buy and to work it was called the Morgan Gold Mining Company. It has worked for gold alone, and has paid a royalty thereon, and has sold gold only; and they have, in fact, found nothing else except in such small quantities as above mentioned. The suggestion that the mine is worked for other minerals as well as gold is a fiction.

The law with respect to the right of the Crown in mines does not present any serious difficulty. It seems probable that at one time the right to all mines, even in the land of a subject, was vested in the Crown, but that in the course of years the right to get all baser metals in his land was conceded to the subject who owned such land (except in certain portions of the kingdom, with which we are not now concerned). In this concession, however, no royal mines or mines of gold and silver were included, and such mines have from the first always been, and still are, the exclusive property of the Crown, as part of the Royal prerogative. The defendant remarked with severity on the hardship of the Crown claiming the gold which is found in the land of the subject and belongs to him. But it does not belong to him, and he has no right to touch it without authority from the Crown, except so far as he acquires such right under the statutes which I will presently refer to. These comments have no foundation. The well-established rights of the Crown to all gold and silver extend not only to those metals themselves found in a comparatively pure state, but also to all other ores and substances containing gold; and in the great *Case of Mines* (1), before the twelve Judges in the reign of Queen Elizabeth, in the year 1568, it was decided authoritatively by all the Judges and Barons that by the law all mines of gold and silver within

the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore; and, further on, it was agreed unanimously by nine out of the twelve Judges that if the gold or silver in the base metal in the land of a subject be of less value than the base metal is, as well the base metal as the gold or silver in it belong by prerogative to the Crown, with liberty to dig for it, and to put it upon the land of the subject, and to carry it away from thence; and in such case it shall be called a mine royal, for the records do not make any distinction herein, but they are general, and prove that all ores or mines of copper and other base metal containing or bearing gold or silver belong to the king. And it was accordingly held in that case that a large quantity of copper ore from a copper mine belonged to the Crown, because it contained some gold and silver, and that the mine was a royal mine. Three of the Judges seem to have taken the view that this might have been otherwise, and that the mine would not have been royal if it had been proved that the value of the copper had exceeded the value of the gold and silver contained in it; but this was opposed to the view of the other nine Judges, and has never been adopted, and, having regard to the facts which I have stated, has no bearing on the present case. Subsequent to that decision, divers questions arose as to the proportion which the gold or silver should bear to the baser metal containing it in order to make the mine a royal mine; and in the year 1641 an opinion was signed by fifteen eminent counsel to the effect that if the value of the gold or silver when extracted from the baser metal was more than the charge of refining it, or was worth more than the base metal spent in refining it, the mine was royal, and the baser metal, as well as the gold and silver therein, belonged to the Crown; otherwise not; and this view seems to have been extensively acted on. As, however, trade and commerce increased and the products of mines were in greater demand, the metallic ores were more extensively sought for than before. At

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the same time, the greater skill and research expended in the treatment of such ores when got disclosed the fact that gold and silver could be extracted with profit from ores in which they were previously not known to exist; and as this might, and often did, give rise to a claim to the whole mine as a royal mine, the search for valuable mines of the baser metals and the working of them when ascertained to exist was seriously impeded and discouraged. The desire to mitigate this evil led to the passing of two Acts in the reign of William and Mary, upon which the only part of the defendant's case which has any substance is founded.

The first of these Acts, the 1 Will. & Mary, c. 30, passed in the year 1688, recited an Act of Henry 4, by which what was called the craft of multiplying silver and gold was made a felony; and it then, in section 1, recited as follows: "And whereas since the making of the said statute divers persons have by their study, industry, and learning arrived to great skill and perfection in the art of melting and refining of metals, and otherwise improving them and their ores (which very much abound within this realm), and extracting gold and silver out of the same; but dare not exercise their said skill within this realm for fear of falling under the penalty of the said statute, but exercise the said art in foreign parts to the great loss and detriment of this realm." And the Act then proceeded, by the 2nd section, to repeal the aforesaid sentence in the Act of Henry 4. The 3rd section then provided "that all the gold and silver that shall be extracted by the aforesaid art of melting and refining of metals and otherwise improving of them and their ores as before set forth, be from henceforth employed for no other use or uses whatsoever, but for the increase of moneys, and that the place hereby appointed for the disposal thereof shall be their Majesties' Mint within the Tower of London; at which place they are to receive the full and true value for their gold and silver so extracted from time to time according to the assay and business thereof; and so for any greater or lesser weight, and that none of that metal of gold and silver so refined and extracted be permitted to be

used or disposed of in any other place or places within their Majesties' kingdoms and dominions." This section was repealed in the year 1867; but it may still be looked at, in my opinion, so far as it throws any light on the construction of the Act of which it was an important part. The defendant contends that the provision that the person giving up the gold and silver to the Mint is to receive the full and true value thereof is inconsistent with the right of the Crown to any part of it as a royalty; but it is nothing of the kind. The fact that the man who has to take gold and silver to the Mint and leave it there is to receive the full and true value of what he so leaves has nothing to do with his title to it, or the terms upon or the obligations under which he acquired it. If, but for this section, such person would have had to pay a royalty, the section no more relieves him from paying it than it would confer a good title to the gold on a thief who had stolen it. The 4th section of that Act, which is still unrepealed, runs as follows: "Provided also, and be it further enacted by the authority aforesaid, that no mine of copper, tin, iron, or lead shall hereafter be adjudged, reputed, or taken to be a royal mine, although gold or silver may be extracted out of the same." It is difficult to ascertain from the language used what was the exact aim or object of the framers of that section. It required explanation, which it received five years later; but it clearly does not, as it stands, assist the defendant in the present case, for no one contends that the Gwynfynydd mine can be described fairly as a mine of copper, tin, iron, or lead. In the year 1693 another Act, the 5th Will. & Mary, c. 6, was passed. It is intitled "an Act to prevent disputes and controversies concerning royal mines." It recites the 4th section of the previous Act, which I have just read, and then proceeds as follows: "But, notwithstanding the good provision by the said statute to prevent the discouraging their Majesties' good subjects who have mines of copper, tin, iron, or lead in their soils, from digging and opening the same, many doubts and questions have arisen upon the statute whereby great suits and troubles have arisen to many owners and proprietors of

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such mines, wherefore for the better explanation of the said statute be it enacted," and then, to read this somewhat shortly, "that all and every person or persons being subjects of the Crown of England, bodies politic or corporate that now are or hereafter shall be the owner or owners, proprietor or proprietors, of any mine or mines within the kingdom of England or dominion of Wales . . . wherein any ore now is or hereafter shall be discovered, opened, found, or wrought, and in which there is copper, tin, iron, or lead, shall and may hold and enjoy the same mine or mines and ore, and continue in the possession thereof, and dig and work the said mine or mines or ore, notwithstanding that such mine or mines or ore shall be pretended or claimed to be a royal mine or royal mines, any law, usage, or custom to the contrary notwithstanding." Then came section 3, which provided "that their Majesties, their heirs and successors, and all claiming any royal mines under them, shall and may have the ore of any such mine or mines in any part of the said kingdom of England, dominion of Wales, or town of Berwick-on-Tweed (other than tin ore in the counties of Devon and Cornwall), paying to the proprietors or owners of the said mine or mines wherein such ore is or shall be found within thirty days after the said ore is or shall be raised and laid upon the banks of the said mine or mines, and before the same be removed from thence, the rates following—that is to say, for all ore washt and made clean and merchantable wherein is copper, the rate of 16*l.* per ton; and for all ore washt, made clean, and merchantable wherein there is tin, the rate of 40*s.* per ton; and for all ore washt, made clean, and merchantable wherein there is iron, the rate of 40*s.* per ton; and for all ore washt, made clean, and merchantable where there is lead, the rate of 9*l.* per ton." By a subsequent Act of 55 Geo. 3, the rate for lead was altered to 25*l.* per ton; the other rates still remain as originally fixed. The defendant suggests that the rates here named were the market prices of the time for ores of lead, copper, iron, and tin. This can hardly be quite correct, as not only would market prices vary from day

to day, but different ores of the same metal would vary in value; but probably they were prices fixed at such sums as it was considered would secure the subject, under all probable circumstances, the full value of the copper, tin, iron, or lead, in the ore the Crown elected to take from him under the statute. The principal argument of the defendant was based upon the 2nd section of the Act. He contends that it differs altogether in language from the 4th section of the prior Act, which dealt with mines of copper, tin, iron, and lead; whereas the latter Act speaks of the proprietor of any mine wherein any ore is found in which there is copper, tin, iron, or lead, and authorises him to work such mine or ore. And then the defendant says he and his company are proprietors of a mine—namely, the Gwynfynydd mine—in which ore, namely, auriferous quartz or gold ore, is found, in which there is copper, iron, and lead, and he claims the right to work it under the statute. In my opinion, after a careful consideration of the letter and spirit of that statute, this is not its true construction. The earlier Act merely deals with mines of copper, tin, iron, or lead, and does not refer to any gold or silver mine, or to any mine or ore of any base metal other than tin, copper, iron, and lead. It does not, for instance, refer to any mine or ore of zinc, though blende is very often found to be highly auriferous, and actually is found in the Gwynfynydd mine itself in that condition. In fact, the report to which I have already particularly referred speaks of the peculiarly kindly influence which the presence of blende has, and the gold-bearing character of the stone, and says that some of this blende is extraordinarily rich in gold, which, in some cases, was as much as one-third of the total weight. So far, therefore, as zinc is concerned, the law was not altered by the earlier statute. The preamble of the second Act states that the object of the first Act was to prevent discouraging subjects who had copper, tin, iron, or lead in their soils from working the same, and that doubts and questions had arisen upon the statute whereby suits and troubles had arisen to the owners and proprietors of such mines, and it recites in the title that the Act was intended to

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prevent such disputes and controversies. We have it, therefore, that the owners and proprietors of such mines were the persons prejudiced by the existing state of things for which the Act proposed to find a remedy. The next thing to be noticed is that the Act is expressly stated to be for the better explanation of the former statute, that is, of the recited section of it, namely, the 4th. It does not purport to be an addition to or explanation of it, so as to apply it to persons and things not affected by the former statute; but is merely an explanation of it, though, no doubt, it supplies new details as to the mode in which its object was to be accomplished. The 2nd section then provides that the persons thereby authorised to work a mine or mines of ore may do so "notwithstanding that such mine or mines or ore shall be pretended or claimed to be a royal mine or royal mines." The allegation that the mine or ore is royal is not to prevent the working, whether such allegation be well founded or not. If on subsequent working it turns out that the mine or ore does not contain gold or silver, then the Crown's claim has no foundation, and the subject's right to work it is clear. In that case no protection is required, and the Act does not confer any. The Act only applies to cases where gold or silver does exist in the mine or ore worked; and, in such cases, protection is conferred on persons working under that section. The title to the Act bears out this view, as it refers to "disputes or controversies concerning royal mines," not concerning mines found not to be royal. The words of the Act are: The owner or proprietor "of any mine wherein any ore shall be discovered, opened, found or wrought, and in which there is copper, tin, iron, or lead." No ore not containing one of those four metals is within this Act at all, whether such ore be gold or silver, or of zinc or other base metal. Suppose, however, that with the gold ore or zinc ore some copper, iron, or lead is found, but merely in such trivial quantities as not to be worth working, are these Acts intended to apply to such a case? The existence of those metals under such circumstances would not make the mine a copper, iron, or lead mine, or bring its proprietor

among the class of persons intended to be benefited by the Acts. The mine would be called a gold or zinc mine and nothing else. The case I have to put as to zinc is not an imaginary one, for a reference to Dana and other standard works on Mineralogy shews that blende almost always contains iron, and is generally associated with lead or copper, or both; and if such a case is within the Acts, how is the protection given to the Crown to be worked out? In the hypothetical case I am putting the ore is zinc ore, containing gold and also small quantities of copper, or iron and lead, or two or one of them; assuming the gold to be worth extracting, the Crown may elect to take the ore under the 3rd section, paying 16*l.* a ton for it if it contains copper, or 2*l.* a ton if it contains iron, or 25*l.* a ton if it contains lead. Is the Crown to take and pay for the blende in question, without regard to what its own value may be, at 2*l.* a ton if it contains a small quantity of iron; but to pay 16*l.* a ton for the blende if it has a small admixture of copper; or 25*l.* a ton for the blende if it contains a little lead? Such a result is what would follow if the construction of the statute contended for by the defendant is a true one; but such a result is absurd, and a statute is not to be so construed as to lead to an absurdity if any other reasonable construction can be placed upon it. To revert to the actual words used, what is meant by an ore "in which there is copper, iron, tin, or lead"? The defendant says it means gold ore or zinc ore, for instance, associated with some other ore of copper, iron, tin, or lead; but those are not the words in the statute, which does not refer to copper, iron, lead, and tin as ores, but as metals. Where ore is intended, that word is used; where it is not intended, that word is omitted. What is the meaning of the word "ore"? Its primary meaning, according to Johnson's and Richardson's Dictionaries, is "Unrefined or unreduced metal"—that is, metal in combination with something else. According to Webster's and the Imperial Dictionaries "ore" is the compound of a metal with some other substance, as oxygen, sulphur, carbon, &c., by which its properties are disguised or lost; and they distin-

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guish such ores from metals uncombined with other substances which are called native metals. It is in this sense that the word "ore" is used in the 2nd section of the Act as a combined substance, of which metal forms a part; and it is not ore of any kind, but ore into the combination of which one or more of the metals copper, tin, iron, or lead enters—in other words, the ore must be one which can properly be called copper ore, iron ore, tin ore, or lead ore, which would not be the case if the contents of the mine or lode were substantially something else; even though such ores as I have mentioned were found therein in inconsiderable quantities. The direction that the proprietors of a mine in which such ore is found may hold and enjoy, and continue in possession of, and dig and work the same mines or ore, has no meaning whatever in connection with ore found merely in such a small quantity as to be without value, which no proprietor in his senses would attempt to dig or work; nor has the subsequent provision giving the Crown the option of taking the ore when washed, cleaned, and made merchantable in such a case any meaning. To sum up, both Acts of Will. & Mary are for the benefit of the owners or proprietors of tin, lead, iron, or copper mines, and no others; and the object and end of those Acts is to secure to the subject the copper, iron, tin, and lead ores found in his soil, or the full value thereof as fixed by the statute, and at the same time to secure to the Crown all the gold and silver (if it chooses to take it), paying the value of the copper, iron, tin, and lead ores which accompany it.

The defendant seeks to use those Acts, not for the purpose of getting his copper, iron, or lead ore or its value; for he has none of any value, but for the purpose of appropriating to himself and his company, without payment, the gold and silver in their land which belongs to the Crown. The Gwynfynydd mine is not a copper, lead, iron, or tin mine; and no one has ever so described it; and its owners therefore are not protected by the Acts. Even if I had taken the view that the defendant was within the protection of those Acts, and that the Gwynfynydd mine was a lead, copper, or iron mine, I must still

have held that he was quite in the wrong in the course which he has taken. The 3rd section of the second Act enacts that the owners of the royal mines "may have the ore of any such mine or mines in any part of the said kingdom of England; dominion of Wales, or town of Berwick-upon-Tweed (other than tin ore in the counties of Devon and Cornwall), paying to the proprietors or owners of the said mine or mines wherein such ore is or shall be found, within thirty days after the said ore is or shall be raised and laid upon the banks," the rates which I have already mentioned for each ton of the ore washed, made clean, and merchantable. And then it provides that "in default of payment of such respective sums as aforesaid, it shall and may be lawful for the owners and proprietors of the said mine or mines wherein such ore is, are, or shall be found, to sell and dispose of the said ore to his and their own uses." Has the Crown ever had the option thus given, and has it made default in exercising it? Most certainly not. The defendant alleges that he has offered to sell to the Crown all the ore he has raised at the statutory price. But it appears to me absurd to treat quartz rock in the rough, just as blasted in the mine, as "ore washt, made clean, and merchantable." It is not even merchantable as it stands. The defendant says that this quartz rock is gold ore, and that, as it lies at the mouth of the adit, it is merchantable and marketable; which I understand to mean that it is in a condition to be sold, and would command some price in the market. But this is wholly inconsistent with his own evidence, in which he took pains to point out that but for the existence upon the mine itself of mills, to which the quartz rock is easily brought by gravitation, and of enormous water power to work the mills, light the mines, and so on, the gold could not be got except at a very great loss. The rock cannot be merchantable. It cannot fetch anything in the market if it is valueless to every one except the proprietor of the farm upon which it is found. Moreover, the ore has not been washed or made clean at all. The processes by which lead and copper ores are separated from the rock in which they are found, and washed,

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cleaned, and made merchantable, are familiar to most persons; whereas the quartz rock here, which the defendant calls gold ore, has not been subjected to any process at all. The defendant says that he was never under any obligation to wash or clean the ore; I am not so sure of that. My own view is that if a man claims under these Acts to work and get ore which he could not touch but for the Acts, he is bound to do all that is necessary to enable the Crown to exercise the option secured to it by the same Acts of taking the ore at the statutory price—namely, so much per ton of ore washed and made clean and merchantable. But, be that as it may, the Act is quite clear that the owner or proprietor cannot remove, sell, or dispose of the ore until after the Crown has made default in payment, and there can be no default in payment until the price has been ascertained, which cannot be done until the ore has been washed, made clean, and merchantable. Therefore, if the owner chooses not to wash the ore or make it clean and merchantable, the result is that it must remain on the land and cannot be removed by him from thence. The defendant persisted deliberately in removing and selling the product of the mines without any licence, and in spite of the repeated protests and remonstrances of the Crown, and maintained his right to do so. In this he was wholly wrong; and this, in itself, would entitle the Crown to the relief which it asks.

[His Lordship, after dealing shortly with the workings on the lands known as Cwmhesian and Dolfrwnog still in the defendant's own hands, continued:] There were two or three matters upon which the defendant laid great stress on which I ought perhaps to say a few words. He contended that if the Crown's claim has any foundation, it is at any rate put forward prematurely, as the mine is a poor mine, and does not yet pay its expenses. If the fact were so, it would not constitute any legal defence, for the defendant could not justify his appropriation of the gold which is not his by merely shewing that the operation did not turn out a profitable one to him. But this argument is not founded on fact. All that the defendant alleges is that the returns have not

yet sufficed to pay the full amount of the large recent expenditure on mills, machinery, &c. This may be true; but it is not inconsistent with the mine being a paying and valuable one. In fact, after the expenditure of 4,000*l.* to 5,000*l.* had been made, the defendant sold the mine for 190,000*l.* The defendant also contended that the existence in the present case of any right in the Crown to royal mines as part of the royal prerogative was against the interest of the public, inasmuch as the Crown could not work the mines, and its adoption of this dog-in-the-manger policy of preventing others from working what it could not work itself had the effect of preventing the development of labour and paralysing a valuable industry among the poor inhabitants of this district, because the exaction of the Crown's and landowner's royalties rendered the workings unprofitable. This is not a legal argument at all, and I believe that the defendant put it forward, not in the hope that it would prevail with me, but for other purposes of his own. If the Crown has the legal right it claims, I must give effect to it, whatever the result, and any remedy for the grievance alleged to arise thereupon must be sought elsewhere. But the contention is based upon an almost ludicrous suppression of the real facts of this case. What are the real facts? The Morgan Gold Mining Company, of which the defendant is the principal member and moving spirit, is not a body existing for charitable or philanthropic purposes, or even for the object of providing work for the poor inhabitants of the principality. But it is a commercial body, formed to carry on the work of mining on commercial principles with the view to the profit of its members, and nothing else. Unless this really could be obtained, the mines would not be worked at all. If all profit and anticipation of profit were at an end, the company would at once be wound up. If the Crown royalty were discontinued, the receipts of the shareholders would be proportionately increased. What, again, is the position of the Crown? In speaking of the right of royal mines, one speaks for convenience of the claim of the Crown, to which all such rights ori-

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ginally belonged; but when such remarks as above mentioned are made, more accuracy and precision of language are necessary. From the time of the Revolution, the hereditary possessions of the Crown, including mines royal, have been given up to the nation in exchange for the appropriation to the use of each reigning monarch of what is known as the Civil List. These possessions are administered by the Commissioners of Woods, Forests, and Land Revenues on behalf of the public, and the income and royalties derived therefrom are not received by her Majesty at all, but form part of the revenue of the country, and are applied for national purposes in relief, so far as they go, of general taxation. It is, however, wholly untrue to say that the commissioners who administer the Crown estates prevent the owner of lands from mining for gold therein, although they are undoubtedly entitled as a matter of law to do so, if for any reason such a course should be deemed desirable. So far is this, however, from being the case, that they are always willing to grant a licence to work such mine on payment of a moderate royalty, generally fixed at one thirtieth of the gold produced; and in this very case they expressed their willingness to grant to the defendant a licence to work the mines in question, and to retain for himself twenty-nine thirtieths of the gold, on what appeared to be, *prima facie*, the extremely liberal terms of accounting to the Woods and Forests for the remaining one thirtieth only. This he has deliberately refused to do, and has claimed, and still claims, the entire produce. In other words, the whole contest has arisen from the persistent endeavour of the defendant to prevent the application of part of the public revenue of the country to its legitimate purpose, and to divert it into the pockets of himself and his fellow-shareholders; and he says it is against public policy that this attempt should be opposed. The Attorney-General has in this action been wholly right from the beginning, and would be entitled now, if he desired it, to an injunction as asked against the defendant. He has not thought it worth while to do so, as the defendant has, since the action was commenced, sold

the Gwynfynydd Mine to a company, who have received the Crown licence to work, and are duly paying the royalty thereunder. But the defendant has persevered in his unfounded assertion of right, and has required that the action should be brought to trial in order to decide who shall pay the costs of it. And as I hold that he has been wrong throughout, I must adjudge that he do pay the plaintiff's costs of the action. It was said that the Crown ought not to have costs against a subject. But I do not see why not, nor why the revenues of the country should bear the expenses of the successful resistance to an attempt by the defendant to misappropriate them.

Solicitors—T. W. Gorst, for plaintiff; E. F. B. Harston, for defendant.

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

CHITTY, J.

1890.

July 23.

LORD ESHER, M.R.

LINDLEY, L.J.

BOWEN, L.J.

August 5, 6, 7.

In re THE EARL OF RADNOR'S TRUSTS.

Settled Land—Heirlooms—Sale—Exercise of Discretion of Tenant for Life—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 37 and 53.

Section 37 of the Settled Land Act, 1882, gives a tenant for life a discretion to sell heirlooms, but in the exercise of that discretion, and when determining whether they ought to be sold or not, he is to act as trustee not for himself only, but for himself and all the persons entitled under the settlement, and must take into consideration all the circumstances of the particular case.

This was an application by the Earl of Radnor, under the Settled Land Act, 1882 (1), for an order of the Court

(1) 45 & 46 Vict. c. 38. s. 37: "(1) Where personal chattels are settled on trust so as to

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sanctioning a conditional contract for the sale of three pictures to the trustees of the National Gallery for the sum of 55,000*l*. The pictures in question, which consisted of a Holbein, a Velasquez, and a Moroni, formed part of a collection of pictures numbering 279 at Longford Castle, and had been annexed as heirlooms, under the will of the late Earl of Radnor, to what were called the Wiltshire estates, which comprised the Longford estate and also the Pucklechurch estate, Longford Castle being the capital mansion of the Longford estate. The application, which was made by the present earl, the tenant for life in possession, was agreed to by Viscount Folkestone, the eldest son, who was of age, and there was no tenant in tail in existence. The earl based his application on the ground that the sale was necessary owing to incumbrances, the necessity of keeping up the estates, and having to make provision in the event of the marriage of his eldest son. The sale was opposed by Lord Penzance, the sole surviving trustee under the late earl's will, and also by the earl's brother—the Hon. Duncombe Pleydell Bouverie—and other members of the family.

Chitty, J., having heard the application in the first instance in chambers, sanctioned the sale, and, being satisfied with the arguments, granted a certificate, on the application of the trustee, to enable the case to be taken to the Court of Appeal, and on the 23rd of July delivered the following judgment in open Court:—

CHITTY, J.—This application was heard in chambers. Had it been intimated to me that any of the parties intended to

devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them. . . . (3) A sale or purchase of chattels under this section shall not be made without an order of the Court."

Section 53: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

appeal, I should, in accordance with the usual practice, have at once adjourned the matter to be heard in open Court. Since my decision in chambers, the sole trustee of the settlement has asked for a certificate to enable him to take the case to the Court of Appeal, without being put to the necessity of moving before me in Court to discharge the order. To save expense, and to expedite the appeal, I have granted a certificate, being satisfied with the argument in chambers. I gave my reasons for the decision at the conclusion of the argument. For the purpose of their being properly presented to the Court of Appeal, I now proceed to state them in open Court.

In accordance with the practice, the trustee alone was served with the summons in the first instance; but, at the request of Mr. Duncombe Pleydell Bouverie, a subsequent tenant for life, and with a view to relieve the trustee from the sole burden of arguing the case, I directed that Mr. Duncombe Pleydell Bouverie also should be served. The application is made by the Earl of Radnor, the tenant for life in possession, asking the Court to sanction a conditional contract for sale of certain heirlooms. Under section 37 of the Act the tenant for life in possession has the power to sell settled heirlooms, but that power cannot be exercised without an order of the Court. The section itself gives no indication of the grounds upon which the Court has to proceed in making, or refusing to make, the order. It is obvious that it is a discretionary jurisdiction, and, being conferred upon a Court of justice, it follows that it is to be exercised on judicial principles. But, as I have said in a former case (2), although the section itself contains no guide to the Court as to the grounds upon which it should proceed, section 53 does afford some assistance. That section treats a tenant for life as a trustee, and enacts that in exercising any power under the Act he shall have regard to the interests of all parties entitled under the settlement. The phrase has been borrowed from preceding Acts of Parliament—see section 20 of the Settled

(2) See *The Duke of Marlborough v. Sartoris*, 56 Law J. Rep. Chanc. 70; Law Rep. 32 Ch. D. 616.

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Estates Act, 1877. The tenant for life, therefore, has a discretionary power of sale over the settled chattels, in the exercise of which he is to be treated as a trustee, who is to have regard to the interests of all persons under the settlement. In the exercise of a discretionary power by a trustee, the Court in its ordinary jurisdiction will see that the power is not exercised improperly or unreasonably—see *Tempest v. Camoys* (3). The settled estate is an estate settled by the will of the late earl, who was owner in fee-simple. It consists of the lands to which these chattels are annexed as heirlooms. Those lands are, first, the Longford estate and the Pucklechurch estate, together called the Wiltshire estates, Longford Castle being the capital mansion on the Longford estate; and secondly, the Folkestone estate and some real property in London. The total net income of these properties apart from incumbrances may be taken in round numbers as being from 20,000*l.* to 21,000*l.* a year. The present earl has other property, to which I will presently refer; but I stay here to observe that estates settled by the will of the late earl are the principal, if not the whole, subject of consideration, and that it is the interests of the persons entitled under the limitations of that will to which regard must be had. The limitations may be stated shortly as a strict settlement in the male line, so that the estates devolve with the earldom. The present earl is the tenant for life in possession, with remainder to his eldest son, Viscount Folkestone, for life. The viscount is now about twenty-two years of age, and is unmarried. Subject to these two life estates the remainders are as follows: namely, remainder to the first and other sons of the viscount in succession in tail male; remainder to Stuart, the second son of the present earl, an infant now twelve years of age, for life; remainder to his first and other sons in succession in tail male; remainder to the other sons of the present earl in succession in tail male (the earl is about forty-seven years of age, and has no other son at present); remainder to the earl's next

brother, the respondent Duncombe Pleydell Bouverie, for life, with remainder to his sons in succession in tail male; remainder similarly to the earl's brothers, John, Mark, and Kenelm, in succession for life, and their sons successively in tail male. There is no tenant in tail in existence, and the reversion in fee-simple is vested in the earl. These are the main limitations of the settlement. In front, however, of all these limitations there stands a long term of years, the trusts of which are to raise money in aid of the late earl's personal estate, for the purpose of paying his debts, funeral and testamentary expenses, and the legacies bequeathed by his will. Under the trusts of that term a sum of no less than 100,000*l.* has been raised by mortgage of the settled estates, and it may be necessary to raise more. The debts of the late earl, as was stated and admitted in chambers, amounted to about 80,000*l.* The trusts of the settled heirlooms follow the limitations of the real estate, subject, however, to the usual and necessary restriction, by virtue of which the chattels vest absolutely in a tenant in tail by purchase. Consequently the chattels, subject to the prior life estates of the earl and the viscount, will vest absolutely in the first son of the viscount who attains twenty-one, and, failing such son, they will vest absolutely in the first son of the brother Stuart who attains that age, subject to the prior life estates. I have heard from the trustee's counsel an elaborate argument founded on the testator's intention; I heard a distinction drawn between what was called the primary intention and the secondary intention, or the general intention and the particular intention of the testator. It appears to me that considerations of that kind have but little weight, because, unquestionably, if the intention of the testator is to be looked at, a tenant for life cannot sell at all. But it is the Act of Parliament which, upon grounds that appeared to be sufficient to the Legislature, has enacted, in contravention of the testator's intention, that the tenant for life may sell the settled property. It has empowered him to sell the fee-simple of the land of his own free will, without the consent of the trustees or any order of the Court—see section 3; to sell

(3) 51 Law J. Rep. Chanc. 785; Law Rep. 21 Ch. D. 571.

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the principal mansion-house, either with the consent of the trustees or an order of the Court—see section 15; and to sell the heirlooms, if he obtains an order of the Court—see section 37. These are permanent powers, wholly independent of, and overriding, the settlor's intention. They cannot be taken away from the tenant for life by the settlor; any attempt on the part of the settlor to prohibit or restrict the exercise of these statutory powers is void—see section 51. Nor can the tenant for life contract himself out of the powers—see section 50. So great is the confidence reposed by the Legislature in the tenant for life, that it has entrusted to him the right of selecting out of the various statutory purposes to which capital money may be applied, the particular purpose to which it shall be applied—see section 22. It leaves it to him to submit to trustees or the Court a scheme of improvements which, though considered beneficial to the estate, are of less permanent character than the improvements which were held by the old Court of Chancery to be “lasting improvements.” In regard to the trustees, they are free from responsibility for giving their consent to the sale of the mansion or to a scheme of improvements, or any other consent under the Act—see section 42. I mention these provisions for the purpose of shewing the extent to which the tenant for life has powers overreaching the settlement and the intention of the settlor. Without going so far as to say that his intention must be wholly laid aside, I do not see how it would be right to do more than to take it into consideration as one of the general circumstances of the case. I desire to repeat here, what I have said before, that this controlling power of the Court is a discretionary power, and that it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself, I say emphatically that this discretion ought not to be crystallised, as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the Legislature has committed to them. This discretion,

like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each particular case. Now, having made these general observations, I proceed to enquire which members of the family object to the present application. Lord Radnor, the tenant for life, asks that the order may be made; his eldest son, the next in succession, supports him. Though I think it right, as I have stated, that due regard should be had to the interests of all entitled under the settlement, yet I think that it is right to give more weight—I cannot say exactly what weight—to the interests of those who stand first or second, than to those who come later. All I can say is, I think the earlier interests ought to be considered first, seeing that they stand first in the order of succession. This view is founded on the Act which has placed such large powers in the hands of the tenant for life in possession. It appears to treat him as the head of the family, as, in fact, he generally is, and it has placed in his hands a large portion of the dominion over the settled property, the principal restriction being that he cannot put capital money into his own pocket. In order that those members of the family who objected to the sale might have the opportunity of being heard, I directed (as already stated) that Mr. Duncombe Pleydell Bouverie should be served. He has appeared by counsel, and opposed the application. It was not necessary, nor was it expedient, that any one else should be served. But Mr. Latham, who appeared for Mr. Duncombe Pleydell Bouverie, told me that he was really opposing in accordance with the wishes of the other members of the family, the other sons of the late earl, and even of the daughters, who have no interest. Amongst those whose names he mentioned as desiring to oppose was Mr. Kenelm Pleydell Bouverie. Strange to say, he is a party to the provisional contract, and has thereby agreed to contribute more than half of the purchase-money. By entering into the contract he has consented to the sale, and apparently he has since changed his mind. But his consent or dissent is really not material. His

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consent is not required by the Settled Land Act. That Act was an entirely new departure, differing in principle from the Settled Estates Act, which required, in substance, that every person interested, down to and including the first tenant in tail, should either concur in the application or be before the Court—see sections 24 to 27 of the Settled Estates Act, 1877. Now, on the question of the propriety of the proposed sale, I do not propose to examine in detail the accounts which have been presented on behalf of the earl; I have the figures sufficiently before me. Critical observations on the amount of the net income and the expenditure have been made by the counsel for the trustees. Questions of this kind must be looked upon broadly. I will take one item on the expenditure side which was commented upon adversely. 13,000*l.* a year is put down as the expenses of keeping up Longford Castle. The earl gives that as the estimate of the proper expenditure. There is no evidence to shew that it is an extravagant estimate. It appears to be a splendid place, and I see no ground for holding that it is an extravagant sum for such a place. The question is not what sum would be deemed sufficient by a gentleman of small means, but what is fair and reasonable to enable the place to be kept up worthy of the estate and dignity of an earl. I consider that I ought not to disregard the ordinary customs or social life in matters of this kind. The earl tells me very candidly that 13,000*l.* is required. This takes at once a very large sum out of the income of the settled estate. I am only mentioning some of the matters; I am not going through the whole of the facts that were discussed at great length. Then the earl makes voluntary and other allowances to a considerable yearly amount. He makes an allowance of some hundreds a year to his eldest son. It is not necessary to state the exact sum. But here I come upon a point which appears to me to be one of considerable importance. The eldest son is unmarried, and the earl says, in substance, that the present allowance is the maximum that he can afford to make to his eldest son. I have no right to dictate to the earl what allowance he should

make; it is beyond my province to say whether it is reasonable or not. But the earl points out that his eldest son has come to an age when he may reasonably entertain prospects of matrimony—and it must be remembered that in a family of this kind, with a title, or in any family of high position, the eldest son, who in the ordinary course of events will succeed to the title, is not expected to wait until his father's death before he marries. The substance of the case on his part is that the son's prospects of marriage will be considerably impaired unless this sum of 55,000*l.*, the price proposed to be given for the pictures, can be acquired for the estate, and a larger income obtained by paying off a portion of the 100,000*l.* mortgage. Much has been said in argument by those who oppose the sale about the interests of the unborn tenant in tail. I am unable to see how it is to his interest to remain unborn. But, speaking seriously, I think that the earl may reasonably and legitimately consider it a matter of importance that his eldest son should be able to take his position in society whilst he is a young man, and I can readily understand that from a family point of view it would be better that he should marry soon. A point strongly pressed against the application was the allegation that the earl has been driven to have recourse to a sale of the heirlooms by his own incumbrances. Now, as a general rule, I think that the circumstance that the tenant for life has incumbered his life estate under the settlement ought to be excluded from consideration by the Court on a question of granting or refusing an order sanctioning the sale of heirlooms. I so held in the cases of *The Duke of Marlborough v. Marjoribanks* (4) and *In re Beaumont's Settled Estates* (5). But any such general rule has no such application to the present case. The incumbrances created by the earl are on his life estate, under an entirely different settlement. I cannot see how the fact that the tenant for life, apart from the settlement in question, is richer or poorer is material. I do not understand

(4) 55 Law J. Rep. Chanc. 339; Law Rep 32 Ch. D. 1.

(5) 58 Law Times Rep. N.S. 916.

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that the Act of Parliament puts the Court upon enquiry into the past life of the tenant for life, or requires the Court to investigate his previous career to ascertain whether in matters not relating to the settlement he has been prudent or imprudent. The earl explains how he came to incur his life estate in the property comprised in his marriage settlement. I am not concerned to consider his explanation—it is a matter foreign to the settlement under his father's will; but I can well understand him, with his past experience, seeing and appreciating keenly the evil of allowing his eldest son—the expectant heir, be it remembered, to an earldom—to be in society without what he considers a sufficient income. That is a family matter unquestionably, but it is a family matter upon which I think the head of the family—I am not in any sense usurping his position—may rightly entertain a strong opinion. The case, therefore, thus far stands thus: The head of the family and his eldest son, who comes next in the succession, consider that the sale ought to be made. I find no reason for thinking that this is not an honest and a *bona fide* application made to the Court in the interests of the family. I place the interest, at any rate, of these two members of the family higher than those of the other members whose chance of succession is remote. I am not going to enter minutely upon the question of the value of the settled land, or to compare it with the value of the settled heirlooms, except in a general way. The materials before me do not enable me to do more than give an approximate opinion. I do, however, know enough to see that the chattels bear a very large proportion in value to the settled lands. The proposal is not to sell all the chattels. The collection of pictures annexed to the estate includes altogether 279 pictures. Some may be away from Longford Castle, but the greater part of them are there, and it is to Longford Castle that they are annexed as heirlooms. Three pictures out of 279 are to be sold. I quite agree that this is not an exhaustive mode of considering the question, because the three pictures may be the gems of the collection, and the taking away of them may injure the rest

of the collection—that is to say, people would care less to go and see the collection, part of the attraction might be gone. But any diminution in the interest of visitors to the Castle is not a matter with which I am concerned. Unquestionably these three pictures are three of the best. I take the trustee's statement in his affidavit that he has been "informed"—that is what he says—that they are the three finest and most valuable pictures in what he describes—apparently with perfect accuracy—as "the extensive and well-known collection in Longford Castle." Now in a case of this kind it would be absurd to go to the extent of having the whole collection valued. The cost of a valuation would be altogether disproportionate to the assistance which would be offered to the Court by a valuation. These pictures represent only a fraction—what fraction I cannot say—in value of the whole collection. I cannot take as final the suggestion I find in the affidavit of the solicitors, to the effect that the value of the three pictures is about one-ninth of the whole collection; but there is nothing against it. Although I would not accept that as a fact upon which to found my judgment, I am unable to say that it is an unfair statement. At any rate, alter the fraction, and say an eighth, a seventh, a sixth, or even a larger fraction—it is clear that is not a large proportion in value of the whole. The catalogue has been produced, and no question has been raised as to its accuracy—it was accepted as correct. It appears that there will remain in the collection many pictures that bear the names of great painters. Something by way of suggestion, but without evidence, was said as to the genuineness of the pictures. Probably some such suggestions, with more or less foundation, may be made on any gallery of paintings. Setting aside the mere suggestions of counsel, it appears that there will be left in the collection twelve Holbeins, one Velasquez, three Titians, four Sir Joshuas, one Murillo, two Rembrandts, one Raphael, two Gainsboroughs, six Rubenses, two Claude Lorraines, two Guidos, nine Vandycks, four Albert Dürers, and one Michael Angelo. So the matter stands upon the catalogue. I cannot accede to the argument that the

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taking away of these three pictures will spoil or ruin the collection. There are some further facts, not to my mind of leading importance, which may be referred to in considering the position of these family estates. It is quite true, as was said, that in a few years—that is, four years from the death of the late earl—the succession duty charged will have run off; but it must be borne in mind that in place of the succession duty, and at no distant time to come, other charges may become chargeable upon the estate—for instance, a sum of no less than 5,000*l.* a year by way of jointure, and sums amounting to 40,000*l.* by way of portions to younger children. Further, although I do not treat the testator's intention as a matter of primary importance, it is noticeable that by his will the testator included other real estate, producing several thousand pounds a year—Mr. Latham mentioned the amount—in his devise to which the heirlooms are annexed. But subsequently, by codicil, he gave the real estate to a younger son. In this way, and by the charge of the 100,000*l.*, the income of the estates settled to accompany the earldom has been very considerably reduced. Where a tenant for life, in proposing to sell heirlooms, is attempting to use his power maliciously or to spite his successor—such cases, I am sorry to say, have occurred—or where he is acting wantonly or capriciously, the Court would undoubtedly decline to sanction the sale. Nothing of the kind has been, or could be, suggested in the present case. The earl, as the head of the family, with the consent of his eldest son, is willing to deprive himself of the enjoyment to be derived from these three pictures; he is desirous of turning them into money to relieve the estate partially of the heavy charge of 100,000*l.*; he has assigned the grounds upon which he proposes to act. I cannot find that they are unreasonable. The contract is to sell for 55,000*l.* As to the price, I have not heard a word against it. It seems to me that the estate is getting a good price, and a price which at some future period it might not be able to obtain. Price in the future is mere speculation. As the wealth of the world increases, the value of the works of the old masters go up; but it would fall if great

wars or other catastrophes happened to diminish the wealth of the world. My conclusion is that I consider the controlling discretionary power vested in the Court will be well exercised in the circumstances of this case by granting the order asked for.

During the argument I called attention to the fact that there was but one trustee, and to the provisions of section 39 of the Act as to his power of giving a receipt for the purchase-money. It appears that under the settlement a sole trustee has power to give receipts for "capital trust money of the settlement," and the provisions of the section therefore apply.

The surviving trustee and remaindermen appealed.

Latham, Q.C. (*Theobald* with him), for the remaindermen.—The learned Judge was wrong in the principles upon which he arrived at his decision, and in holding that neither the earl nor his son, taking into consideration the incumbrances, would be in a position to keep up their station in life. No doubt it is fair to consider whether the settled estate is solvent, and if it is, the pictures ought not to be sold. The Court should only sanction the sale of heirlooms under section 37 as a last resort, and not if the tenant for life has means of raising money in other ways.

Sir H. Davey, Q.C. (with him *S. Dickinson*), for the surviving trustee.—Upon the statement of the condition of the estate of the tenant for life, there is no necessity for the sale of the pictures in question—*In re Beaumont's Settled Estates* (5) and *The Duke of Marlborough v. Marjoribanks* (4). It cannot be said that the Court has only to see whether the price offered is adequate. Prior to the Act of 1882, neither the trustees nor the Court could sanction the sale of chattels settled in strict settlement—*D'Eyncourt v. Gregory* (6); and section 37 was intended to meet a case where, owing to a change in the circumstances of the tenant for life, it becomes necessary to sell the mansion-house, and the question then arises as to what is to be done with the heirlooms. A

(6) 45 Law J. Rep. Chanc. 205; Law Rep. 3 Ch. D. 635.

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case might arise where the circumstances altered the intention of the settlor, and it was not advisable to keep the heirlooms, and there a sale should be sanctioned; or again, where the tenant for life could not afford to live in the mansion but had very valuable pictures. The section was not intended to enable a person to increase his income, it was meant to meet the case where it was no longer expedient to keep the heirlooms, or the exceptional case of *The Duke of Marlborough v. Marjoribanks* (4), where a sale was sanctioned and the proceeds applied to the discharge of incumbrances.

Romer, Q.C., and *W. C. Druce*, for the tenant for life.—The earl here has entered into the contract for the sale of the pictures, intending it to be for the benefit of all parties. The Court must look at all the circumstances of the case, and if, having done so, it comes to the conclusion that the tenant for life has not acted unreasonably, then the sale should be sanctioned, even if it was clear that some person after the tenant for life would suffer some injury. The Court has to see whether the tenant for life has acted in accordance with the provisions of section 53, and, if so, the Court ought to sanction the sale. It is not a true proposition to say that a sale ought not to be allowed where it would be adverse to the interest of a single remainderman. Then with regard to the powers to be exercised by the tenant for life under section 53, the word "thereof" means "every power" which he, as trustee, has to exercise; and, as such trustee, it is his duty when exercising the power of sale to pay due attention to the interests of all and each of the parties entitled under the settlement; and if it is to the interest of all the parties except one that there should be a sale, then the Court ought to sanction it.

Sir H. Davey, Q.C., replied.

Cur. adv. vult.

LORD ESHER, M.R. (on August 7).—In this case, under the will of one of the Earls of Radnor, two estates were strictly entailed, and certain heirlooms, including pictures, furniture, and jewels, were devised to follow the estates. The present

Earl of Radnor, who is tenant for life of the estates, on a fair and honest consideration of the condition of the family as a whole, came to the conclusion that it was desirable in their interest to sell three of the most valuable of the pictures which were part of the heirlooms. He consulted with his eldest son, the present Lord Folkestone, who is the next tenant for life, and he agreed with his father that it was advisable in the interests of the family that the pictures should be sold. The right of the tenant for life to act in this way depends upon section 37 of the Settled Land Act, 1882. If it were not for that Act, the sale of these heirlooms could not be effected; but Parliament has considered that persons who come into landed estates, or heirlooms which are to go with landed estates, should be able to depart from the will of the testator. That was the obvious object of the Act; but the tenant for life must not do so capriciously, selfishly, or dishonestly, and the Act, therefore, put a fetter on his power to sell either the land, or even the family house, or the heirlooms. Section 37, sub-section 1, gives a tenant for life power to sell heirlooms; he is not bound to sell, but he has a discretion to do so, and, even if that stood alone, he ought to exercise that discretion honestly. A fetter, however, is put upon that by sub-section 3, for a sale or purchase of chattels under the section is not to be made without an order of the Court. The tenant for life is to take the first step, and to determine that the heirlooms ought to be sold, and then a sale under the section is not to be made without an order of the Court; and therefore, in order to make the sale effective, there must be the concurrence both of the tenant for life and also of the Court. Is there anything in the Act to shew how this discretion of the tenant for life and of the Court ought to be exercised? Section 53 shews that a tenant for life, in exercising any power under the Act, is to have regard to the interests of all parties entitled under the settlement; and, in relation to the exercise thereof by him, is to be deemed to be in the position and to have the duties and liabilities of a trustee for those parties. That provision includes the power given under section 37. The

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tenant for life also is to be deemed to be in the position of a trustee for those parties—that is to say, he is, for the purpose of exercising his discretion under section 37, put in the hypothetical position of trustee, not merely for himself, or for all or each of the others, but for himself and all the other parties. He is, therefore, in the first place bound to exercise his discretion as if he were an independent trustee for himself and all the members of his family—that is, he is to exercise his discretion as a fair, honest, and careful trustee would under the circumstances; and the Court ought, I think, to view the matter in the same light. It may be that the tenant for life, acting with perfect *bona fides*, with perfect honesty, and with all the care that he can bring to it, may resolve in the particular circumstances of a given case to do something which the Court may think he should not do. In that case the Court ought not, in my opinion, if it differs from the view taken by the tenant for life, then to allow the thing to be done. The Court is not a mere Court of appeal from him, but is to act, as I have said, with him—both he and the Court are to come to the same conclusion—and the Court is to this extent master of the situation, in that the sale cannot be made without its consent. The tenant for life has in the first place to exercise his discretion, in the way I have said, in the case and at the time and under the circumstances—I say that advisedly—in which he is placed. All the circumstances of the family, and of each member of the family who may be affected by what is about to be done, must be carefully considered in the way in which an honest outside trustee would consider them. Then he must consider what in his judgment would under the circumstances be—not the best, but the right thing to do. It is immaterial that some one else might have found out a better way of doing the thing; but if it is the right thing, then I think that the Court of first instance, when it comes to consider the matter, ought to consider it precisely in the same view. The Court cannot have the same knowledge of the family that the tenant for life, the head of the family, has—that is to say, in every respect. I should

therefore think that the Court, if it considered that the tenant for life had been acting honestly, would take careful note as to his discretion; and that if he, as the head of the family, and interested in the whole matter, has come to the conclusion that his discretion ought to be exercised in the sale, the Court would not lightly differ from him; but if it did differ on the question of fact as to the exercise of his discretion under the circumstances of the case, then the sale could not take effect, because the two concurring parties to its validity would not have agreed. It is obvious that the view to be taken by an outside honest trustee is one which must be taken, having regard to all the circumstances of each particular case; and it would be wrong to lay down any rule as to what the Court should or should not allow to be done in a particular case, because in another case the Court had thought that that particular thing should not be done. I agree with Mr. Justice Chitty that the discretion of the Court should not be fettered in any way whatever. It is obvious there must be matters which no trustee, acting honestly, could do properly, and therefore, whenever that difficulty arises, the decision must be the same in every case. Mr. Justice Chitty, in his judgment, said: "I desire to repeat here what I have said before, that this controlling power of the Court is a discretionary power, and that it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself, I say emphatically that this discretion ought not to be crystallised, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of that discretion which the Legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free so as to be fairly exercised according to the exigencies of each particular case." In my opinion, that is the right rule, and is the one which I have endeavoured to explain in other words. It is all the circumstances of the case which have to

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be considered. A fair and honest trustee would therefore consider whether it was right, under the circumstances of the particular case before him, that at that time, and under the circumstances of that case, the heirlooms, or the parts of them which are desired to be sold, ought to be sold at all. There may be cases in which they ought not to be sold; and I should think that a fair and honest trustee would lean against selling heirlooms, because *prima facie*, unless something in the circumstances justified it, an honest trustee would be inclined to keep the heirlooms where the settlor desired that they should be. The leaning, therefore, would be against a sale. But then that is not all. If the trustee—that is, the trustee for the tenant for life, as well as for all the other parties—has to consider whether he would sell, he must take into consideration the circumstances of the tenant for life. I think he would take them into consideration as the head of the family; and it is most material that the head of a great family, or of any family, should be in a position to do his duty to the whole family. It is therefore impossible to throw out of consideration the circumstances of the particular tenant for life. If he cannot keep up the family property—if he cannot live in the family house without some assistance from the sale of the heirlooms, or any part of them—that fact ought to be taken very much into consideration. Then the position of the next tenant for life—that is, the person who will become the next tenant for life—is also material, and it ought to be considered whether he will be able, as head of the family, to keep up the family property. Next after him, his children—even though unborn—are to be considered, and then will come the other persons who may become tenants for life under the settlement, although it cannot be said there is the necessity to deal with them in precisely the same manner as the others. It is not that each of the persons is to be considered separately, for although in one sense each of them is to be considered separately, yet the whole position of the family taken altogether is to be considered. Circumstances, therefore, may arise with regard to them all which will justify the exercise of the dis-

cretion, although if the case of one only of them were being considered it would not be justified. Thus, supposing that the tenant for life who is to exercise the discretion is a man of wealth *aliunde*, or outside the property which is settled under the settlement, and with regard to which he has a discretion, and by means of that wealth is in a position to keep up the family estates and the heirlooms all intact, that would be a very strong reason why a trustee in the exercise of his duty should lean against a sale, and say that the heirlooms should not be sold. But suppose, on the other hand, taking into consideration the wealth belonging to the existing owner of the life estate, that wealth which does not belong to those estates would necessarily depart from him when he died, so that his heir, his son, would not have it; and suppose also that, without that wealth, it would be obvious that the family estate could not be kept up in his hands; and suppose that an exceptional offer for some of the heirlooms, or all of them, was made to that tenant for life who has the means, and who, if he were regarded, would not be allowed to sell; and supposing he has an exceptional offer, which probably will not arise in the time of his successors if it is allowed to pass by—take, for instance, pictures, or furniture, or jewels, for which a more than usually good offer is made to the tenant for life—a trustee might fairly say that although he would not let these things be sold now if he considered the tenant for life only, yet that when he came to consider the heir, if he let this exceptional offer go by he would not be able to sell them for anything like the same sum, and when he comes in would not be able to keep up the family property so well as he would have been able to if they were sold now, that would, I think, be a circumstance which would justify an honest and careful trustee in exercising his discretion and allowing the things to be sold now. Then, take the case of the tenant for life himself, by reason of some circumstance or other, not being able during his life to keep up the family estate, and supposing that the circumstances of the property are such that he is not able to keep it up, and that his son will not be able to do so

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—if that be so, would not an honest trustee say that he must take into account the position of the present tenant for life, his age, and how long he will be tenant for life? Also that he is the head of the family, and what will become of the family supposing they are young and in want of the assistance which the head of a family can give, and that if he does not allow this sale, even though the property may recover in the hands of his successor, it would all be in abeyance during the whole of his life and his family, the very people who are to succeed him, one after the other, will not have the same advantages during the whole of his life which they would have if they are allowed to sell. I think circumstances such as those would be taken into consideration, and under those circumstances an honest trustee would say he would allow the sale so that the money might be in his hands for the time. That would not deprive the subsequent heirs really of anything of value; they would get the full value of the thing, and the money which is the produce of the sale would go to them just as the thing itself, and the trustee therefore might think, in the exercise of his discretion, and taking these circumstances into account, that he would direct the sale if the Court agreed with him. The Court, when the matter comes before it, will take all the circumstances of the particular case into account—such circumstances as I have enunciated by way of example, and which are not necessarily all the circumstances which might arise in each particular case; and the Court would take care that no absolute injustice was done to any one. But this matter would also be taken into account: that it might be less beneficial to one than to another. The Court would take all the circumstances of the family with due care into consideration, and would act as an honest and careful trustee would in agreeing to the discretion which has been first exercised by the tenant for life. If it agreed with him, it would allow the sale; if it disagreed with him, it would say, Although we do not say that you in your view were wrong—we have nothing to do with that—we do not agree with you, therefore there cannot be a sale.

That is, therefore, the position of the Court of first instance; but when the matter comes to the Court of Appeal a greater burden is imposed on those who object to the mode in which the discretion of the tenant for life and of the Court of first instance—the joint discretion of the two—has been exercised. In that case they must satisfy the Court of Appeal that the joint discretion of the tenant for life and of the Court has been wrongly exercised.

In the present case the tenant for life, admittedly desiring to act with perfect *bona fides*, has exercised his discretion, and thinks there ought to be a sale of three pictures out of a large number. Mr. Justice Chitty, with his usual care, having thought that under the circumstances of this family as it exists at this time, and considering the price to be paid, and also that the eldest son desired to be married, and ought, as heir of such a family and to such a title—for that must be taken into account—to have a very considerable allowance; and considering that the sale will obviously be for the advantage of the son, and that he agrees to it, and being unable to see that any injury will in this case be done to any of the future tenants for life under the settlement, except the sentimental desire of possessing the pictures, it seems to me to be a clear case to shew the Court was justified in agreeing with the exercise of the discretion by the present Earl of Radnor, the tenant for life. It is clear the Court was justified in agreeing, and there is not a single point of valid argument which can be suggested why Mr. Justice Chitty should not have come to the conclusion which he did. Under the circumstances, the burden of proof in this Court has not been satisfied by the appellants, who are trustees, and were entitled to take the opinion of Mr. Justice Chitty as to what was right to be done; but, having appealed to the Court of Appeal, being absolutely protected by the decision of Mr. Justice Chitty, they appeal under the ordinary conditions of appellants, and the appeal having failed, must be dismissed, with costs.

LINDLEY, L.J.—I am of the same opinion,

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and if it were not that such important questions have arisen as to the true construction of section 53, I should content myself by saying simply that I agree; but although I take exactly the same view as I understand Mr. Justice Chitty took, I think it is better to express it in my own way, so as to leave no doubt as to the view which is taken. The power to sell heirlooms is given to the tenant for life; but he must exercise this power as a trustee for all parties entitled under the settlement; and no sale can be made without the order of the Court. That is the effect of sections 37 and 53. Two questions thus arise—first, What is the duty of the tenant for life—what limit is set to his power? and secondly, What is the function of the Court? The duty of the tenant for life is *bona fide* to exercise the power for the purpose for which it is conferred; and to have regard not to his own interests only, but to the interests of all persons entitled under the settlement. This is clear not only from section 53, but also from section 21, which provides for the application of the capital money. He cannot put money into his own pocket, but must expend the money in the way provided by the Act, which is in some way or other for the benefit of the estate. But it must be borne in mind that he is like a trustee with a discretionary power to sell; he is not subject to an absolute trust either to preserve or to sell the heirlooms. He cannot be compelled to sell; he must decide on the above principles whether he will sell or not; and, if he does, he must sell as any other trustee must sell, with due regard to the interests of all persons entitled to the settled estates. But the more remote their title the less their interest in the matter, and the interest of any one liable to be cut off by a tenant in tail is entitled to little weight. Next as to the function of the Court. Before the Court can properly sanction any proposed sale, the Court must be satisfied that such sale is reasonable and proper; and before coming to any conclusion one way or the other, the Court ought to have regard to the interests of all parties entitled under the settlement. Whether, having regard to these interests, any particular sale is

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reasonable and proper must depend upon all the circumstances of the particular case. The views of the tenant for life naturally count for much. The views of those who differ from him ought not to be excluded from consideration. But the more remote the chance of succession, the less the importance of the interest to be regarded. The Court is trusted with a discretion, and I decline to fetter it by attempting to lay down any rule or principle which may fetter, or tend to fetter, its exercise. Supposing that there should be a conflict of interests or of views in any particular case, the Court would not be necessarily paralysed; it might still exercise its discretion and sanction a sale. The Legislature has taken for granted that the Court will act as every Court ought to act, and this is all that I have endeavoured to express by saying that the Court ought to be satisfied that a proposed sale is reasonable and proper. The protection thus afforded to unborn children and to remaindermen is very much greater than that afforded by section 53 or any other section in the Act. The tenant for life must obtain the sanction of the Court. An injunction might be applied for too late; and any remedy in the shape of compensation from the tenant for life or his estate for any breach of trust by him might be illusory. The view taken by Mr. Justice Chitty as to the power and duty of the Court in cases of this description is, I think, correct, and the appeal ought to be dismissed.

BOWEN, L.J.—I concur.

Appeal dismissed.

Solicitors—Tylee & Co., for surviving trustee; Bompas, Bischoff, Dodgson, & Cox, for tenant for life; A. C. Curtis-Hayward, for parties entitled in remainder.

[IN THE CHANCERY DIVISION AND IN
THE COURT OF APPEAL.]

CHITTY, J.	} HENDERSON v. THE BANK OF AUSTRALASIA.
1890.	
May 1, 2.	
COTTON, L.J.	
FRY, L.J.	
LOPES, L.J.	
July 11.	

Company—Meeting—Conduct of Business—Ruling of Chairman—Resolution—Validity—Waiver.

Where the chairman at a meeting of a public company deliberately rules in a certain way, a shareholder is not bound to challenge such ruling in order to preserve his right to impeach the validity of the proceedings in a Court of law.

At a meeting convened for the purpose of making certain alterations in the rules of a company, a resolution was proposed giving each proprietor one vote for every share, subject to a proviso requiring him to have been on the register for six months. The plaintiff, a proprietor, having moved to omit the proviso, the chairman, after consulting his legal adviser, ruled, erroneously, that the resolution must be accepted or rejected in its entirety, and declined to put the amendment. The plaintiff then moved the rejection of the resolution. The resolution was passed, and was subsequently confirmed:—Held (reversing the decision of CHITTY, J.), that there was no waiver by the plaintiff, and that he was entitled to a declaration that the resolution was invalid.

This was an action by Mr. Robert Henderson, who was a large proprietor of shares in the defendant bank, impeaching the validity of certain resolutions passed on the 4th of April, 1889, and confirmed on the 2nd of May, 1889.

The bank was constituted under a deed of settlement, which provided as follows:—

"(12) That an extraordinary general meeting may be called at any time by the court of directors, or otherwise, in the manner hereinafter mentioned."

"(15) That no other business shall be transacted at any extraordinary general meeting besides that for which it shall have been specially called, unless such ex-

traordinary general meeting shall have been called for the same time and place with any general meeting, in which case, besides the business for which such extraordinary general meeting shall have been specially called, any other business for which an extraordinary general meeting is not specially required by these presents to be called may be transacted at any such yearly general and extraordinary general meeting which shall be so held together at one and the same time and place."

"(18) That no proprietor or other holder of shares shall be considered qualified to vote at any general meeting or ballot who shall be a holder in his or her individual right of less than five shares in the capital of the society, or who, not being an original proprietor, shall have been such a holder for less than six calendar months previous to such general meeting or ballot.

"(19) That at any general meeting and ballot every qualified proprietor holding five shares in the capital of the society, and less than ten shares, shall be entitled to one vote, and holding ten shares and less than twenty shares shall be entitled to two votes, and holding twenty shares and less than fifty shares shall be entitled to three votes, and holding fifty shares or upwards shall be entitled to four votes, and no more.

"(20) That a majority of the votes of the qualified proprietors at two successive extraordinary general meetings to be specially called for the purpose, or at any ballot which may be granted at such meetings, or either of them, shall be requisite and sufficient for making new laws, regulations, and provisions for the society or co-partnership, and for amending, annulling, altering, or repealing all or any of the previous existing laws, regulations, and provisions thereof, or for dissolving the society or co-partnership."

"(27) That two successive extraordinary general meetings specially called for the purpose shall have full power to make any new laws, regulations, and provisions for the society or co-partnership, or to amend, alter, or repeal all or any of the previously existing laws, regulations, and provisions thereof."

"(29) That notice of every yearly

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general meeting and extraordinary general meeting shall be given by the court of directors by advertising the same in any two or more London daily morning newspapers, and any two or more London daily evening newspapers, at least twenty-one days and not more than thirty days before the time fixed for holding such meeting, and in such advertisements the day and hour of the meeting, and the place in London or Middlesex at which it will be held, and (as to extraordinary general meetings and adjourned meetings) the objects for holding the same, shall be specified."

On the 7th of March, 1889, the directors gave notice of an extraordinary general meeting to be held on the 4th of April, immediately after the annual general meeting, "for the purpose of considering and, if thought fit, passing special resolutions to be then proposed for amending the deed of settlement of the bank" in certain particulars, which, so far as material, were as follows:—

"1. To alter the scale of voting by giving to every qualified proprietor one vote for every share held by him or her.

"2. To enable the qualified proprietors to give their votes at every ballot, either personally or by proxy."

The notice then proceeded as follows:—

"Should the resolutions to be proposed at the said extraordinary general meeting, or any of them, be passed, the resolutions or resolution so passed will be submitted for confirmation to a second extraordinary general meeting of the proprietors which will be subsequently convened."

On the 1st of April, 1889, the directors sent to the proprietors of the bank a circular containing the full text of the resolutions to be proposed. The first resolution was in the following terms:—

"(1) That the 18th clause of the deed of settlement be repealed, and that instead thereof the following clause be inserted immediately after the 17th clause: 'That every proprietor shall have one vote for every share held by him or her, provided that no proprietor shall be entitled to vote at any general meeting or ballot in respect of any share unless he or she shall have been registered as the holder of such share for at least six

calendar months prior to such general meeting, or, in case of a ballot, prior to the general meeting at which the ballot is granted.'"

The second resolution proposed to repeal the 19th clause of the deed of settlement, and to enable votes to be given by proxy.

The meeting was duly held on the 4th of April, and a shorthand note of the proceedings was taken, which was admitted by both sides. The plaintiff was present at the meeting, and after the first resolution had been proposed and seconded, he made a speech objecting to the six months' qualification in the case of ordinary shareholders, unless a time qualification was added in the case of the directors. He concluded as follows:—"I do not say that it is unreasonable that a shareholder should be on the register for six months; but I say that a director should be on it for longer than six months—namely, twelve months or two years—and therefore I will support the resolution if that qualification can be added; but if not, then I should strike out the six months' disqualification of an ordinary shareholder. I beg to move that, so far as that part of the resolution is concerned; but if that cannot be done, then I object to the other provision. I am aware that it stands in the deed at present." The chairman: "You mean as to the six months?" Mr. Henderson: "Yes." A proprietor: "That a director should have been a shareholder for one year." The chairman: "You cannot raise that question just now." A proprietor: "That a person who is nominated as a director should have been on the register for one year; or put it equally with a shareholder—namely, that a person should have been on the register for six months before he is qualified to be nominated as a director." Mr. Henderson: "I am quite willing to have it either way." The chairman: "Does any gentleman second Mr. Henderson's amendment?" A proprietor: "I second it."

The chairman, before putting the amendment, desired to offer a word of explanation, and he made some observations upon Mr. Henderson's amendment, which he described as relating to the term of six months. Then, after a pause, during

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which he appears to have consulted the legal adviser of the bank, he continued: "I find that the proposal of Mr. Henderson is *ultra vires*. I find from the nature of the notice which has been given with regard to these proposals they must either be accepted or rejected." Mr. Henderson: "That is precisely what I say—to strike out the six months, or add that the directors must be equally qualified." The chairman: "Unfortunately we cannot do that." Mr. Henderson: "Then I must vote against the resolution." The chairman: "It cannot be done. I am advised by the legal adviser of the bank that either we must carry this alteration in the terms of the notice which has been given with respect to this alteration, or else we must reject it." Then Mr. Henderson moved its rejection. A discussion ensued, in the course of which a proprietor asked: "Am I to understand that the only course open to those who agree with the proposed amendment is to reject the amendment now, and to reserve it for a future meeting? Why should we not vote upon it now?" Ultimately both the proposed resolutions were put, and carried without amendment.

On the 2nd of May, 1889, a second extraordinary general meeting was held for the purpose of confirming the resolutions.

The plaintiff was present, and protested that the resolutions had not been validly passed, on the ground, first, that they were not covered by the notice; and secondly, that the chairman had not allowed his amendment to be put. The resolutions were, however, confirmed, notwithstanding the plaintiff's protest.

On the 14th of May, 1889, the plaintiff commenced this action for a declaration that the resolutions in question were void, and for an injunction restraining the bank from acting upon them.

Romer, Q.C., and J. Henderson, for the plaintiff.

Rigby, Q.C., Maclean, Q.C., and C. G. Hamilton, for the defendants.

CHITTY, J.—This is an action by a single shareholder against the Bank of Australasia. It is not a suit by him on behalf of

himself and all the other shareholders, but it is a suit by him personally. Nor is it a suit, as sometimes one sees, by the company itself against its directors. Two questions are raised in this action. The first relates to the terms of the notice convening the meeting of the 4th of April. The meeting was an extraordinary general meeting. The 23rd clause of the deed of settlement requires in such a case that the notice should specify the objects for holding the meeting. The point raised by the plaintiff is that the notice given was insufficient, on the ground that it did not, within the fair meaning of that clause, specify the objects. [His Lordship then referred to the notice of the 7th of March and the circular of the 1st of April, which he held could not be relied upon as a notice because it was not within the required time, and he continued as follows:] The first part of the resolution as put before the meeting was clearly within the scope of the notice, because it was an alteration of the scale of voting by giving (I will leave out the word "qualified" for the moment) to every proprietor one vote for every share. But it was said that, in view of the fact that the objects for holding the meeting were to be specified, it was not competent for the meeting to entertain so much of that resolution as related to the proviso at the end. To understand the argument submitted upon this point, it is necessary to refer shortly to the 18th and 19th clauses of the deed. [His Lordship read the clauses.] Shortly, it is stated that the 18th is a disqualification clause, and that the 19th is to be read separately from that, so that when once the voter is not disqualified he can use all his voting powers. I will assume, without deciding in favour of the plaintiff, that that is the right construction. Then was it competent for the meeting to entertain this resolution in the form that I have read it?

It is settled in cases of this kind that the notice which specifies the business or the object of the meeting is to be a fair notice, intelligible to the minds of the class of men to whom it is addressed. The Court does not scrutinise these notices with a view to excessive criticism to find out defects, but it looks at them fairly. I

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think the question may be put in this form: What is the meaning which this would fairly carry to ordinary minds? That, I think, is a very fair test. Of course, it is like all tests of this class—namely, tests with reference to the construction of the meaning of certain particular words; it is only an assistance to the Court to put the question in this form. In dealing with this as a practical question there is one matter which appears to me to be of considerable importance. Several questions were raised and discussed at the meeting, but no objection was taken to the resolution on the ground that it was not within the scope of the notice. Certainly, the plaintiff, who took an active part in the meeting, did not raise the objection. It is plain that he put no one on his guard, either the chairman or any of the shareholders so assembled—nay, more, the plaintiff, according to his case, proposed an amendment which would have embodied the disqualification which is objected to, if as part of his proposition he could have carried something which was altogether outside the scope of the objects of the meeting—namely, a similar qualification clause with regard to the directors.

I have here a very fair test of how the notice was understood by men of the class to which it was addressed; and, in particular, I have a strong case as against the plaintiff, to shew how he understood it. I think, therefore, it does not lie in the plaintiff's mouth to say that the resolution proposed was not within the fair meaning of the notice which was given, and, seeing that this is an action by the plaintiff alone, it is a personal objection to him. The result is, I think, that he has himself waived the objection, and it is not open for him now to raise it. Therefore I decide the first point against the plaintiff.

The next point has reference particularly to the proceedings at the first meeting, and the question is as to the regularity of those proceedings. It is contended on behalf of the plaintiff that he put before the meeting an amendment which was a proper amendment, and that the chairman declined to allow that amendment to go to the meeting. I will not read through the shorthand notes of what took place.

Mr. Henderson made a speech, and the

substance of what he says is this: "If you will put the directors in a similar position, or add something to their necessary qualification, then I am willing that the resolution should go with reference to the shareholder's qualification; but if not, then I should strike out the six months' disqualification of an ordinary shareholder." Then he says he begs to move that—"that," I take it, must mean what he has already stated, because it has been nowhere intimated to him that he could not move the earlier part of his proposition. He says, "If that cannot be done, then I object to the other provision." Then, after some few words more, the chairman, who seems to have been conducting the business courteously, thought that he had comprehended the meaning of the proposition which Mr. Henderson was desirous of having submitted to the meeting, and he presently asked whether anybody seconded Mr. Henderson's amendment, and a proprietor stated at once that he seconded it. Then the chairman said that before he put it he would give a word of explanation, and towards the end of his observations he made a pause. I stay for one moment to consider what was the condition of the affairs of that meeting at that time. There was no amendment in terms. No amendment in any shape had been submitted to the chairman which he was asked to put to the meeting; and although the chairman may have thought that he could extract Mr. Henderson's meaning from his speech—and possibly, from what I can see from what took place at that time, it would have assisted him in putting the amendment into shape—yet it never was reduced into such a definite form as to enable it to be placed before the meeting. Therefore there was at this moment no amendment before the meeting, and, consequently, there was nothing that the chairman could put. The chairman seems there to have made a pause, and I think counsel are probably right in what they have said, that there was a consultation with the bank's solicitor, and that, as the result of that consultation, the chairman said, "I find the proposal of Mr. Henderson is *ultra vires*. I find, from the nature of the notice which has been given with regard

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to these proposals, they must either be accepted or rejected." If Mr. Henderson had put his amendment into the form which his speech certainly suggested, of proposing in some way to alter the qualification of the directors, then clearly it was a matter which could not have been put to the meeting. But if the amendment was put into the form of proposing to omit all the words which related to the six months' qualification of the shareholder—that is to say, to omit certain words in the resolution itself which was then before the meeting—the amendment certainly could have been put. If the advice given to the chairman was that no amendment could be received to the resolution, that advice was erroneous. About that I entertain no doubt whatever. But it is clear on this point there was some embarrassment. Without reading further, it is plain that the chairman was of opinion that he could not put any amendment.

Now I come to what is the critical question in this action. It appears to me that meetings of this kind are not bound to model all their proceedings strictly on the rules of the House of Commons. Those rules are very useful—they are the result of long experience—and when those rules are understood they work out admirably. But they are too complex for the comprehension of ordinary shareholders, and it is not necessary to pursue the form. There is one point which I mentioned in the argument which I repeat here by way of illustration, and that is, that in the House of Commons the Speaker puts matters in a deliberative way. After the question has been put and voted on, the Speaker says, "I think the ayes have it," or "I think the noes have it." That is a deliberative expression of his opinion, but not final. Then that is sometimes challenged once or twice, but definitely challenged, and after a time it occurs that there is no further challenge. Thereupon the Speaker says, "The ayes have it," or "The noes have it." That is final. After that, no point of order can be raised. But in a case of this kind I think the chairman is not to be caught suddenly by the expression of an opinion which he, without very much experience (of course, I am

speaking of chairmen in general, and not of this chairman), has formed on the spur of the moment; and I am prepared to hold, and do hold, that he is allowed to express his opinion in a deliberative way. In this case I think that it was quite competent for the plaintiff, without any breach of order or any want of propriety, immediately—or, at any rate, before the voting took place upon the resolution itself—to have risen to a point of order, and, without saying that he must use these words, to have addressed the chairman somewhat in this fashion, "I respectfully object to your ruling. I think you are in error, and I give you notice that I intend to insist on my right to move an amendment." Then I think, in the state the business was in at the time, he must have told the chairman what his amendment was. In other words, he must have definitely challenged the chairman. It was his duty to put that, of course, in a courteous way, and without any breach of order. Then the chairman would have had an opportunity of reconsidering whether his opinion was right or wrong; and some other shareholders, knowing something about the conduct of business, might have got up and suggested to the chairman that it would be proper if the amendment had been put in the form in which it was legitimate to put it to the meeting. For instance, if Mr. Henderson had, after this, tendered his amendment containing some clause as to the qualification of directors, and also containing some words with reference to the qualification of shareholders, the chairman would have said, "I am bound to reject your amendment, and I do so." That, I think, is a good illustration of the state of proceedings, and how they ought to have been conducted. Mr. Henderson, the counsel, told me not to guess—I do not. I cannot say what the chairman would have done if the plaintiff had said, "My amendment is to omit all the words as to the qualification of shareholders;" but he would have been in a position to reconsider his opinion.

That was not done. There I think Mr. Henderson, the plaintiff, failed in his duty if he meant ever to raise this point hereafter. I do not say he was bound to do it, because no man is bound to move an

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amendment. It is entirely within his own breast whether he shall do it or not. But it is material to observe what took place afterwards. I said there was no such amendment proposed; but it is noticeable that, after the chairman had expressed his opinion, which I hold he did in a deliberative way, the plaintiff said he moved the rejection of the resolution, though I am not taking him too much upon the mere words. Of course he could not move the rejection. That would be an irregular mode of dealing with the question. The right way was to vote against the resolution. The resolution was then put and carried.

Under these circumstances, can the plaintiff come forward to impeach the regularity of the proceedings? I think not. I think that the course that he pursued is equivalent to a waiver on this part of the case. I think he never placed the chairman in the position in which he ought to have placed him, and consequently that his objection, founded in part on the allegation that his amendment was not put, cannot be sustained. I say "the allegation that his amendment was not put," because he never placed before the chairman either orally or in writing the terms of the amendment itself.

That practically disposes of the case. The second meeting was held, and the defendants' counsel urged that it was not open at the second meeting, held merely for the purpose of confirming the resolutions which had been passed at the first, to entertain any amendment. I am not concerned with that proposition beyond stating it, because the plaintiff's counsel affirmed it. If the resolutions at the first meeting were good, as I have held they were, then there is no question left for me to decide as to the regularity of the proceedings at the second meeting.

The result is that the plaintiff fails.

The plaintiff appealed from this decision.

Romer, Q.C., and J. Henderson, for the plaintiff.—We submit that the resolutions are bad on two grounds. First, that they are not covered by the notice. Secondly, that the plaintiff's amendment was not allowed to be put. Chitty, J., was in error

in holding that the plaintiff did not move any amendment. The terms of the amendment were well understood by the meeting. There has been nothing in the conduct of the plaintiff amounting to waiver.

Rigby, Q.C., Maclean, Q.C., and C. G. Hamilton, for the defendants.—The notice is sufficient to cover the resolutions. As to the amendment, there was nothing more than an intention to move an amendment; it is not clear what the amendment was. If the plaintiff had intended to insist on his amendment, it was his duty to have given notice to the chairman of his intention, and if the chairman had then declined to put the amendment he ought to have withdrawn from the meeting.

Cotton, L.J.—Two objections are taken to these resolutions. First, it was said that the objects for which the meeting was called were not sufficiently expressed in the advertisement. I do not think it necessary to decide that at present, having regard to the opinion that we all entertain on the second objection; but, as far as my opinion goes, I must say that the notice fairly and reasonably expresses to the shareholders what matters were going to be discussed at the meeting.

The second objection is this: The plaintiff says, "I wished to propose an amendment, and that the chairman refused to put, and therefore he prevented the opinion of the shareholders being taken on a matter which was legitimately within the power of the meeting to be considered." In answer to that, it is said that there was no definite proposal made by the plaintiff. I am disposed to agree with Mr. Justice Chitty in thinking that the notice ought not to be treated very critically with a view to seeing whether one cannot pick out some defect in it; but I also think we ought not to treat too critically the question whether an amendment was proposed by the plaintiff, because although he did not make his proposal in the formal way in which he ought to have done—hand in a formal amendment to the chairman—yet I think that he did really propose an amendment to the resolution which was then before the meeting, and that the

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chairman understood what the amendment was, because he asked if any gentleman would second the amendment. Then, after it was seconded, he refused to put it to the meeting, and expressed an opinion, acting under the advice of the legal adviser of the company, that no amendment at all could be proposed, and that the resolutions which had been placed before the meeting must be accepted *en bloc* or rejected altogether. Let us see how the matter stood. I quite agree that the plaintiff first proposed a resolution that the directors should have the qualification of having held shares for a year. That was his principal object; but if the amendment to alter the qualification of the directors was not accepted, then he desired to strike out the six months' qualification for ordinary shareholders. He did not in terms move an amendment that the qualification of an ordinary shareholder should be struck out, but I think that was the reasonable and fair meaning of the words which he used. Although his language is not quite so full or accurate as it might have been, or as it would have been if it had been a matter of pleading in a Court of law, yet I think it fairly expressed to the meeting and to the chairman what he intended to do if he could not introduce by way of amendment the qualification of directors. He says, "I am aware that it stands in the deed at present"—that is to say, the six months' qualification for holding shares. The chairman says, "You mean as to the six months"—to which the plaintiff assents. Then a proprietor says "that a director should have been a shareholder for one year"—no doubt referring to the first amendment proposed by the plaintiff. Then the chairman says—and I think quite rightly—"You cannot raise that question just now"; that is to say, "any proposal imposing a disqualification on a director is beyond the notice given for the meeting, and that, therefore, cannot be raised." The chairman says definitely, as I understand him, that any amendment as to the qualification of a director is not within the notice, and therefore cannot be proposed. In that I think he was perfectly right; but he does not say that with

regard to the latter part of the plaintiff's objection, and he goes on to consider that subsequently. The plaintiff says, "I am quite willing to have it either way"—that is to say, to have either amendment. But the chairman had already said that the first amendment could not be put. Then the chairman, having said that, says, "Does any gentleman second Mr. Henderson's amendment?" and it is duly seconded. The chairman could not so far stultify himself as to ask whether any proprietor supported the amendment which he had decided could not be put. He intended at this period to put the second amendment which the plaintiff proposed to the meeting. Then he made a speech which makes it clear that he understood the amendment to have reference simply to the six months.

Then he seems to have had some conversation with some one, because he says ultimately, "I find that the proposal of Mr. Henderson is *ultra vires*." Why? "I find that from the nature of the notice which has been given with regard to these proposals, they must be either accepted or rejected." He is not referring now to the proposal to alter the qualification of a director; but he says, "This amendment which I intended to put, I find I cannot put because the proposed resolutions must be adopted *en bloc*, or not at all." Then the plaintiff says, "That is precisely what I say, to strike out the six months." I do not quite see the meaning of that, but he goes back to the same idea; what he was proposing was to strike out the six months' qualification of an ordinary shareholder, or add that the directors must be fully qualified. "Unfortunately we cannot do that," says the chairman—that is, cannot propose to the meeting, having regard to the notice, that an additional qualification should be required in the case of a director. Then the plaintiff says that if what he proposes cannot be done, he must vote against the resolution. The chairman: "It cannot be done; I am advised by the legal officer of the bank that either we must carry this alteration in the terms of the notice which has been given, or else we must reject it."

That, I think, clearly shews what was

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done. The chairman understood that, as he had ruled that the amendment originally proposed by the plaintiff could not be put, the plaintiff intended to move, and did in fact move, the other alternative, that the qualification of a shareholder as a part of the resolution proposed by the directors should be cut out. The chairman may have misunderstood what was said to him by the legal adviser—which may have been that he could not put any resolution which was not within the notice calling the meeting; but this second amendment of the plaintiff's was something not touched by that, because it was within the notice calling the meeting, and might therefore properly be put before the meeting for consideration.

I think that the chairman, in refusing to allow any amendment to be put, was entirely wrong, and that the resolutions which were passed cannot be allowed to stand as effectual resolutions, in consequence of the chairman, under a mistaken idea as to what the law was which ought to have regulated his conduct, having prevented a material question from being brought before the meeting. But then it was said that the plaintiff had waived this objection, on the ground that he had acquiesced in the ruling of the chairman. I cannot think that that is so. The meeting was called to consider proposals to alter the rules of the bank. The chairman ruled that he could not allow what he understood to be the plaintiff's amendment, an amendment which he might have legitimately put to the meeting. He said: "You must either take these proposals as they are without any amendment, or reject them altogether," and then the plaintiff moves their rejection. That, in my opinion, was not acquiescing in the ruling of the chairman. I think, therefore, on this point, that the plaintiff is right, and I cannot agree with Mr. Justice Chitty's view. I think it is impossible to contend that, after a chairman has consulted a legal adviser, and after he has ruled in a certain way, he should be allowed an opportunity to reconsider his ruling, and that it was the duty of a shareholder to say, "I object to your ruling, and I ask you now, notwithstand-

ing your ruling, to put the amendment which I propose."

FRY, L.J.—I am entirely of the same opinion. I look upon what took place at the meeting as amounting to this. The plaintiff was desirous of moving one or other of two amendments. The one which he preferred was the one introducing terms with regard to the qualification of the directors, and the other was to strike out the proposal with regard to the qualification of shareholders. The chairman ruled that the first of those was out of order—and in so ruling I think he was quite right. Then the plaintiff moved the other amendment—namely, the omission of the proviso with regard to the six months' holding of shares; and so completely did the chairman understand that, that he invited any proprietor present to second it, and it was seconded accordingly; and not only that, but the chairman rose to put it to the meeting, and he explained what he was going to do. It was an amendment, to use his own language, with regard to the term of six months. I think, therefore, that there was an amendment moved and seconded, and about to be put to the meeting by the chairman, and I do not think there was any serious ambiguity as to what was the nature of that amendment. If the chairman had felt any difficulty with regard to it, it was his duty to invite the plaintiff to express himself more explicitly; and if the plaintiff had declined to do that, then it might well be that the chairman would have been justified in refusing to put the amendment to the meeting. But there was no misunderstanding of that sort. Then, unfortunately, some one intervenes, and apparently, from what occurs afterwards, the legal adviser of the company tells the chairman that no amendment can be put; and, therefore, that the plaintiff's alternative amendment, to the validity of which no objection had been taken by the chairman, could not be put any more than the other, and accordingly the chairman declined to put it.

Now, I think that was entirely wrong. It is to be observed that neither Mr. Rigby nor Mr. Maclean, although invited

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so to do, have attempted to justify the correctness of that ruling, and that was a ruling of a very serious description, having regard to the character of the meeting. The meeting was called to consider certain proposed alterations in the deed of settlement; and to conduct the meeting in such a way as to prohibit any amendment to any of the proposals, so that each resolution should be taken as it stood or rejected, was to conduct it under a very serious misapprehension of the rights of the shareholders and of their powers of discussion.

Then it is said that the chairman's ruling ought to have been challenged, that he ought to have been allowed a *locus penitentie*, and that a bill of exceptions, if I may be allowed to say so, ought to have been tendered to his ruling. But even if that contention were well founded—and I do not think that it is—in point of fact his ruling was challenged, not, indeed, by the plaintiff, but by another proprietor, and he adhered to it. Now, I am distinctly of opinion that it was not a necessary course of conduct on the part of the shareholders to impeach the ruling of the chairman after it had been once deliberately made. It may be that the plaintiff would not have been acting improperly if he had challenged it; but there was no such obligation upon him. It follows that the chairman, without any right, rejected a legitimate and germane amendment.

Then it is said that the plaintiff has acquiesced in that ruling, and has lost his rights. But I think there was no acquiescence at all. He insisted on his right to move the amendment, and the chairman ruled that it could not be done. It was not for him to keep up an altercation with the chairman, nor would he lose his rights by acting under the ruling of the chairman. I think, therefore, that these resolutions have been carried at a meeting improperly conducted, and that they involve serious consequences to the shareholders. I think that the shareholders had a right, and should have been allowed, to move amendments; and that this particular amendment not having been put, in consequence of the unfortunate ruling

of the chairman—a ruling which, I am bound to say, seems to me to have been against his own judgment—these resolutions cannot stand, and consequently that this appeal must be allowed.

LOPES, L.J.—The first question is as to the sufficiency of the notice; but it is unnecessary to express any opinion upon that matter, because the view that is taken by this Court with regard to the other matter determines this case. I desire to say for myself that I have doubts whether that notice was sufficient; but the material matter is with regard to the amendment.

It has been urged, as one ground why the proceedings were not irregular, that there was no definite amendment put forward by the plaintiff. I can quite imagine circumstances where it would not be necessary that there should be any definite amendment. I can imagine a case of this kind where a shareholder says, "I propose to move an amendment," and where the chairman says, "I am perfectly clear that no amendment can be moved, and I will allow no amendment." It would be absurd in such a case as that to say that the shareholder is bound to tender some definite amendment; but I think in the case before us there was a definite amendment, and an amendment which is not at all difficult to understand. The amendment in effect, to my mind, was this, that the provision with regard to the registration for six months of the shareholders should be omitted. I think, from the evidence appearing on the shorthand-writer's note, when it is carefully read, it is perfectly clear that that was the amendment which the plaintiff wanted to move, and which in point of fact he did move. I think it was so understood by the chairman, and I have no doubt in my own mind that it was so understood by the shareholders present. It is quite true that in the first instance the plaintiff wished to move that there should be a qualification for the directors; but the chairman ruled, and I think properly ruled, that that would be *ultra vires*, and it seems to me that that was abandoned by the plaintiff. Then he put, sufficiently clearly for any one to understand it, the proposed amendment

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to which I have alluded. That was refused. The question is whether that refusal by the chairman invalidates the proceedings. It is perfectly clear that it does. But then it is said that there was some acquiescence by the plaintiff. I am bound to say that I can see no evidence at all of that. I think that, so far from there having been any acquiescence by the plaintiff, he resisted the action of the chairman as far as he decently could.

It is said that he ought to have challenged the ruling of the chairman. That is an entirely new proposition to me. I should have thought, and I do think, that when a chairman deliberately rules that a certain amendment cannot be put, it would be improper and indecent for any shareholder to proceed to discuss the propriety of the chairman's ruling. Of course, I am assuming that his ruling is given deliberately, and after having the matter sufficiently before him. Mr. Rigby said that the proper course of action for the plaintiff to take when his amendment was not put was to have walked out of the room altogether, and to have left the discussion. Again, I cannot understand that. I think the plaintiff was quite justified in doing what he did—namely, remaining in the room and voting upon the resolution which was put. I think the decision of the learned Judge below was wrong, and that this appeal should be allowed.

Solicitors—Dawes & Sons, for plaintiff; Farrer & Co., for defendants.

CHITTY, J.)
 1890.)
 Feb. 21.)
 March 7.)

In re TAYLOR.
TURPIN v. PAIN.

Practice—Official Referee—Judicature Act, 1873, s. 56—Reference for Enquiry and Report—Administration Action—Account—Form of Report.

Where in an administration action the accounts are referred to an official referee, he is not bound to adopt procedure usual in the Chancery chambers, although he may do so if he finds it convenient and likely to advance the ends of justice.

Accounts in an administration action, after having been ineffectually prosecuted in chambers for two years, were referred to an official referee, under section 56 of the Judicature Act, 1873, to enquire and report. The referee stated in his report the total amounts of receipts and payments, and found a balance, without detailing items; but the Court was satisfied that the report contained sufficient materials to enable the parties to attack it on points of substance:—Held, that the report ought not, under the circumstances of the case, to be remitted for want of particularity.

Motion.

Mrs. Taylor, a widow, who died in August, 1872, by her will appointed her two brothers her executors and trustees, and directed them to carry on her farming business at Gooseheys Farm, and employ the capital embarked therein together with any other part of her personal estate which might be required for that purpose during the remainder of the term for which she held the farm, and to stand possessed of the clear profits arising from her said business upon the trusts therein-after declared concerning her residuary estate; and after the expiration of the said term she gave her implements, &c., of husbandry, with her household furniture and effects, to her son P. T. Taylor, and she bequeathed the residue of her personal estate, including profits arising from the carrying on of her said business, upon trust therewith to provide for the maintenance and education of all her children during their minorities, and until her estate should be divisible under the trusts

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of her will, and after the youngest of her children should attain the age of twenty-one years, in trust to divide the same among all her children equally. She also empowered her trustees, after the expiration of the said term, to advance and pay to her said son P. T. Taylor his share under her will.

The testatrix left five children, one son and four daughters, the youngest of whom attained the age of twenty-one in October, 1885.

It appeared that the farming business carried on by the testatrix was originally that of her deceased husband.

In August, 1886, the above action was instituted by the four daughters against the trustees of the will for an account of the personal estate, on the footing of a wilful default, and administration.

By an order of the 14th of May, 1887, the following enquiries and accounts were directed: First, an enquiry of what the testatrix's estate consisted at the time of her death; secondly, an account of the dealings and transactions of the defendants in the carrying on of the business of the testatrix at Gooseheys Farm from her death to September, 1877 (when the lease of the farm expired); thirdly, an account of the receipts and payments of the defendants in respect of the estate of the testatrix other than those comprised in account No. 2; fourthly, an enquiry of what the testatrix's estate consisted at the date of the order.

By an order of the 15th of December, 1887, these accounts and enquiries were extended so as to include the estate of the testatrix's late husband.

The defendants, one of whom was a farmer, and the other a cattle-dealer, had kept no proper accounts, and after the enquiries and accounts had been prosecuted in chambers for two years without making any effectual progress, they were referred by an order of the 11th of November, 1889, to one of the official referees under the Judicature Act, 1873, section 56, to take and report thereon to the Court.

The questions raised in chambers and before the official referee were mainly in reference to accounts 2 and 3.

The official referee, by his report dated

the 24th of December, 1889, and filed the 8th of January, 1890, after reporting in answer to enquiry No. 1, and stating the number and ages of the children, continued: "The trustees who proved the will, and shortly afterwards took out administration *de bonis non* to the estate of the testatrix's husband, allowed the children to occupy the farmhouse, and employed the son as their bailiff in managing the farm. All sales and purchases were effected by the trustees, and they paid about once a week to the son the moneys required, whether for labour and expenses, on the farm or for household expenses. These sums were never distinguished, and in this account I have necessarily included payments for household expenses among the payments on account of the farm. This mode of conducting the business went on until the term of the lease expired at Michaelmas, 1877. P. T. Taylor then became tenant of the farm on his own account, and acquired certain farming and household effects under the will. He allowed his four sisters to remain in the farmhouse, and provided for their support. On taking over the farm P. T. Taylor took one part of the assets, and his liability to the trustees was valued at 689*l.* 17*s.* 6*d.* The trustees (who had power from time to time to advance to P. T. Taylor his share of the estate, and also to provide maintenance for the children) allowed this valuation to remain unpaid, and from time to time furnished P. T. Taylor with moneys towards household expenses, and with further moneys towards meeting his expenses on the farm, by occasional payments of rent, tithes, or other liabilities, and by money payments from time to time. Some portion of these payments could be traced to specific household expenses, others to specific farm expenses, while in the remaining instances it was not possible to discriminate between the two. The total amount so paid between 1877 and 1880 was 764*l.* 18*s.* 7*d.* None of these payments were made in express terms by way of maintenance and advances; but as the trustees had power to make them, I have allowed them in account No. 3 as payments under the maintenance and advancement powers, notwithstanding any

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defect in the form of the transactions. There appeared to be no doubt that the most beneficial way of providing a home for the children was to allow them to be kept by P. T. Taylor at the farmhouse, and to supply such pecuniary assistance as was required to enable the farm to be kept on so long as there was a prospect of its being worked successfully. In the year 1880 the farming had become unprosperous, and P. T. Taylor gave up the farm, and made an arrangement with his creditors under which the trustees obtained a sum of 532*l.* 4*s.* 2*d.* on account of the valuation debt of 689*l.* 17*s.* 6*d.* After this date the trustees provided a cottage for the daughters, and maintained them there at an expense of little more than 150*l.* a year.

"In respect of account No. 2, I report as follows: The trustees have received 9,758*l.* 0*s.* 4*d.*, and have paid 9,823*l.* 6*s.* 11*d.*, leaving a balance in their favour of 65*l.* 6*s.* 7*d.*"

"In respect of account No. 3, I report as follows: The trustees have received 5,061*l.* 19*s.* 6*d.*, and have paid 5,080*l.* 7*s.* 2*d.*, leaving a balance in their favour of 18*l.* 7*s.* 8*d.*"

On the 21st of February, 1890, a motion was made by the plaintiffs to remit this report to the official referee or some other official referee, with directions that such accounts be taken in the way usual in the Chancery Division before a chief clerk, and vouched accordingly; that directions be given to such referee that he take the accounts rendered by the defendants and filed before the date of the order of reference; and that directions be given to such referee to state in his report which of the items in the accounts rendered by the defendants have been allowed and disallowed by him respectively, and to shew what, if any, sums not mentioned in such accounts he has charged against the defendants.

After some argument Chitty, J., directed the motion to stand over, to enable the defendants' counsel to point out from the referee's notes, a copy of which had been supplied, how the sums allowed by him in his report had been arrived at, and that his Lordship might in the meantime make further enquiry of the referee.

On the 6th of March, 1890, the referee,

at his Lordship's request, made a further report, stating, *inter alia*, as follows:—

"These accounts have been prosecuted in chambers for more than two years without making any effectual progress, and were then referred to me. The failure in chambers was plainly due to the fact that the case was one to which the customary procedure in chambers was quite inappropriate, and it was no doubt sent to me for that reason.

"The method pursued in chambers in taking accounts is:—

"1. To require an account from the accounting party or parties to be verified by affidavit.

"2. To have the items of this account vouched, and to take evidence by affidavit (with cross-examination occasionally) as to every disputed item.

"3. To allow, disallow, or vary each item from beginning to end of the account.

"The cases which occur may be divided into three classes.

"1. Where the accounting party is able to produce and verify an approximate account, and the details are not too extensive or complicated.

"2. Where the accounting party is unable to produce and verify an approximate account.

"3. Where the accounts are so extensive or complicated that the chambers procedure involves an amount of delay equivalent to a denial of justice.

"In the first class of cases the methods employed in chambers (though necessarily slow) bring out all the exact details, not only of the items disputed before the chief clerk, but also of the items (generally the great majority of the whole) which have been accepted or not seriously questioned before him.

"Cases of this description to which the methods of chambers are applicable are now very seldom sent to official referees, for the obvious reason that a chief clerk, having at his disposal a staff of junior accountant-clerks to do the vouching and other mechanical work, can deal with them much more rapidly than an official referee who works single-handed.

"In the second class of cases the procedure of chambers breaks down altogether (as it did in this case for two

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years) from the impossibility of getting an account from which to start the enquiry.

"In the third class, the chambers procedure practically breaks down from enormous delay, even though a staff of clerks is available for the work. An illustration of this may be seen in the case of *Macintosh v. The Great Western Railway Company* (1), in which it was held by the Court of Appeal that a chief clerk was not at liberty to depart even in so extreme a case from the usual form of certificate. The result, I believe, was that after some twenty or thirty years of useless and costly litigation the executors of the plaintiff (then long dead) were driven to accept a lump sum in compromise rather than continue the contest.

"It is chiefly cases of the second and third classes which, according to the recent practice, have been sent to official referees. *Turpin v. Pain* was a case involving the difficulties both of the second and third class.

"The testatrix appointed as trustees her two brothers, one a farmer and the other a cattle-dealer. They, though very suitable persons for carrying on the management of a trust farm, knew very little about accounts, and kept none beyond their ordinary market-books of sales and purchases, and the cheques and pass-books of the executorship account.

"After a lapse of many years these materials were insufficient to enable them to produce an approximate account.

"They severed in their defence. One of them gave such materials as he had or could discover from the plaintiffs to an accountant to do what he could with them, and the other entrusted his solicitor with a like duty, and they produced accounts for their respective employers which were not in harmony with one another, and were too defective in form to supply the basis of investigation in the usual way. The trustees could not verify these accounts on oath, and the accountant could say no more than that his account was as good as it could be made with such materials as he had.

"If I had insisted on waiting for the production of a suitable account to work

(1) 1 De Gex, J. & S. 443; 32 Law J. Rep. Chanc. 412.

upon, I should probably have spent another two years or more to as little purpose as the first two had been spent in chambers.

"I therefore pursued a course analogous to that which I have found to work satisfactorily in dealing with the numerous complicated accounts which have been referred to me from the Queen's Bench Division.

"I collated such documents as could be found with the *viva voce* evidence of every one who knew anything about the matter, and among others of the testatrix's son (one of the five residuary legatees), who had managed the farm for his mother while she lived, and had been continued as bailiff by the trustees after her death. Fortunately he had a book in which he had in an informal way made entries of the sales and purchases effected by the trustees in carrying on the farm, as well as notes of the money expended by himself for wages, maintenance of his four infant sisters at the farmhouse, and other petty outgoings.

"With these materials I was able, after a close investigation of eight days, to get at the aggregate expenditure and receipts of the trustees; and after I had made some progress with the evidence, I obtained from the accountant who had acted for one of the trustees a fresh account on lines which I indicated to him, which greatly assisted me, though it was not an account which I could have taken as the basis of investigation on the chambers method, because it was not in its form and character suitable to be so dealt with, and because, in fact, it was essentially a rough account, and not one by which either of the trustees could be held bound.

"I understand that it has been suggested that the result attained by the method I pursued does not give the same facility for reviewing my decision on particular items which the procedure in chambers resulting in a common form certificate would give.

"This is only true to this extent—that it does not afford materials for opening up new questions on items which were not made the subject of controversy before me.

"As to all points which were taken before

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me, my notes will afford at least as great facilities as an ordinary chief clerk's certificate for re-arguing them before the Court. I think, in fact, the facilities will be found greater, as there will be less difficulty in tracing any specific matter through my notes, than in hunting it down through a vast mass of affidavits.

"I ought perhaps to refer to the case of *Burrard v. Calisher* (2), in which Mr. Justice Kay did direct the referee to bring out an account substantially in the form of a chief clerk's certificate.

"Probably (though the report is too short to make it clear) that was a case of what I have called the first class, in which such treatment was appropriate, and the learned Judge expressly abstained from laying down any general rule for official referees such as had been laid down for chief clerks in *Macintosh v. The Great Western Railway Company* (1)."

Maclean, Q.C., and *Redman*, in support of the motion.—The referee's report is deficient in the particulars which would enable us to question his findings. The accounts should have been brought in and vouched, in analogy to the practice before the chief clerk in chambers. As nothing of this kind has been attempted, we are entitled to an order remitting the accounts—*Burrard v. Calisher* (2).

Romer, Q.C., and *Curtis-Price, Byrne, Q.C.*, *Haldane, Q.C.*, and *Sheldon, contra*.—The circumstances of the case plainly shew that strictness of account is impossible. In this action the usual proceedings in chambers, after going on for two years, have been found to lead to no results, and the plaintiffs now ask that the referee to whom for that very reason the matter has been referred should, although unsupplied with the machinery existing in chambers, attempt to do what has already been found impossible where every facility existed. The principle and facts upon which the referee proceeded are clearly shewn in his notes and reports. The plaintiffs should shew some specific item or exact ground of objection. It is not, under the circumstances, open to the plaintiffs to object to the generality of the

(2) 51 Law J. Rep. Chanc. 223 and 510; Law Rep. 19 Ch. D. 644.

report, unless they are prepared to shew that it was possible for the referee to make it in some specific matter more particular.

Maclean, Q.C., in reply.

Walker v. Bunkell (3), *Baroness Wenlock v. The River Dee Company* (4), and *The Dunkirk Colliery Company v. Lever* (5) were referred to.

CHITTY, J. [after stating the facts, and that there was no charge of dishonesty against the defendants the trustees, but they had kept no proper accounts; and after observing that the state of entanglement in which matters were was such as to render the ordinary system of taking trustees' accounts impossible; and after having referred to the way in which the method of taking accounts in chambers had broken down in the present case, continued:—]It is a strong observation to make with regard to these matters that the delay which can and does take place in some very intricate accounts almost amounts to a denial of justice. Of course, trustees ought to keep accounts, and I am not at liberty for a moment to say that these trustees, the one being a farmer and the other a cattle salesman, are exempt from the ordinary law; neither am I in a position to attempt to draw any distinction between the accounts to be kept by different kinds of trustees, because I should then have to weigh the capacity of each individual in golden scales, and say that such and such a man is one who ought to keep perfect accounts, and another should keep less perfect accounts, and others should keep none at all. It is not possible for a Judge to make these varying distinctions. Trustees against whom it is proved that they did not keep accounts render themselves liable to be charged with moneys they have received. The proper remedy with regard to the non-keeping of accounts is, in a proper case, to disallow the costs of taking them, or direct the trustees to pay them. I have nothing to do with any-

(3) 52 Law J. Rep. Chanc. 596; Law Rep. 22 Ch. D. 722.

(4) 56 Law J. Rep. Q.B. 589; Law Rep. 19 Q.B. D. 155.

(5) Law Rep. 9 Ch. D. 20.

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thing of that kind in the case before me. [His Lordship then referred to the report of the official referee as set out above, and continued :]

That is a short and graphic account of what took place and what these trustees did, from which it appears that, though they did not act strictly, they were doing the best they could for the family, and that they were doing the best they could for the family as trustees, and according to the best judgment that they could form. Then the referee goes on to give the lump sums the result of his investigations, leaving a small balance in favour of the trustees, and that is his report. Now, I have a motion before me which asks me to deal with this matter strictly: first, I am asked to remit this report with directions that these accounts be taken and vouched in the way usually adopted before a chief clerk; this part of the motion was not seriously pressed at the bar. The official referee could not take these accounts in that way; an attempt was made to do so in chambers, which failed. The official referee, in my judgment, is not bound to take accounts referred to him in the same way as the chief clerks do; if this had been intended, provisions would have been made by the General Orders to this effect. I have referred to some of the rules, such as Order XXXIII. rules 2, 3, 4, and 4a, for the purpose of shewing that they are dealing only with a particular method of taking accounts before a chief clerk in chambers. There is an advantage, in some instances, in taking the accounts before the official referee according to the existing practice. The official referee does not proceed by affidavit and then by cross-examination: what he can do, and what he has done in this case, is to have the witnesses before him, and the accounts, and also all the account-books, and then to sit continuously, as he did in this case, till the matter is finished. The parties come before him and give their evidence *viva voce*, certain accounts are produced, and evidence is taken there and then upon the matter, and there is cross-examination, of course, if need be. The referee has seen the witnesses, and has made notes, and I have a copy of the voluminous

notes which were taken by him in this case. These notes contain all the materials upon which the referee proceeded. This method of taking accounts is similar to that adopted by the Masters in the Queen's Bench Division. No doubt it is not so formal or so rigid as is the manner of taking accounts in the Chancery Division, and the reason is, putting it generally, that the matter to be enquired into, and the accounts to be taken, do not stand on the same footing. On this part of the motion, therefore, I am of opinion that the official referee is not bound to take these accounts in the same way as a chief clerk does; of course, he may adopt that method if he finds it convenient and likely to advance the ends of justice: he may have regular accounts before him, and he may draw his report referring to these accounts, and saying that he has allowed this item and disallowed that; but to take such an instance as the one the referee had before him in this case, with the farming account mixed up with the household account, and again mixed up with advances to the children, and having regard to the state of the family during the time the accounts relate to, he could not properly have taken the accounts in the way adopted in chambers, and, accordingly, this part of the application fails.

Then I am asked to give directions to the official referee to take the accounts rendered by the defendants, and filed before the date of the order of reference, and to state which of the items in these accounts he has allowed and disallowed, and what, if any, sums not mentioned in such accounts he has charged against the defendants. This part of the motion, as presented to me in argument at the bar, resolved itself into this. It is said by those who are not satisfied with the report that it is in such a form that they cannot attack it, and the force of the argument is that the report is practically final. The referee was not directed to conclude the matter—that is to say, to try it as if it were the trial of the action, and enter judgment; he is only directed, under the 56th section of the Judicature Act, 1873, to enquire and report, and he has made a report in such a form that the

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plaintiffs say they cannot put their finger on anything and bring it before the Court as a matter with regard to which they can say that the referee has erred. There is one observation to be made—namely, that in this report the official referee has found the total amount of receipts and the total amount of payments, and he has found a balance; but it is obvious from what I have said that he has not stated in the report on what accounts he has proceeded; and he has not, as a fact, proceeded on any particular account with specific numbers to any item. It was arranged between the parties that I should see the official referee, and thinking it would be much more satisfactory to them that I should have something in writing from him, rather than a mere report of what had taken place between us, I have asked him to prepare, and have received from him, a detailed statement or second report on the particular points which had been urged before me when this motion was first opened. My suggestion to the official referee was whether he could not go through the accounts, or rather go through the materials before him, again, and point out in some way, by reference to the items or sets of items, what he had allowed or partially allowed, or disallowed or partially disallowed, but the substance of what he tells me is that he cannot do so. The official referee's additional report, which is of very considerable value, classifies the various kinds of accounts, and is as follows: [His Lordship read the report, and continued:] There are in Court what I have already referred to—namely, the notes of the official referee, written out in an engrossing hand which is perfectly legible, and which any one can read through who wishes to do so. Now, this is a peculiar case, and if I thought that the report was really in such a form that the plaintiffs could not attack it, I might have acceded to this application—reluctantly, I admit, because such a course would probably have only led to further expense, delay, and vexation. I might, however, have been induced to send the report back, not generally, but so that the official referee might on the face of his report have pointed out generally or specifically, as the case per-

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mitted, the items which were allowed or disallowed by reference to some document. But I think, in the circumstances of this case, it would be wrong to do this, because I am satisfied by the second report that if there are any special grounds for attacking the report, not as a matter of form but as a matter of substance, there are here all the materials upon which to do it. No doubt, counsel would find it a very great labour to read through all the official referee's notes, to understand them, and to put the items together; but the parties who were before the official referee will be able—if there is really any ground for saying that substantial justice has not been done—by reference to these notes to pick out the material points and bring them before the Court. I referred in the course of the argument to *The Dunkirk Colliery Company v. Lever* (5). There it was a question of ascertaining damages, but it was a complicated case, and the notes were very voluminous; the matter was brought before the late Master of the Rolls, and it was afterwards taken before the Court of Appeal. There the task was imposed on those who objected to the report of going through the notes and pointing out on what matters it was considered the report could be attacked and where the referee had erred. There was some success in that case, but the time and labour which were imposed were great; but that is no reason why, in such a special case as I have before me, I should insist on form to such an extent as would in substance result in a denial of justice. The result is that this part also of the plaintiffs' application fails. At the present moment I am not asked to adopt the report or to reject it. I am simply asked to send it back to the official referee with directions. The motion must accordingly be refused, and I make the defendants' (the trustees) costs their costs in any event.

Solicitors—Child & Norton, for plaintiffs; A. H. Hunt & Co. and Haynes & Clifton, for defendants.

STIRLING, J. }
 1890. }
 May 3. } *In re* WELLS.
 MOLONY v. BROOKE.

Practice—Receiver—Creditor's Administration Action—Executor—Retainer.

A creditor in an administration action is only entitled to the appointment of a receiver as against the executor when it can be shewn that the assets are being wasted. The Court will not interfere with the executor's right of retainer, and a receiver will not be appointed merely on the ground that it is probable the executor will exercise such right of retainer to the prejudice of the general body of creditors.

This was a motion to discharge an order for a receiver of the estate of the testator, Mr. W. M. Wells, of Holme. The testator died on the 1st of May, 1889, having appointed as his executors and trustees the defendants Lord Brooke and Admiral Wells, the former of whom alone proved the will, the latter being absent from England on service. At the date of his death the testator was entitled to an estate of between 6,000 and 7,000 acres, called the Holme Wood estate, in Huntingdonshire, which was subject to mortgages to the extent of about 160,000*l.* Of this sum mortgages to the extent of about 120,000*l.* were vested in the defendants Lord Brooke and Admiral Wells as trustees of the will of William Wells, of Redleaf, the testator's great-uncle. In addition to the real estate above mentioned, the testator died possessed of considerable personal estate, including the life interest (which he had purchased) of his brother, Captain G. G. Wells, in the estate of William Wells, of Redleaf.

The plaintiff, Colonel Molony, was the trustee of a mortgage for 6,700*l.* upon the Holme Wood estate, and was also beneficially interested as a creditor of the testator to the extent of 860*l.* On the 23rd of April, 1890, he commenced this action on behalf of himself and all other creditors of the testator, asking for the administration of his estate.

On the 25th of April he moved *ex parte* for the appointment of a receiver of the personal estate of the testator, with the object of preventing the defendants Lord

Brooke and Admiral Wells from exercising their right as executors to retain out of the testator's estate the debt of 120,000*l.* due to them as trustees of the estate of William Wells, of Redleaf.

Upon this application Lord Brooke was represented by counsel, and did not oppose the appointment of a receiver, but stated to the Court that Lord Brooke, as trustee of the Redleaf estate, had been ordered by his *cestui que trust*, Mr. Hubert Wells—who, subject to the life interest of his father, Captain G. G. Wells, was entitled to the estate of William Wells of Redleaf—to exercise his right of retainer. He further informed the Court that Mr. Hubert Wells had, on the 22nd of April, taken out an originating summons to have the question of the right of retainer determined. Under these circumstances Stirling, J., made the order for a receiver, but put the plaintiff on terms to accept service of notice of motion to discharge it from Mr. Hubert Wells, should he think proper to serve such notice.

This was a motion by Mr. Hubert Wells to discharge the above-mentioned order. Since the date of the order Mr. Hubert Wells, together with other persons, had been added as defendants to the action.

Sir Horace Davey, Q.C., Rigby, Q.C., and Swinfen Eady, for the applicant.—There is no ground for the appointment of a receiver in this case. The object of the plaintiff is to interfere with the legal rights of the *cestuis que trust* under the will of William Wells, of Redleaf. Some foundation for that, no doubt, is to be found in the case of *In re Radcliffe; The European Assurance Society v. Radcliffe* (1), where the late Master of the Rolls suggested that the only way in which you could prevent one creditor from being preferred to another was by getting a receiver appointed. That has been construed into meaning that you can have a receiver appointed for that reason only. But the question was argued before the Court of Appeal in a case of *Phillips v. Jones* (2), and they took a different view from the late Master of the Rolls of the construction of sub-section 8 of section 25 of the Judica-

(1) Law Rep. 7 Ch. D. 733.

(2) 28 Sol. J. 360.

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ture Act, 1873. They said that that subsection "only gave the Court power to appoint a receiver in aid of existing rights," and that "to accede to the application then before them would amount to a reversal of the decision of the House of Lords in *Darston v. Lord Orford* (3). The observations of Jessel, M.R., in *The European Assurance Society v. Radcliffe* (1) were only *dicta*, not necessary to his decision in that case; if they were intended to be a decision that in any creditor's administration action, without making any special case, merely because the executor would not admit assets, a receiver would be appointed, they were inconsistent with the course of authority."

The question arose again before Chitty, J., in a case of *Harris v. Harris* (4). That was no doubt an *ex parte* application, but we submit that it goes to the substance of the case. Chitty, J., stated the principle to be that a plaintiff in an administration action is only entitled to interim relief against the administrator or executor when a case is shewn of assets being wasted. The law allows the administrator or executor to prefer one creditor to another, and there is no equity which entitles the Court to interfere, except after judgment for administration. The Courts of equity have said from earliest times that they would not do anything to interfere with the legal right of retainer, nor anything to promote it. In another case before the Court of Appeal, *The London and North Western Railway Company v. The Great Northern Railway Company* (5), an attempt was made to get an interlocutory injunction against carrying the case to arbitration. The Court held, upon the same section, that the power of granting the injunction was not extended by the Judicature Act, 1873, and said that they looked on the Act rather as regulating procedure than extending jurisdiction. The view of the Master of the Rolls has, therefore, been entirely disavowed and overruled by the Court of Appeal.

Then as regards the position of an executor who is also a trustee, an executor

who is not a trustee may consent to the appointment of a receiver at once, because he is dealing with his own rights; but here Lord Brooke is in the position of a single executor, who also happens to be one of a body of trustees, and in such a case it would be a breach of trust for him to consent, and so give up his legal right of retainer, which he holds in trust for his *cestuis que trust*—*Fox v. Garrett* (6), *Sander v. Heathfield* (7), *In re Hubback* (8), *In re Jones*; *Calver v. Laxton* (9), and *In re York*; *Atkinson v. Powell* (10). The order for a receiver, which has been made provisionally in this case, ought not to stand.

Graham Hastings, Q.C., and *Fossett Lock*, for the plaintiff.—This order ought to stand. The plaintiff is suing on behalf of himself and all other creditors, and the Court will not refuse him any assistance in procuring an equal distribution of the estate. The executor is just as much a trustee for the plaintiff, as a creditor of the estate, as he is for the applicant. The cases which have been relied on are cases of preference, and do not apply to a case of retainer. An administration judgment does not prevent an executor retaining, but it does prevent him from preferring a creditor. The case of *Phillips v. Jones* (2) was only a decision that the Court will not, for the purpose of stopping the preference of a creditor, appoint a receiver. But that does not apply to a case of retainer, because the executor may retain notwithstanding the judgment; and therefore the only way in which you can stop a retainer as regards the executor is by obtaining the appointment of a receiver.

[STIRLING, J.—Is there any authority that you are entitled to appoint a receiver merely for that purpose?]

No direct authority, but it is assumed by Cotton, L.J., in *Richmond v. White* (11).

(6) 28 Beav. 16; 29 Law J. Rep. Chanc. 428.

(7) 44 Law J. Rep. Chanc. 113; Law Rep. 19 Eq. 21.

(8) 54 Law J. Rep. Chanc. 923; Law Rep. 29 Ch. D. 934.

(9) 55 Law J. Rep. Chanc. 350; Law Rep. 31 Ch. D. 440.

(10) 56 Law J. Rep. Chanc. 552; Law Rep. 36 Ch. D. 233.

(11) 48 Law J. Rep. Chanc. 798; Law Rep. 12 Ch. D. 361.

(3) Prec. in Chanc. 188; Colles, 229.

(4) 56 Law J. Rep. Chanc. 754.

(5) Unreported.

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We submit that all the authorities against us were cases of preference.

[STIRLING, J.—Yes; but the principle is the same.]

The point has never yet been decided; but where an order for a receiver has been made at the instance of a creditor and with the consent of the executor, no other creditor has a right to come and have the order discharged.

[*Talbot v. Hope Scott* (12) was also referred to.]

Buckley, Q.C., and *Onslow*, for Lord Brooke.—Lord Brooke's position as executor of one will and trustee of another is a difficult one, and he desires to act only and entirely under the direction of the Court.

STIRLING, J.—This is an application to discharge an order which I made last week for the appointment of a receiver of the estate of William Wells, late of Holme, in the county of Huntingdon. The action is brought by a creditor, on behalf of himself and all other creditors, against the legal personal representative and a trustee of the will, who is named as an executor and has not proved. These were the only defendants, I believe, when the order was made; but since then other persons, including the present applicant, have been added as defendants, and are now parties to the action. I do not discharge the order which I made, as I said yesterday week, on the ground that any of the parties to the proceedings were guilty of any impropriety whatever in coming here and asking for the appointment of a receiver, or that they withheld anything from the Court of which the Court ought to have been informed. Certainly, as far as regards what took place in Court, there was no impropriety whatever, because I was informed by the learned counsel engaged of all the facts which appear to me now on this hearing really material to the decision of the case, and nothing that I can see was kept back. The application was for a receiver, and I was informed on the one hand that the executor was not unwilling, to say the least—perhaps I may go so far as to say

(12) 4 Kay & J. 96, 139; 27 Law J. Rep. Chanc. 273.

he was willing—that the receiver should be appointed, but that on the other hand he could not consent, because the present applicant insisted that the right of retainer legally vested in the executor, should be exercised in his favour, and that, further, a summons had been taken out by the present applicant for the purpose of enforcing that right. Under these circumstances, seeing that the executor is not unwilling that the assets of the testator should be distributed in the manner which is favoured, if I may say so, by the Court of equity, where lawfully it can be done—that is to say, in such a way as to produce equality among the various creditors—I thought the best course to take was to appoint a receiver, and at the same time to protect the interests of the then absent party, by imposing a term upon the plaintiff in the action that he should accept short notice of motion to discharge the order which I made. I did not make that order altogether without consideration. I need not go into the considerations which guide me on the present occasion; but I am bound to say now, having further considered the matter and heard the arguments, I think I should have done better if I had simply directed the motion to stand over in order that the present applicant might be brought here. However, the present applicant immediately gave notice of motion. An application was made to me to stay the completion of the order until that motion had been heard; and the order has not been completed, still less has anything been done under it, and the position of the assets is precisely the same at this moment as it was yesterday week, when the order was made, and no party has as yet been prejudiced.

Now I have to consider whether really it is right and proper that a receiver should be appointed on the present occasion. The position of matters is this: The defendant, Lord Brooke, who is the legal personal representative of the testator, has vested in him and Admiral Wells, as trustees of the will of Mr. Wells of Redleaf, a debt due from the testator's estate. The beneficiaries under that will say this: "You, Lord Brooke, by virtue of your position as executor, have

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acquired at law the right of retaining out of the legal assets of the testator the debt which is legally due to you, and we insist that you shall use that legal right for our benefit," and they have taken out a summons in this branch of the Court for the purpose of having that question determined.

That summons is not ripe for hearing, but it is obvious that there is a question to be considered upon it, and it is not right that anything should be done to prejudice the position of the present applicant until that question is determined.

Now the effect of appointing a receiver is this: that the assets will be intercepted before they reach the hands of the executor; and it may be—I do not say necessarily that it will be—that by that means the assets which would otherwise be applicable in payment of the debt due to the Redleaf trustees will be prevented from being so applied. The present applicant, therefore, has an interest in seeing that no order is made which would prejudice that right, and he comes here and says that no sufficient ground has been shewn for the appointment of a receiver. Now the state of matters is this: The appointment of a receiver is not made by consent; the executor takes up this position, that he is very willing to submit to the appointment of a receiver, and he is very willing to abstain from exercising his right of retainer if he can properly do so; but that, while this question is pending between him and the beneficiaries under the will of Mr. Wells of Redleaf, he cannot consent to any order which would prejudice their rights; therefore he does not consent, and the order cannot be treated as a consent order. The only question is whether any ground other than that of consent can be shewn for obtaining the order.

Now it is admitted, and it is common ground to all parties, that Lord Brooke has not been guilty of any impropriety as regards the assets, he has not wasted them or done anything which is wrong in any way, and the only question which appears to me to arise is this—whether it is right and proper that a receiver should be appointed simply on the ground that Lord

Brooke may, and probably will, exercise the legal right of retainer which is vested in him to the prejudice of the general creditors of the testator. The question in that precise form does not seem to have been the subject of decision, but there are certain decisions which have been referred to which appear to me to indicate clearly the course which I ought to take under the circumstances. In the case of *In re Radcliffe* (1) it was decided by the late Master of the Rolls that "where an executor or administrator, after the commencement of a creditor's administration action, and before judgment, has voluntarily paid any creditor in full, the rule in equity and not at law must now prevail under the Judicature Act, 1873, s. 25, sub-s. 11, and he will accordingly be held to have made a good payment, and will be allowed it in passing his accounts, even though he may have had notice of the action before payment." To that decision no objection has been taken, or indeed can be taken, in this Court, because it has been recently followed by the Court of Appeal.

But the Master of the Rolls at the conclusion of his judgment said this: "The only way to prevent such payments being made is by the plaintiff upon issuing the writ immediately applying for and obtaining a receiver." That was a *dictum* only, but I believe that I am right in saying that upon that *dictum* many applications for receivers were made, and were acceded to, both by the late Master of the Rolls and also by other Judges of the Chancery Division, and that in none of these cases was any resistance offered to the application. But that came to an end upon a decision of the Court of Appeal in the year 1884—*Phillips v. Jones* (2)—this case of *In re Radcliffe* (1) having occurred in the year 1878. There the application for the appointment of a receiver was made to the Vice-Chancellor of the County Palatine of Lancaster, and the only ground alleged for asking for a receiver was that the executors would not admit assets, and that they would be entitled, according to the settled rule in equity, before judgment in the action, to pay in full any creditor whom they might choose to prefer. Reliance was placed on the power given to

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the Court by sub-section 8 of section 25 of the Judicature Act, 1873, to appoint a receiver by an interlocutory order "in all cases in which it shall appear to the Court to be just and convenient that such order should be made"; and on an observation made by Sir G. Jessel (Master of the Rolls) in *The European Assurance Society v. Radcliffe* (1), in which case, when deciding that the old rule in equity that an executor is entitled at any time before a decree is made in an administration suit of which he has notice to pay a creditor in full still remained in force, he added, "the only way to prevent such payments being made is by the plaintiff, upon issuing the writ, immediately applying for and obtaining a receiver." Vice-Chancellor Bristowe declined to appoint a receiver, and the Court of Appeal (Lord Justice Cotton, Lord Justice Bowen, and Lord Justice Fry) affirmed his decision. The Court said that "sub-section 8 of section 25 of the Judicature Act only gave the Court power to appoint a receiver in aid of existing rights. The words 'just and convenient' must be construed with reference to the existing law of the country. To accede to the present application would amount to a reversal of the decision of the House of Lords in *Darston v. Lord Orford* (3), which established the right of an executor to pay a creditor in full after the institution of a suit to administer the testator's estate, but before decree. The observations of Sir George Jessel, the Master of the Rolls, in *The European Assurance Society v. Radcliffe* (1) were only *dicta*, not necessary to his decision in that case; if they were intended to be a decision that in any creditor's administration action, without making any special case, merely because the executor would not admit assets, a receiver would be appointed, they were inconsistent with the course of authority." The matter does not rest there, because in the case of *Harris v. Harris* (4) an application was made to Mr. Justice Chitty for the appointment of a receiver on the like grounds; and what his Lordship said was this: "The principle is that a plaintiff in an administration action is only entitled to interim relief against the administrator or executor when a case is shewn of assets

being wasted. The law allows the administrator or executor to prefer one creditor to another, and there is no equity which entitles the Court to interfere except after judgment for administration. That is the law, and it is a curious state of things, and I do not say that I approve of it. I cannot, however, accede to the plaintiff's application, nor do I think that he would fare better in the Court of Appeal. I will, however, if the plaintiff still desires it, give leave to serve short notice of motion."

There the matter stopped, but that is a clear statement by the learned Judge of the principle on which these applications ought to be dealt with. It is that the plaintiff in an administration action is only entitled to relief against the administrator or executor when a case is shewn of assets being wasted. Now here there is no such case made. Then it is said that these cases only relate to the preference by an executor or administrator of one creditor to another, and that here I have to deal with the right of the executor to retain for his own debt. No doubt that is a difference; and it is a substantial difference, because, although the judgment for administration would interfere with the executor's right to prefer one creditor to another, it does not interfere with the executor's right of retainer; therefore there is a substantial difference between the two. But it seems to me that in principle one case governs the other. The Court of Appeal, in *Phillips v. Jones* (2), say that they will not interfere with the legal right of an executor to prefer one creditor to another. Here it seems to me that in like manner I ought not to interfere with what is a legal right of the executor to retain in satisfaction of a debt. In coming to that conclusion in the present case, I feel strongly that if I abstain from appointing a receiver the general creditors are not likely to be prejudiced; whereas if I continue the present order, and appoint a receiver, the applicant in this case may be prejudiced. As I have already pointed out, by the appointment of a receiver, assets applicable for the payment of the applicant's debt may be diverted from the hands of the executor; whereas if the assets are allowed to come

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to the hands of the executor, he is not thereby precluded at the proper time from asserting his right of retainer.

I think, therefore, that, with the view of keeping the matter *in statu quo*, and not prejudicing any right, I ought to discharge the present order; but, for the sake of saving expense, I will allow the motion to be again brought on after the decision upon the summons which has been taken out by the present applicant. As regards costs, it seems to me I should be doing justice if I made them costs in the action.

Solicitors—Hasties; H. A. Dowse, Frere & Co.

FRY, L.J.
(for KEKEWICH, J.) } *In re BOWDEN.*
1890. } ANDREW v. COOPER.
August 7, 8.

Trustee—Breach of Trust—Practice—Parties—Amendment—Statute of Limitations—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, sub-s. 1 (a) (b), sub-s. 3—Rules of Supreme Court, Order XVI. rule 8.

In an action commenced after the 1st of January, 1890, to render trustees liable for a loss arising from an improvident investment of the trust funds, where the breach of trust is committed more than six years before the commencement of the action,—Semble, clause (a) of sub-section 1 of section 8 of the Trustee Act, 1888, does not apply, but, held, that clause (b) applies.

Where a claimant against the estate of a deceased person seeks to follow the assets into the hands of a trustee, it is not necessary to make the beneficiaries parties.

Dictum of MALINS, V.C., in Clegg v. Rowland (36 Law J. Rep. Chanc. 137, 140; Law Rep. 3 Eq. 368, 373) dissented from.

This was an action by John Orrell Andrew, who was one of the trustees of the will of William Bowden, deceased,

against his co-trustee, James Gould Cooper, Richard Greateorex, who was the sole acting executor of the will of Daniel Greateorex, a deceased trustee, and the representatives of Frederick Baxter, another deceased trustee, to recover sums, amounting in the whole to 8,400*l.*, in respect of several breaches of trust committed in 1874 and 1878 before the plaintiff's appointment. The alleged breaches of trust consisted in advancing money upon freehold securities of insufficient value. There was no real defence to the action upon the merits.

The writ, which was issued on the 28th of March, 1889, sought relief against Richard Greateorex only in his character of executor.

The statement of claim alleged as follows:—Par. 21. "The said Daniel Greateorex died on the 17th of January, 1883, having by his will, dated the 28th of July, 1881, devised his real and the residue of his personal estate to the defendant Richard Greateorex, and one John Law Worthington, their heirs, executors, administrators, and assigns, upon trust to appropriate two trust legacies of 6,000*l.* and 5,000*l.* respectively, and to stand possessed of the clear residue of the estate upon trust for the persons therein mentioned, and appointed the defendant Richard Greateorex, and the said John Law Worthington, and Albert Daniel Greateorex, and Frederick Greateorex, executors of the said will."

Par. 23. "The estate of the said Daniel Greateorex was not sufficient to provide for the payment of the said two trust legacies of 6,000*l.* and 5,000*l.* in full, but a sum of 8,000*l.* has been invested on mortgage in the name of the defendant Richard Greateorex, and is now held by him as executor and trustee of the will of the said Daniel Greateorex, and is applicable to answer the claim raised in this action."

Par. 24 alleged that, under the circumstances above stated, the estate of Daniel Greateorex was liable to make good the losses arising to the trust estate of William Bowden.

The claim asked for a declaration that Richard Greateorex was liable, as executor

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of Daniel Greatorex, to make good the losses out of his testator's estate, and for the administration of the real and personal estate of Daniel Greatorex so far as necessary.

Richard Greatorex in his defence denied that the sum of 8,000*l.* invested on mortgage, as mentioned in the statement of claim, was held by him as executor of the will of Daniel Greatorex, or that it was applicable to answer the claim raised in the action, and stated that he had caused the usual statutory notice to creditors to be issued, and that, not having any notice of the claims alleged in the action, he had distributed the estate.

Warmington, Q.C., and *Methold*, for the plaintiff, contended that, as the defendant Greatorex was before the Court, the plaintiff was entitled to follow the 8,000*l.*, the right of following assets in such a case being expressly reserved by 22 & 23 Vict. c. 35. s. 29. The issue was distinctly raised in the statement of claim, and the defendant was liable both as executor and trustee. If the plaintiff was entitled to follow the money, it was not necessary to join the persons beneficially interested in the trust legacy—Order XVI. rule 8. They asked leave to amend the writ if necessary.

Neville, Q.C., and *T. L. Higgins*, for the representatives of Baxter.

O. L. Clare, for the executors of Cooper, who had died since the commencement of the action.

S. Hall, Q.C., and *E. S. Ford*, for Greatorex.—Greatorex is sued as executor both in the writ and in the claim, and the action ought to be dismissed as against him. On the fair construction of the statement of claim no case is made for following the assets. There is a substantial reason why leave to amend should not be granted, because, if a new action were commenced, Greatorex would be entitled to the benefit of the Statutes of Limitation, under section 8 of the Trustee Act, 1888. That section applies to all actions commenced after the 1st of January, 1890. But, assuming that he may be made liable as trustee, the beneficiaries are necessary parties to the action. *Clegg*

v. Rowland (1) is in our favour on all points.

Methold replied.

FRY, L.J.—One point which has been raised is this. Assuming that the defendant Greatorex is sued as trustee of the trust legacy on the principle of the plaintiff seeking to follow the assets, is it necessary that the *cestuis que trust* should be parties to the action? I think that rule 8 of Order XVI. covers this case. There is no doubt a discretionary power in the Court to require the *cestuis que trust* to be made parties, and there are some observations of Vice-Chancellor Malins which seem to shew that in such a case as this the Court would require the presence of the *cestuis que trust*. Those observations were made with reference to the 9th rule of section 42 of the Chancery Improvement Act, which was substantially to the same effect as the rule now in force. The Vice-Chancellor says: "I find by the decisions upon this section, which are collected in Mr. Morgan's book (3rd ed. p. 196), that in all cases where the Court sees executors or trustees are wholly uninterested in the question, it will never make a decree in the absence of those parties who are alone interested in the contest, but will have them brought before the Court in order that those who are interested in resisting the demand may resist it at the proper time, which is the hearing of the cause." That, in my judgment, does not accurately represent the present practice of the Court. It is obvious that if that were the practice, the discretion of the Court would be gone. I have no hesitation in determining that the *cestuis que trust* are not necessary parties. Then comes the question: Is this defendant sued as executor, or is he sued as trustee? I shall not express any opinion on that point at present.

[His Lordship then offered the plaintiff the option of trying the case on the present pleadings, or amending the pleadings by making Greatorex liable as trustee, the amendment to be subject to the condition

(1) 36 Law J. Rep. Chanc. 137; Law Rep. 3 Eq. 368.

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that the action should be treated as if it had been commenced on that day, and as if Greateorex had set up in his defence any benefit arising from the analogy of the Statutes of Limitation to which he might be entitled under section 8 of the Trustee Act, 1888. The plaintiff having elected to amend on these terms, the case was continued on that footing.]

Warmington, Q.C., and *Methold*, for the plaintiff.

Hall, Q.C., and *E. S. Ford*, for the defendant Greateorex.—We submit that the action ought to be dismissed as against this defendant. Assuming that this defendant had not been a trustee, the action would have been an action on the case for negligence. We rely on section 3 of the statute of James I. The only breach of trust in this case was negligence in the duty of administering the trust. The intention of the Legislature was to give to trustees a bar based on the analogy of the Statutes of Limitation, except in the particular cases specified in section 8.

Methold, in reply.—This is an action for breach of trust. An action on the case is essentially different from the present action, in that it is an action for damages. There is no Statute of Limitations which applies.

[*Fry, L.J.*, then delivered judgment in favour of the plaintiff against the defendants other than Greateorex, and he reserved judgment on the question arising under the Trustee Act.]

Aug. 8.—*Fry, L.J.*—This is an action brought by a trustee who has been recently appointed against an old trustee and the representatives of two deceased trustees. That is the nature of the action. One of the defendants is the executor of a certain Mr. Greateorex, who was one of the trustees. That estate has been administered, and advertisements have been issued in the usual way. Objection was taken that it was necessary that the beneficiaries should be parties to the action if any relief was to be sought against the funds remaining in the hands of the defendant Mr. Greateorex, which are trust legacies of which he is trustee. I yesterday de-

termined that they were not; but then the question arose whether or no, in the present state of the pleadings, this was or was not an action to follow assets, or whether it was an action as regards Mr. Greateorex merely in his character of executor. On the pleadings as they stand a difficulty arises in consequence of the allegation contained in the 23rd paragraph of the statement of claim. It is obvious that that allegation is somewhat embarrassing, because the trust money is said to be held by Greateorex in two inconsistent characters, as executor and trustee. Then the plaintiff's claim asks that it may be declared that the defendant Richard Greateorex is liable as executor of Daniel Greateorex out of his estate to make good the losses to the estate of William Bowden, and it prays, so far as necessary, that the real and personal estate of Daniel Greateorex may be administered under the direction of the Court; and I ought further to add that the writ, as originally drawn, was brought against Richard Greateorex as executor, and was never amended.

In that state of circumstances what I did was this. I offered to the plaintiff's counsel either to go on with the action as it then stood, in which case I should have had to determine the effect of the pleadings, or to amend, provided that if the amendment was made with a view of stating a case for following assets, it should be subject to two conditions—one, that the action should be treated as if it was instituted yesterday; and the second, that not only should the plaintiff's pleadings be amended, but the defendant's pleadings should be treated as amended, by allowing the defendant to set up every Statute of Limitations on which he could rely. After consultation between the learned counsel who represented the plaintiff, they elected to amend, subject to those conditions. Therefore, I have so treated the pleadings as amended.

That raises this question, whether or no the Trustee Act of 1888 does, under the circumstances, furnish a defence. In order to shew how that arises, I ought to mention that the last of the breaches of trust which are relied on took place as long ago

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as the year 1878, more than six years before the action was begun. The 8th section of the Trustee Act of 1888 is, as regards part of it, in these terms: "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply." I think it is plain that neither of the three excepted cases includes the present action, and, therefore, the clause would apply. Clause (a), which is the first provision, is this, "All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him." That was, rather curiously, the sub-section relied on by the defendant. That I do not think can apply in this case. In the first place, it is obvious that, if he had not been trustee, he could not be sued for a breach of trust; and, further than that, there is no right or privilege that I am aware of, or which has been called to my attention, conferred by any Statute of Limitations in respect of a breach of trust. Therefore, I should have great difficulty in applying that sub-section to the present case. But the material clause, to which the defendant has not called my attention, appears to me to be clause (b): "If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies." I pause there to enquire whether the present action is within that description. It appears to me that it is. It is an action brought to recover money. It is an action to which no existing Statute of Limitations applies. In that event the provision is this: "The trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other pro-

ceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received." Pausing there, it appears to me that that gives the defendant a good defence under this new clause. If this had been an action for debt for money had and received, and the debt had arisen more than six years ago, and no acknowledgment had taken place in the meanwhile, the lapse of time would have furnished a defence. Then the clause goes on: "But so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without restraint upon anticipation"—that does not apply to this case—"but shall not begin to run against any beneficiary, unless and until the interest of such beneficiary shall be an interest in possession." That is a restriction upon the clause, but it is only as against a beneficiary, and a beneficiary is only affected from the time of possession. That limitation does not apply to the present case, because, in the present case, the action is brought by one of the trustees against another; and therefore neither of the provisoes, the one relating to married women, the other to beneficiaries, applies to the case before me. It appears to me, therefore, that this clause does furnish a defence, and, consequently, that as against the defendant Richard Greatorex the action must be dismissed, with costs.

Solicitors—Rowcliffes, Rawle & Co., agents for Claye & Son, Manchester, for plaintiff; H. Percy Becher, agent for Hedgcock & Ducker, Manchester, for representatives of Baxter and Cooper; Chester, Mayhew, Broome & Griffiths, agents for Bullock & Worthington, Manchester, for Greatorex.

CHITTY, J. }
 1890. }
 July 11, 12, } SHEPHERD v. HIRSCH, PRIT-
 17, 22. } CHARD AND COMPANY.

Practice—Service of Writ—Partnership—Foreign Partner—Rules of Supreme Court, 1883, Order IX. rule 6, and Order XVI. rule 14.

Where a partnership between a foreigner residing abroad and a British subject has, before the commencement of an action against the partnership, been dissolved, without the knowledge of the plaintiff, and the business has been carried on in England under the style of the firm by the foreigner alone, service of the writ on the partnership can be effected under Order IX. rule 6, and Order XVI. rule 14, by service, at the principal place within the jurisdiction of the business of the partnership, upon any person having at the time of service the management of the business.

Pollexfen v. Sibson (55 Law J. Rep. Q.B. 217; Law Rep. 16 Q.B. D. 792) discussed and followed.

A plaintiff, being ignorant of the dissolution of a partnership, served his writ under Order IX. rule 6 at the place of business where a former partner purported to carry on the business of the partnership firm, but which was not the place of business of the firm during the subsistence of the partnership:—Held, that the service was good service on the partnership.

The plaintiff, an English merchant at Lagos, had employed the firm of Hirsch, Pritchard & Co. as his London agents, and claimed an account and redemption of securities. The firm had originally consisted of two partners, Hirsch and Pritchard. Hirsch was a naturalised French subject resident in France. Pritchard was a British subject, and was assumed to be residing in England. The plaintiff had served his writ of summons, under Order IX. rule 6 (1), on the manager of the

(1) Order IX. rule 6: "Where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership, upon any person having at the time of service the control or management of

firm at the firm's place of business in London.

Hirsch now moved to set aside the service of the writ, alleging that at the date of service he was sole member of the firm, and that the plaintiff had knowledge of the dissolution of the partnership.

The plaintiff, however, alleged that he had no knowledge of the dissolution of the partnership, and contended that, under Order XVI. rule 14 (2), the service of the writ as against Hirsch was good, notwithstanding that he was a foreigner resident out of the jurisdiction.

It also appeared that the partnership business had been carried on at a house in Holborn, and that after the date of dissolution Hirsch had carried on the business, under the style of Hirsch, Pritchard & Co., in other premises in Fore Street, and that the writ had been served in Fore Street; and a question was raised on behalf of Hirsch whether service at Fore Street was service at the "place of business of the partnership" within Order IX. rule 6; but the point was not pressed.

Levett, for Hirsch.—Even assuming that the plaintiff had no knowledge of the dissolution of the partnership, the service of the writ under Order IX. rule 6, and Order XVI. rule 14, as against Hirsch is bad; for, under those rules, service cannot be effected against a foreign partner resident out of the jurisdiction—*Russell v. Cambefort* (3).

the partnership business there, and, subject to these rules, such service shall be deemed good service upon the firm."

(2) Order XVI. rule 14: "Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a Judge for a statement of the names of the persons who were at the time of the accruing of the cause of action co-partners in any such firm, to be furnished in such manner, and verified, on oath or otherwise, as the Judge may direct. Provided, that in the case of a co-partnership which has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ of summons shall be served upon every person sought to be made liable."

(3) 58 Law J. Rep. Q.B. 498; Law Rep. 23 Q.B. D. 526.

Shepherd v. Hirsch, Pritchard & Co.

Moreover, the proviso to Order XVI. rule 14 is prohibitive and not permissive. What it says, in effect, is that in no case shall the rule be applicable if the plaintiff has knowledge of the dissolution of the partnership. We submit, however, that even if the implication contained in the proviso be that the rule is to be applicable where the plaintiff is ignorant of the dissolution, the proviso does not operate to extend the rule so as to make the service reach a foreigner out of the jurisdiction, simply because the plaintiff is ignorant of the fact that such foreigner is no longer a partner. It is also submitted that the rule only applies to the case of a continuing partnership—that is to say, where there has been a partnership between three persons, or more, and one having gone out, the business is continued by those who remain. It does not apply to a partnership like the present, which is absolutely dead. The language of Order IX. rule 6 supports this view. The plaintiff's proper course is to apply under Order XI. for leave to serve Hirsch as a person out of the jurisdiction.

Romer, Q.C., and Ribton, for the plaintiff.—The effect of the applicant's contention is that a person abroad can never under any circumstances be reached by service at the English place of partnership, for the applicant's argument is not based on the person being a foreigner, but on his being out of the jurisdiction. All that was decided in *Russell v. Cambefort* (3) was that where there is a partnership of foreigners and all are out of the jurisdiction, seeing that they cannot be sued separately, they cannot be sued together. It is submitted that the present case falls within the *ratio decidendi* in *Pollexfen v. Sibson* (4), where it was held that service on one member of a foreign partnership when within the jurisdiction was good partnership service. The proviso to Order XVI. rule 14 was added with the object of getting rid of the doubts expressed in *Ex parte Young* (5) as to whether the rule in its then existing state (being the

same as at present, less the proviso) was applicable to the service of partnerships which at the date of service had been dissolved without the knowledge of the plaintiff. The inference from the proviso is that if a partnership is dissolved without the knowledge of the plaintiff, the partnership service is good. The contention that the rule is only applicable to partnerships of more than two members is negatived by the language of the rule, which, at its commencement, speaks of co-partnerships between two or more persons.

CHITTY, J. [after stating that the evidence was in a very unsatisfactory state, but as both parties were desirous that he should give judgment at once, he would do so, continued :—Hirsch's case is simple. He says, and it is proved, that he is a foreigner, naturalised in the Republic of France, and out of the jurisdiction of this Court. He further says and proves that at the time of the issue and service of the writ, the Fore Street business was carried on by him alone, and without any partner, under the style of Hirsch, Pritchard & Co.

In interpreting Order IX. rule 6 regard must be had to the ordinary principles of international law. It occurred to me that it was a question worthy of consideration whether where a State allows a foreigner to carry on business at a fixed place within its jurisdiction, it is not competent to that State to direct, consistently with such principles, that the foreigner, in return for the protection afforded to him by the laws of the State, should be liable as to writs or other processes issuing out of its Courts to be served at such place of business on his manager or agent there in respect of contracts entered into or arising in the course of such business. But I am precluded from entertaining any such question by the decision of the Court of Appeal in *Russell v. Cambefort* (3). In that case the three members of a partnership, carrying on business at a fixed place of business in England, were all foreigners residing out of the jurisdiction, and it was held that the service on their manager under Order IX. rule 6 was bad. It, therefore, follows that where the foreigner is the sole proprietor of the business the service

(4) 55 Law J. Rep. Q.B. 217; Law Rep. 16 Q.B. D. 792.

(5) 51 Law J. Rep. Chanc. 141; Law Rep. 19 Ch. D. 124.

Shepherd v Hirsch, Pritchard & Co.

is bad. If, then, these were the only facts in the case, my decision must be in favour of Hirsch. I, however, must hold upon the evidence as it stands that the plaintiff is right when he says that he was not aware of the dissolution of the partnership when he commenced his action. This additional fact brings me to the argument upon Order XVI. rule 14. The proviso to that rule was added by the Rule Committee after the judgment in *Ex parte Young* (5), where, on the rule as it then stood (being Order XVI. rule 10 of the Rules of 1875) before the proviso was added, doubts were expressed in the Court of Appeal whether the words "partners" and "partnership" were applicable to partners in a firm which had been dissolved before the commencement of the action. Lord Selborne pronounced no opinion on the point, but Lord Justice Cotton said (6), "In my opinion, such persons can no longer properly be called partners. . . . I think it is reasonable to say that when persons are engaged in carrying on a partnership they may be sued in the firm's name, and that service at the place of business of any one of the partners shall be good service on all. The subsisting relations of partnership will ensure that those who have thus in fact notice of the action will give notice to or protect the interest of the others. But when the partnership has been dissolved, there is no security that such will be the case." The passage which I have read has a bearing upon the arguments in this case. Then Lord Justice Brett gives a contrary opinion on the point. Now the proviso was added, of course, by the Rule Committee with knowledge of the doubts expressed in *Ex parte Young* (5). The proviso is: [His Lordship then read the proviso in Order XVI. rule 14, and continued:] This provides affirmatively for the case where the plaintiff knows at the commencement of the action that the partnership has been dissolved. It does not in terms provide for the case where he does not know that it has been dissolved; but it is impossible to read this proviso—which is a proviso in the form of a partnership rule—without seeing that it

was considered that the other case was comprised within the terms of the rule apart from the proviso. The argument of Mr. Levett, therefore, cannot be adopted, and, as it appears to me, it would be putting a wrong construction on the rule to hold that where a plaintiff does not know of the dissolution of the partnership he cannot serve his writ on the firm which has been dissolved.

Then Mr. Levett put forward another ingenious argument, the effect of which is this—that there must be a continuing partnership to bring the case within the rule; and he says if the partnership is between three or more persons, and one of the partners goes out so as to make a dissolution in law and the others continue in the partnership, the rule would apply to the partnership thus continued (continued, of course, is a loose term, because the partnership is really a new partnership); but if the partnership is one between two persons, and two only, and one goes out and the other continues the business, there is a dissolution, to which the rule is not applicable. That, however, is against the express language of Order XVI. rule 14, commencing as it does with the words "Any two or more persons claiming or being liable may sue or be sued in the name of their respective firms." Therefore, I am unable to adopt that argument, because I think that the contrary is said.

Now, then, I have got so far as this—if the business of Hirsch, Pritchard & Co. had been carried on by Englishmen, and if the partnership had been dissolved without the knowledge of such dissolution coming to the plaintiff before the commencement of the action, the service of the writ on the manager at the place of business would be good service. I may mention here that a point was raised on behalf of Hirsch, but not pressed, that Fore Street was not the place of business where the partnership was ever carried on, and that when the partnership subsisted the place of business was in Holborn. Fore Street, however, was the place where business was carried on under the name of Hirsch, Pritchard & Co., whatever was meant by the name, and, under those circumstances, I hold it was a proper place

(6) 51 Law J. Rep. Chanc. at p. 148.

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for effecting service under Order IX. rule 6.

I now come to the last point taken on behalf of Hirsch. It is a curious one. It is said that, taking it for granted that if both the partners had been British subjects carrying on business here, the service would have been good; yet the fact is, Hirsch is a foreigner. Therefore it is said he owes no allegiance to this country, and he must be served, if served at all, under Order XI.—that is to say, the plaintiff must issue a concurrent writ and serve him with notice.

Now, for this, *Russell v. Cambefort* (3) is again relied on, and there are certainly some observations of Lord Justice Cotton in that case which countenance that contention, or, at any rate, his observations have been relied on as supporting that contention. But there was a prior decision of the Divisional Court—*Pollexfen v. Sibson* (4). In the report of that case, as I understand it, it was during the argument assumed that Sibson, a partner in the firm named as defendants in the writ, had been served in this country at a place of business of the firm here. But I have since been furnished with copies of the affidavits and with the orders in that action, from which it appears clearly that the firm had no place of business here, and that Sibson was simply served here personally while he was within the jurisdiction. Mr. Justice Mathew and Mr. Justice Smith held that service on Sibson alone was good service on the firm. The service was effected under the first branch of Order IX. rule 6—namely, on one of the partners while within the jurisdiction. Now, the Court of Appeal in *Russell v. Cambefort* (3) did not, as I read the judgment, overrule the decision in *Pollexfen v. Sibson* (4); and it is my duty, therefore, to follow that decision. The effect of the decision as it stands is plain. Service on one partner within the jurisdiction is good service on all the partners, although the partnership is a foreign partnership and all the partners reside and are domiciled out of the jurisdiction. On the facts before me, although Pritchard is not a party to the motion, I am bound to decide that the service effected is good service on

him. Consequently, the decision in *Pollexfen v. Sibson* (4) applies, and the service is good as against Hirsch, although he resides out of the jurisdiction.

I wish to make one observation. No doubt Mr. Levett is right in saying that Pritchard, or any other members of the firm sued and served here—if the firm had consisted of other partners within the jurisdiction—are rightly served as to all of them, though not served personally, but only served on them at the place of business; and also that he is right in saying that if I exclude Hirsch from that service on the ground that he is a foreigner out of the jurisdiction, Hirsch could be reached by a concurrent writ issued for the purpose of allowing him to be served with notice of it out of the jurisdiction. But I am unable to see any sufficient reason why the rules should be interpreted in so narrow a sense.

I hold that the service of the writ is good as against Hirsch, and dismiss the application, with costs, in any event. The time for entering appearance will be extended by a period of seven days from the present date.

[*Note*.—On the day following his Lordship's decision further evidence was produced on behalf of Hirsch, proving that the plaintiff, when he commenced his action, was aware of the dissolution of the partnership. His Lordship accordingly made an order acceding to Hirsch's application, and setting aside the service of the writ, and giving Hirsch his costs, in any event.]

Solicitors—Lewis & Lewis, for Hirsch; Ralph Raphael, for plaintiff.

CHITTY, J.
1890.
July 31.

In re THE WEST RIDING OF
YORKSHIRE PERMANENT BENEFIT
BUILDING SOCIETY (No. 2);
ex parte PULLMAN, *ex parte*
CHARNOCK, *ex parte* JOHNSON
AND GREENWOOD.

Building Society—Winding-up—Liability of Withdrawn Members—Society's Borrowing Powers—Mode of calculating—Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 15, sub-s. 2.

Members of a building society who have either redeemed their mortgages or withdrawn their shares before the date of its winding-up are not liable to make good any deficiency in its assets.

In calculating the extent of a building society's borrowing power, as limited by the Building Societies Act, 1874, s. 15, sub-s. 2, "the total amount borrowed and not repaid by the society" is not to be taken as reduced by sums secured to the society from non-members; and the amount "secured to the society by mortgages from its members" need not have been advanced to them on the value of their shares.

This society was ordered to be wound up, as reported *ante*, p. 197; Law Rep. 43 Ch. D. 407, where it was held that the borrowing members of the society were liable under the rules to contribute to the losses sustained by the investing members by reason of the assets being insufficient to satisfy their claims.

Questions were now raised by summons in the winding-up, (a) in the case of Pullman, whether a borrowing member who had redeemed his mortgage by paying the full amount due from him under the rules, and had received back his deeds with a receipt indorsed on the mortgage-deed, prior to the date of the winding-up, was liable to contribute to the above-mentioned losses; and (b) in the case of Charnock, whether a member whose shares had been, some realised and some withdrawn, prior to the date of the winding-up, was similarly liable.

By the society's rules, on the amount of a member's share being realised, he was to receive the same, subject to certain deductions, "and should he wish to con-

tinue a member of the society, he may do so upon re-entering the same and paying the re-entrance fee"; and any unadvanced member was to be at liberty to withdraw from the society on notice and payment of a fine per share, "and the full amount then due from such member for subscriptions, fines, and other payments."

Romer, Q.C., and W. Baker, for the liquidator.

Whitehorne, Q.C., and Levett, for Pullman.

Latham, Q.C., and Godefroi, for Charnock.

CHITTY, J., held in both cases that the members had ceased, to all intents and purposes, to be members of the society at the time it was wound up. Had there been subsequently a triennial adjustment under rule 40 (*ante*, p. 198), they could not have claimed any profits then ascertained. It followed that they could not be liable for any losses then ascertained. There had been a stated account between them and the society. They were, therefore, not liable to be placed on the list of contributories.

Questions were also raised on claims made by two depositors, Johnson and Greenwood, with respect to the validity of the borrowings made by the society under a power in their rules to the same effect as that conferred by the Building Societies Act, 1874, s. 15, sub-s. 2—namely, "The total amount borrowed and not repaid shall not at any one time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members," such questions being whether the latter amount included (a) moneys secured to the society by mortgages from persons who were only borrowers from, but not members of the society; (b) moneys so secured from persons who were members, but not advanced to such persons in respect of their shares.

CHITTY, J., without requiring any argument, held that the first-mentioned moneys were not, but that the second

In re West Riding Permanent Benefit Building Soc. ; ex parte Pullman.

were, to be included in "the amount for the time being secured to the society by mortgages from its members."

Thereupon the question arose whether the first-mentioned moneys were to be included in the amount at any time "borrowed and not repaid" by the society, on which

Byrne, Q.C., and *Levett*, for the depositors, contended that in calculating the amount of any borrowing by the society in excess of the two-thirds limit imposed by the rules, the total amount so borrowed ought to be considered as reduced by any sums which might be owing to the society on security from non-members.

Romer, Q.C., and *W. Baker, contra*, contended that the effect of the rule was to contrast the amount of borrowings from any source with loans from a specific class—that is, members.

CHITTY, J., held that the term "total amount borrowed" meant, not borrowed

from members, but borrowed from anybody, without any limitation. But the term with which it was to be compared was, not the total amount for the time being secured to the society by mortgages generally, but a particular class of mortgages—namely, "mortgages from its members." The meaning of the rule was plain, two-thirds of the latter amount was the limit of the society's borrowing power at any given point of time. The question must be answered in the negative.

Solicitors—Burn & Berridge, agents for J. R. Farrar, Halifax, for the liquidator; J. H. Bridgford, agent for Jubb, Booth & Helliwell, Halifax, for depositors and shareholders.

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the testator owed trade debts not secured by mortgage, and private debts which were secured by mortgage of real and leasehold estate used in his business, and also of real and leasehold estate not used in his business. On the question whether the real and leasehold estate used in the business was primarily liable together with the other real and leasehold estate to the payment of the mortgage debts under Locke King's Act and the Amendment Acts,—*Held*, that the testator having divided his debts into two classes, trade debts and private debts, and as to the first class having clearly indicated a contrary intention so as to exclude the operation of the Acts, the necessary implication was that he had the same intention in dealing with the second class, and that the mortgage debts were therefore primarily payable out of the proceeds of sale of the residuary real and personal estate. *In re Nevill; Robinson v. Nevill*, 511

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2. — *reference: terms: injunction to restrain arbitration: particulars of differences*—Where, in pursuance of articles of partnership, some of the partners proceed to the appointment of arbitrators for the settlement of differences arising between the partners, but without specifying what the differences are, and refuse to supply the other partners, whom they call upon to appoint their arbitrators, with particulars of the matter to be referred, the Court has jurisdiction to grant an injunction in restraint of further proceedings in the arbitration, but will not do so, inasmuch as the proceedings of such an arbitration, carried on against the will of the dissenting partners, would have no binding effect upon the latter. *Farrar v. Cooper*, 506

3. — *staying legal proceedings: agreement to refer matters in dispute: question of law: discretion of court: arbitration act, 1889 (52 & 53 Vict. c. 49), ss. 4 and 19*—A deed made between four partners contained a clause providing that, whenever any difference should arise between all or any of the partners, or between any of them and the executors of any other or others of them, touching the construction of the deed, or anything therein contained, or any account, valuation, &c., or any other thing in anywise relating to the partnership, or the business or affairs thereof, such dispute should be referred to arbitration, pursuant to the provisions of the Common Law Procedure Act, or any then subsisting statutory modification thereof. After the death of two of the partners, the executors of one of them commenced an action against the two surviving partners and the executors of the other deceased partner, claiming payment from the defendants, jointly and

severally, of a sum alleged by the plaintiffs to be due to them as executors in respect of their testator's share and interest in the partnership. Before delivery of any defence, two of the defendants took out a summons asking that, pursuant to section 11 of the Common Law Procedure Act, 1854, all proceedings in the action might be stayed and the matter in dispute referred to arbitration. The summons came on for hearing after the day when the Arbitration Act, 1889, came into operation. The Court, in exercise of the discretion conferred upon it by section 4 of the Act, ordered the summons to stand over until after the delivery of the defences, in order that the parties might have an opportunity of then applying to the Court to decide any question of law raised by the pleadings, before referring the matter to an arbitrator to decide any question of account. *In re Carlisle. Clegg v. Clegg*, 520

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A holder of a promissory note when on his death-bed expressed a wish that the debt should be forgiven, and directed the note to be searched for and destroyed, and the note not being forthcoming, the nurse at his instance made a memorandum as follows: "It is by Mr. G.'s" (the holder's) "dying wish that the note for 2,000*l.* money lent to Mrs. F.

Bill of Exchange (continued)—

be destroyed as soon as found." The memorandum was signed by the nurse, but not by the holder:—*Held*, that, apart from any question as to whether the renunciation should have borne the signature of the holder (which question the Court held entirely open), the memorandum did not operate as a renunciation of the note under the Bills of Exchange Act, 1882, s. 62, sub-s. 1, inasmuch as it was competent for the holder to have revoked his wish and orders with respect to the destruction of the note. *Ibid*.

A promissory note payable on demand with interest is "at maturity" notwithstanding no demand has been made. *Ibid*.

Norton v. Ellam (3 Mee. & W. 461; 6 Law J. Rep. Exch. 121) followed. *Ibid*.

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Building Estate—restrictive covenant. See COVENANT, 2, 3.

Building Society—arbitration: dispute with withdrawing member: appointment of arbitrators after action commenced—By one of the rules of a benefit building society it was provided that every dispute between the society and any member in which the decision of the board should not be deemed satisfactory should be settled by a reference to arbitration pursuant to the Building Societies Act, 1874, and that five arbitrators should be elected by the members at a general meeting. A dispute having arisen between a member who had given notice of withdrawal and the society as to the amount which the member was entitled to receive on withdrawal, an action was commenced by the member against the society to enforce his claim. At the date of the issue of the writ in the action no arbitrators had been appointed pursuant to the rules. After the writ had been served a meeting of members was held, and five persons were elected arbitrators. The society then took out a summons to stay all further proceedings in the action and to have all matters in dispute referred to arbitration pursuant to the rules of the society:—*Held*, that the society could not, after litigation had commenced, nominate the tribunal to decide the question in dispute. *Christie v. Northern Counties Permanent Benefit Building Society*, 210

2. — **borrowing power: extent: "amount secured by mortgage": building societies act, 1874 (37 & 38 Vict. c. 42), s. 18, sub-s. 2: society borrowing ultra vires: extent of lender's right to have the benefit of securities obtained by means of the loan**—In calculating the extent of a building society's borrowing power, which, by the Building Societies Act, 1874, s. 18, sub-s. 2, is not to exceed "two-thirds of the amount for the time being secured to the

society by mortgages from its members," the amount so secured is not to be limited to the principal sum secured by such mortgages, but covers all sums due thereon at the date when the borrowing power is exercised, whether for principal, or interest, or fines, or otherwise, and all instalments not then accrued due, but secured by such mortgages and outstanding. *North Permanent Benefit Building Society v. Lucas*, 3

The right of a person who has lent money to a building society in excess of its borrowing power to have the benefit of securities obtained from members of the society by means of the loan extends to the whole amount covered by such securities, although a lesser amount was, in fact, received by the members from the society. *Ibid*.

The Blackburn and District Benefit Building Society v. Cunliffe, Brookes & Co. (54 Law J. Rep. Chanc. 1091; Law Rep. 29 Ch. D. 902) followed. *Ibid*.

3. — **directors: misfeasance: imprudent investment: ultra vires: negligence: building societies act, 1874 (37 & 38 Vict. c. 42), ss. 13, 16, and 25**—The rules of a building society registered under the Building Societies Act, 1874, provided that advances might be made on leasehold security, and that none of the directors should be answerable for the insufficiency or deficiency in the title or otherwise of any security, unless the loss arising therefrom should happen through their own neglect or default; and that when the directors were of opinion that the premises were a sufficient security, and the solicitor was satisfied as to the title, the amount advanced should be paid to the borrower upon his executing a mortgage in the form required by the solicitor:—*Held*, that the directors were not liable for the loss of a sum advanced upon a second mortgage of a leasehold colliery and certain collateral security, although the valuer on whose opinion they acted was selected by the chairman from a list of four names supplied by the mortgagor. *Sheffield and South Yorkshire Building Society v. Aislewood*, 34

The directors subsequently advanced 41,000*l.*, which they borrowed for the purpose of paying off the first mortgagees, who were threatening to foreclose, and they entered into possession and expended large sums in payment of rents and royalties and in working and maintaining the colliery:—*Held*, that the directors had an implied power to pay off the first mortgage and to enter into possession and pay the rents and royalties and proper expenses of working, and were not liable for loss resulting thereby. *Ibid*.

Such directors are in a different position from trustees, and are at liberty to accept securities which trustees could not accept. *Ibid*.

Small v. Smith (Law Rep. 10 App. Cas. 118) explained and distinguished. *Ibid*.

Building Society (continued)—

4. — *mortgage: marshalling: security and set-off: separate assignees*—A member of a building society obtained an appropriation of 500*l.* in respect of certain shares, repayment of which was secured by mortgage to the society. He also continued his subscriptions after his appropriation. Afterwards he made default in his repayments under the mortgage, and also discontinued his subscriptions. By the rules of the society he was then entitled to have his subscriptions placed to his credit in respect of his repayments under the mortgage; but he made no request to this effect, and it was not done, but the society entered on the mortgaged estate, and ultimately sold it for a sum which, after repaying all moneys due to the society, left a surplus for the member. The member had mortgaged the equity of redemption in the mortgaged estate to A., and his other property, including the subscriptions, had been assigned to B.:—*Held*, that as between A. and B. the doctrine of marshalling applied, and the repayments to the society must be apportioned rateably between the mortgaged estate and the subscriptions. *Mowon v. Berkeley Mutual Benefit Building Society*, 524

5. — *winding-up: borrowing members: liability to contribute to losses of investing members: terms of redemption*—A rule of a building society provided that, in the event of there being a "deficiency of income by which the society may be prevented from meeting its anticipated expenditure and liabilities," the amount should be apportioned between the investing and borrowing members. Losses having occurred,—*Held*, that "liabilities" included the sums due to the investing members in respect of their shares, and that the borrowing members were liable to contribute rateably to any losses thereon incurred by the investing members. *In re West Riding of Yorkshire Permanent Benefit Building Society*, 197

Another rule provided that property mortgaged to the society to secure advanced shares should be so secured "until the amount of such shares shall be repaid to the society, with all fines and other payments incurred in respect thereof":—*Held*, that under this rule a borrowing member was not entitled to redeem his mortgage, except on payment of what might be due from him in respect of his above-mentioned liability. *Ibid*.

6. — *winding-up: liability of withdrawn members: society's borrowing powers: mode of calculating: building societies act, 1874* (37 & 38 Vict. c. 42), s. 15, sub-s. 2]—Members of a building society who have either redeemed their mortgages or withdrawn their shares before the date of its winding-up are not liable to make good any deficiency in its assets. *In re West Riding of Yorkshire Permanent Benefit Building Society* (No. 2); *ex*

parte Pullman, ex parte Charnock, ex parte Johnson & Greenwood, 823

In calculating the extent of a building society's borrowing power as limited by the Building Societies Act, 1874, s. 15, sub-s. 2, "the total amount borrowed and not repaid by the society" is not to be taken as reduced by sums secured to the society from non-members; and the amount "secured to the society by mortgages from its members" need not have been advanced to them on the value of their shares. *Ibid*.

— Trust Investment Act, 1889. See TRUSTEE, 6.

Charity—dismissal of schoolmaster: ejectment: action to restrain: certificates of charity commissioners: charitable trusts acts, 1853 (16 & 17 Vict. c. 137), s. 17]—The plaintiff brought an action claiming an injunction to restrain the trustees of a national school founded under the provisions of 4 & 5 Vict. c. 38, from removing or dismissing him from his office of head-master of the school, and from electing or appointing any other person to the said office, and from ejecting him from the schoolhouse or premises occupied by him in virtue of his office, on the ground that the trustees were not duly appointed. The defendants objected that the plaintiff could not sue for the relief claimed without previously obtaining the consent of the Charity Commissioners, as required by section 17 of the Charitable Trusts Act, 1853. KAY, J., allowed the objection, and declined to allow the action to stand over in order that the consent of the Commissioners might be obtained. On appeal, *Held*, by BOWEN, L.J., and FRY, L.J., that section 17 relates exclusively to the administration of trusts, and does not apply to common law rights, legal or equitable modes of enforcing common law rights, or any individual equitable right not relating to the administration of a trust, and that as the plaintiff's claim was based on contract, and, so far as could be seen at the present stage of the action, did not involve the administration of the trust, the consent of the Commissioners was unnecessary. *Rendall v. Blair* (App.), 641

Held, by COTTON, L.J., that having regard to the claim made by the plaintiff, it would be open to enter into discussion as to the proper administration of the trust, and therefore the consent of the Commissioners was necessary. *Ibid*.

Held, by COTTON, L.J., BOWEN, L.J., and FRY, L.J., that the consent of the Commissioners may be obtained after the petition, action, or proceeding has been commenced. *Ibid*.

The comments in *Glen v. Gregg* (61 Law J. Rep. Chanc. 581, 783) on *The Attorney-General v. The Sidney Sussex College, Cambridge* (Law Rep. 21 Ch. D. 514, note; 15 W.R. 162) considered. *Ibid*.

Charity (continued).—

2. — gift to persons "not under fifty years of age": "aged": "deserving": 43 *Eliz. c. 4*]—A gift of the interest of a fund to be divided among an equal number of men and women not under fifty years of age attending a particular place of worship—"a tablet to be placed in the chapel to give information of gift: otherwise how should the deserving know of it?"—*Held*, a good charitable gift for the benefit of "aged" persons within 43 *Eliz. c. 4*. *In re Wall*; *Pomeroy v. Willway*, 172

3. — mortmain: corporation bonds: charge on surplus borough fund: pure personality: mortmain act (9 *Geo. 2. c. 36*)—A charge upon a borough fund existing either under the Municipal Corporations Act, 1835, s. 92, or the Municipal Corporations Act, 1882, Part VII., and partly arising from rents of real estate and partly from other sources, is a charge on the surplus remaining in the hands of the corporation after the payments directed by the Acts have been satisfied, and does not give the holder an interest in land within 9 *Geo. 2. c. 36*. *In re Thompson*; *Bedford v. Teal* (App.), 689

A mortgage was created on a district fund under an Act which did not expressly incorporate section 175 of the Public Health Act, 1875, which directs that surplus lands shall be sold and the proceeds applied towards the discharge by means of a sinking fund, or otherwise, of any principal moneys which may be borrowed upon the security of the district fund:—*Held*, without expressing any opinion whether or not section 175 might apply if the district fund had been in part constituted of the proceeds of sale of surplus land, that there was no evidence that the corporation had any surplus lands, and that the mortgage was not a charge upon an interest in land within 9 *Geo. 2. c. 36*. *Ibid*.
Decision of STIRLING, J. (reported *ante*, p. 249), on these points reversed. *Ibid*.

4. — mortmain: interest in land: bonds of harbour trustees: assignments of rates, tolls, rents, &c.: bridge tolls—Harbour trustees, under their statutory powers, borrowed money on security of bonds of 100*l.* each by which they assigned to the lender "such proportions of the several rates, tolls, rents, and other moneys arising by virtue of the Act as the said sum of 100*l.* doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, tolls, rents, and other moneys," to hold to the assignee until the sum of 100*l.*, with interest thereon, should be paid:—*Held*, that the bridge tolls constituted an interest in land within 9 *Geo. 3. c. 36*, and that, consequently, the bonds could not be given for charitable purposes. *In re David*; *Buckley v. Royal National Life-boat Institution* (App.), 87

Distinction laid down in *Knapp v. Williams* (4 *Ves. 429n*) and in *In re Christmas*; *Martin v. Lacon* (55 *Law J. Rep. Chanc. 878*; *Law Rep. 33 Ch. D. 332*) applied. *Ibid*.
Decision of NORTH, J. (reported 58 *Law J. Rep. Chanc. 542*; *Law Rep. 41 Ch. D. 168*), affirmed. *Ibid*.

Cheque. See DONATIO MORTIS CAUSA.

Club—proprietary club: expulsion of member by committee: irregularity: committee not properly constituted: remedy in damages, and not by injunction—The jurisdiction of the Court to interfere in the case of a club on the expulsion of a member is based upon the right of property vested in the member; and in the case of a proprietary club the members of which have no right of property, but merely a right to use the club premises on payment of a subscription, the Court will not restrain by injunction the expulsion of a member by the committee, although the committee may have been invalidly constituted, and may not have acted in accordance with the rules. The plaintiff in such a case will be left to his remedy in damages. *Baird v. Wells* (App.), 673

Commissioners' Clauses Act. See COSTS, 4.

Common—right of common of pasture: inclosures on common by lord of manor: test of sufficiency of common—In determining whether there is a sufficiency of common for the rights of pasture of the commoners, the test is not as to the average number of sheep which have, in fact, been turned out by the commoners for a great number of years, but whether there is pasture for the sheep which the commoners can maintain on their respective tenements during the winter, and which they are entitled to turn out on the common. *Robertson v. Hartopp* (App.), 553

Quare, whether any modern practice of farming ought to be considered. *Ibid*.

Lake v. Plaxton (10 *Exch. Rep. 196*; 24 *Law J. Rep. Exch. 52*) and *Lascelles v. Lord Onslow* (46 *Law J. Rep. Q.B. 333*; *Law Rep. 2 Q.B. D. 432*) considered. *Ibid*.

Company—director: appointment, validity of: contributory: allotment: companies act, 1862 (25 & 26 *Vict. c. 89*), table A, articles 52, 53, 55, 58, 61, 62, and 66—In a company regulated by Table A, where the subscribers to the memorandum of association all concur in appointing first directors, it is not necessary that they should meet for the purpose. *In re Great Northern Salt and Chemical Works (Limited)*; *ex parte Kennedy*, 288

Dictum of LORD HATHERLEY in *Hallows v. Fernis* (36 *Law J. Rep. Chanc. 267*, 273;

Company (continued)—

- Law Rep. 3 Rq. 520, 536) followed and approved. *Ibid.*
- D'Arcy v. The Tamar, Kit Hill, and Callington Railway Company* (36 Law J. Rep. Exch. 37; Law Rep. 2 Exch. 158) distinguished. *Ibid.*
- All the subscribers to the memorandum of association of a company regulated by Table A, signed a document appointing four persons directors. At the statutory general meeting of the company, a resolution was passed continuing in office three of the four persons so appointed:—*Held*, that the original appointment was valid, and that the resolution of the general meeting was a sufficient compliance with the requirements of Table A, and that allotments made by the continuing directors were binding. *Ibid.*
2. — *director: meeting: notice: validity: absence from England*—By the articles of association of the plaintiff company it was provided that the directors should not be less than three, and that the office of a director should be vacated if he absented himself from the meetings of the directors for three calendar months without special leave, and by a resolution of the board it was determined that two directors should constitute a quorum. There being four directors, a meeting of two of the directors was held, the other two being absent in America:—*Held*, that it was not necessary to give notice of the meeting to the absent directors. *Halifax Sugar Refining Co. (Lim.) v. Franklyn*, 591
3. — *director: misfeasance: breach of trust: companies act, 1862 (25 & 26 Vict. c. 89), s. 165: committee of directors*—Section 165 of the Companies Act, 1862, enables a creditor of a company to obtain by summary process any relief to which he is entitled in respect of damages incurred through the misfeasance of an officer of the company, but the remedy afforded by the section is only for the recovery of damages for losses incurred. The misfeasance to which the section is directed is not restricted to acts of commission, but extends to all breaches of trust in relation to a company through which loss is incurred. Misfeasance is not to be imputed to a director unless he has dishonestly acted, or abstained from acting, in conflict with his plain duty, and the burden of proof lies on the party making the charge; but in considering the question of the director's liability there must be imputed to him a special knowledge of the business which he has undertaken. Directors are liable for losses occasioned through acts done by them as directors in matters which are *ultra vires* the company, and this liability is not dependent upon any question of honesty of intention. *In re Liverpool Household Stores Association (Lim.)*, 616
- Where a board of directors delegate their powers to a committee, without any provision as to

the committee acting by a quorum, all acts of the committee must be done in the presence of all the members of the committee; and, *Semble*, the committee have not, under their delegated authority, power to add to their number or supply a vacancy. *Ibid.*

4. — *director: resignation: regulations of company: companies act, 1862, sched. 1 (25 & 26 Vict. c. 89), s. 15: table A, article 55*—The directors of a company have not power, in the absence of a special power under the regulations of the company, to accept the resignation of a member of the board. *Municipal Freehold Land Co. (Lim.) v. Polington*, 734

A member of the board of a company which was regulated by the provisions of table A, purported to resign his office by a letter addressed and delivered to the board. Table A, by article 55, provides that the directors may exercise all such powers of the company as are not required to be exercised by the company in general meeting, but does not contain any direct provision for the resignation of a director:—*Held*, that the resignation was not effected until accepted by the company in general meeting. *Ibid.*

5. — *meeting: conduct of business: ruling of chairman: resolution: validity: waiver*—Where the chairman at a meeting of a public company deliberately rules in a certain way, a shareholder is not bound to challenge such ruling in order to preserve his right to impeach the validity of the proceedings in a Court of law. *Henderson v. Bank of Australasia*, 794

At a meeting convened for the purpose of making certain alterations in the rules of a company, a resolution was proposed giving each proprietor one vote for every share, subject to a proviso requiring him to have been on the register for six months. The plaintiff, a proprietor, having moved to omit the proviso, the chairman, after consulting his legal adviser, ruled, erroneously, that the resolution must be accepted or rejected in its entirety, and declined to put the amendment. The plaintiff then moved the rejection of the resolution. The resolution was passed, and was subsequently confirmed:—*Held* (reversing the decision of CHITTY, J.), that there was no waiver by the plaintiff, and that he was entitled to a declaration that the resolution was invalid. *Ibid.*

6. — *meeting: notices: special resolutions: companies act, 1862, s. 51, table A, article 35*—A notice dated the 3rd of July, 1889, was issued to the shareholder of a company, to the effect that an extraordinary general meeting of the company would be held on the 12th of July, at a specified time and place, "for the purpose of considering

Company (continued)—

and, if deemed advisable, of passing the sub-joined resolutions" (being special resolutions). The notice proceeded: "should such resolutions be duly passed, the same will be submitted for confirmation to a subsequent extraordinary general meeting of the company, which will be held on Monday, the 29th of July, 1889, at the same time and place." The regulation contained in the articles of association of the company as to the notice to be given of every general meeting was in the same terms as article 35 of table A:—*Held* (affirming the decision of CHITTY, J.), that the notice of the second meeting, being, on its true construction, notice of a conditional meeting to be held only if the resolutions were duly passed at the first meeting, was not such a notice of such meeting as was required by section 51 of the Companies Act, 1862. *Alexander v. Simpson* (App.), 137

7. — *mortgage of uncalled capital: calls made in winding-up: priority over general creditors*—Where, by the memorandum and articles of association of a limited company, there is power to mortgage unpaid capital, a mortgage of future calls is effectual on calls made by the liquidator in the winding-up of the company. *In re Pyle Works, Limited* (App.), 489

In re The Phoenix Bessemer Steel Company (44 Law J. Rep. Chanc. 683) and *Howard v. The Patent Ivory Manufacturing Company* (57 Law J. Rep. Chanc. 878; Law Rep. 38 Ch. D. 151) approved. *Ibid.*

In re Whitehouse & Co. (47 Law J. Rep. Chanc. 801; Law Rep. 9 Ch. D. 595) discussed. *Ibid.* Decision of STIRLING, J., affirmed. *Ibid.*

8. — *name: registration: similarity to name of company already on register: injunction: companies act, 1862, s. 20*—The plaintiffs were a registered company carrying on the business of a wax-work exhibition in London under the name of "Madame Tussaud & Sons, Limited." Their exhibition was a very old-established one. The defendant, Louis Tussaud, was a wax-modeller, who had formerly been employed by the plaintiff company, but had never carried on any business on his own account. He promoted a company, of which he was to be manager, to carry on an exhibition similar to that of the plaintiffs, but in another part of London. It was proposed to register the new company under the name of "Louis Tussaud, Limited." The plaintiffs moved for an injunction to restrain the defendant from proceeding with the registration of the new company under the proposed name or any other name so nearly resembling that of the plaintiff company as to be calculated to deceive:—*Held*, that an injunction ought to be granted in similar terms to the order in *Hendriks v. Montagu* (50 Law J. Rep. Chanc. 456; Law Rep. 17 Ch. D. 638). *Tussaud v. Tussaud*, 631

Seemle, that if the defendant had previously carried on an exhibition in his own name, and had sold it with the goodwill to third parties, who had transferred it to the company, registration under the proposed name might have been allowed. *Ibid.*

9. — *prospectus: misrepresentation: statement of names of council of administration: provisional consent: subsequent withdrawal: rescission: return of deposit: interest on: rate of*—A prospectus stated that there would be a council of administration of the company of not less than twenty-five members, from whom would be selected a committee of not more than ten nor less than five members, which committee would constitute the board and have all the powers of directors; and under the heading "council of administration" gave seventeen names. The applicant, on the faith of those names, and especially of three of them, applied for and was allotted shares in the company. It was not the fact that these three persons were members of the council, but they had before the company was formed provisionally consented to become members, but had not authorised the public issue of the prospectus with their names thereon even as proposed members. Shortly after the allotment to the applicant was made, these persons withdrew their consents to become members of the council:—*Held*, that the representation that these persons were members of the council was substantially untrue, and that the applicant was entitled to have the contract to take shares rescinded, and to a return of the deposit paid on his shares, with interest at the rate of four per cent. *In re Metropolitan Coal Consumers' Association (Lim.)*; *ex parte Wainwright*, 281

10. — *reconstruction: scheme of arrangement: transfer of assets: companies act, 1862 (25 & 26 Vict. c. 89), s. 161: joint-stock companies arrangement act, 1870 (33 & 34 Vict. c. 104), s. 2*—A scheme for the transfer of the assets of a company in liquidation to a new company, if sanctioned by an order of the Court under section 2 of the Joint-Stock Companies' Arrangement Act, 1870, is binding in all its terms upon all the contributories of the company in liquidation, notwithstanding that some of such terms are not authorised by section 161 of the Companies Act, 1862, and cannot afterwards be impeached except in the form of an appeal from the order of the Court. *Nicholl v. Eberhardt Co.* (App.), 108
Decision of KEEBLE, J. (58 Law J. Rep. Chanc. 596), affirmed. *Ibid.*

11. — *reconstruction: transfer to new company in consideration of shares: scheme: limitation of time for exercise of option to take shares: forfeiture: ultra vires: ac-*

Company (continued)—

- quiescence: delay: companies act, 1862, s. 161*—A scheme for the reconstruction of a company by the transfer of its assets to a new company in consideration of shares under section 161 of the Companies Act, 1862, is not vitiated by the insertion of a limit of time within which the option given to the shareholders of the old company to take shares in the new must be exercised, provided the limit be such as to leave the option available for a reasonable time. *Postlethwaite v. Port Philip and Colonial Gold Mining Co.*, 201
12. — *reduction of capital: confirmation by the court: reducing part only: companies act, 1867, sections 9 and 11*—There is nothing in the Companies Act, 1867, which prevents a limited company, in a proper case, from reducing some of its shares without reducing the others. *In re Gatling Gun (Lim.)*, 279
In re The Barrow Hematite Steel Company (58 Law J. Rep. Chanc. 148; Law Rep. 39 Ch. D. 582) followed. *Ibid.*
In re The Union Plate Glass Company (58 Law J. Rep. Chanc. 767; Law Rep. 42 Ch. D. 513) not followed. *Ibid.*
13. — *shares: rectification of register: shares to be held as fully paid up in cash: registered agreement: execution by company only: companies act, 1867 (30 & 31 Vict. c. 131), s. 25*—The filing with the Registrar of Joint-Stock Companies of an agreement, purporting to be between a company and the persons mentioned in the schedule thereto, for the issue to such persons of shares as fully paid up, but executed by the company only and not by the persons named in the schedule, is not the filing of "a contract duly made in writing" in compliance with the provision of section 25 of the Companies Act, 1867. *In re New Eberhardt Co. (Lim.)*; *ex parte Mensies* (App.), 73
Decision of STIRLING, J., reversed. *Ibid.*
14. — *winding-up: discovery: examination of person capable of giving information: pending action: question relating thereto: appeal from order for examination: companies act, 1862 (25 & 26 Vict. c. 89), s. 115*—The liquidator of the above-named company brought an action against another company to set aside an agreement entered into by the two companies, on the ground of misrepresentation. An order was made in that action that the defendant company, through their secretary, should make an affidavit of documents relating to the matters in question in the action; but KAY, J., directed that there should be no production of documents until further order, and refused leave to the plaintiff to deliver interrogatories to the defendant company until after the defence had been delivered. The plaintiff then obtained an order for the examination of the secretary of the defendant company under section 115 of the Companies Act, 1862. This order was not appealed from. On the examination, the secretary objected to answer a question put to him, on the ground that it related to the subject-matter of the action. KEKEWICH, J. (sitting for KAY, J.), directed him to attend at his own expense and answer the question:—*Held*, on appeal, that the question put related to the subject-matter of the pending action, and was put for the purpose of obtaining discovery which had been decided to be premature in the action, and was not properly put for the purposes of the winding-up, and therefore the secretary ought not to be compelled to answer it. *In re North Australian Territory Company* (App.), 654
Semble, a person ordered to attend for examination under section 115 has a right of appeal from the order. *Ibid.*
Observations of JESSEL, M.R., in *In re The Gold Company* (48 Law J. Rep. Chanc. 650; Law Rep. 12 Ch. D. 77) commented upon. *Ibid.*
15. — *winding-up: garnishee order absolute: right of garnishor to petition: companies act, 1862, section 82*—A garnishee order absolute obtained against a company does not constitute the garnishor a creditor of the company so as to entitle him to present a winding-up petition. *In re Combined Weighing and Advertising Machine Co. (Lim.)* (App.), 26
Decision of NORTH, J., affirmed. *Ibid.*
16. — *winding-up: literary society: companies act, 1862, s. 199: literary and scientific institutions act, 1854 (17 & 18 Vict. c. 112), ss. 29, 30, and 33*—An unregistered literary society, not established for the purposes of gain, cannot be wound up under section 199 of the Companies Act, 1862, which applies only to unregistered trading associations. The property of such a society on its dissolution ought to be given to some kindred institution, in accordance with the provisions of the Literary and Scientific Institutions Act, 1854, s. 30. A society of this character is not within the proviso in section 30 of that Act, which excepts from its operation institutions established by the "contributions of shareholders in the nature of a joint-stock company," although some of its members may be shareholders. *In re Bristol Athenaeum*, 116
17. — *winding-up: petition by company: second petition by creditor with notice: costs*—A creditor who presents a petition to wind up, with notice that a prior petition has been presented by the company, will have his petition dismissed with costs as against the company, notwithstanding that his petition has been advertised first. *In re Standard Portland Cement Co.*, 408

Company (continued).—

18. — *winding-up: proof: managing director: claim for salary: competition with outside creditors: money due in character of member: companies act, 1862, s. 38, sub-s. 7*—Salary due to a managing director of a company of which the directors were obliged to be shareholders, and damages claimed by such director for breach of a contract to pay him such salary for a number of years, are not debts due to such director in his character of member of the company within the terms of sub-section 7, section 38, of the Companies Act, 1862, and may be proved in competition with the outside creditors in the winding-up of the company. *In re Dale & Plant (Lim.)*, 180
19. — *winding-up: proof: rentcharge: liability on the terre-tenant: possession of land subject to rentcharge: companies act, 1862 (25 & 26 Vict. c. 89), ss. 158 and 203*—The B. Society, an unregistered company, were in possession, as mortgagees, of land subject to a rentcharge, which was also secured by covenant. The society was ordered to be wound up, and an order was made in February, 1882, under section 203 of the Companies Act, vesting in the official liquidators the legal estate in the land which was then vested in the trustees of the society. The liquidators paid the rentcharge down to May, 1885, when, the income from the land being less than the rentcharge, they obtained, on the 17th of June, 1885, an order to assign or quit possession of the land on such terms as they should deem advisable. They thereupon gave notice to the owner of the rentcharge and to the tenant of the land that they renounced possession and all interest, but did not actually convey it away till the 8th of September, 1887. The owners of the rentcharge claimed to prove in the winding-up, under section 158 of the Companies Act, for arrears which had accrued from the date of repudiation down to the 8th of September, 1887.—*Held* (affirming *Bristowe, V.C.*), that as there were no arrears due at the commencement of the winding-up, there was no claim which could have been valued under section 158—that section relating only to obligations existing at the commencement of the winding-up—the liability for the payment of the rentcharge not being a debt, but only a liability binding on the company so long as it remained in possession; and that as, on the evidence, the liquidators could not be said to have been in possession of the land for the purposes of the liquidation subsequent to the date of repudiation, there was no liability on the society subsequent to the winding-up, and consequently the claim must be disallowed. *In re Blackburn and District Benefit Building Society; ex parte Graham* (App.), 183
Thomas v. Sylrester (42 Law J. Rep. Q.B. 237; Law Rep. 8 Q.B. 368) explained and approved. *Ibid.*
20. — *winding-up: rival petitions: priority: presentation of petition: advertisement of petition*—The date of presentation and not of advertisement regulates the priority of winding-up petitions: therefore, where two or more *bona fide* petitions have been successively presented by creditors of a company for its winding-up, the order should be made on the petition first presented, notwithstanding that such petition has not been advertised first. *In re Building Societies' Trusts (Lim.)*, 638
In re The Norton Iron Company (47 Law J. Rep. Chanc. 9) followed, and *The United Ports Company* (39 Law J. Rep. Chanc. 146) not followed. *Ibid.*
21. — *winding-up: scheme of arrangement: sanction of court: secured creditors: power to compel secured creditors to surrender their security: joint-stock companies' arrangement act, 1870 (33 & 34 Vict. c. 104), s. 2*—The Court has jurisdiction under section 2 of the Joint-Stock Companies' Arrangement Act, 1870, to compel secured creditors of a company to surrender their security and to accept shares in lieu thereof. *In re Empire Mining Co*, 345
22. — *winding-up: shareholder's petition: construction of memorandum of association: companies act, 1862, s. 8, sub-ss. 1 and 3; s. 79, sub-s. 5*—The name of a company is important in construing the objects for which the proposed company is to be established. *In re Crown Bank*, 739
 Where a company has ceased to carry on the business for which it was established, but is carrying on a business which is outside its powers, a shareholder may present a winding-up petition, and is not confined to his remedy by injunction. *Ibid.*
- A company was registered under the name of the Mid-Northamptonshire Bank (Limited). The objects for which the bank was stated to be established were divided into a number of heads of a very varied character. The first head related to the carrying on the business of banking in all its branches; other heads related to the investing and dealing in shares and securities, the acquiring and improving of land and buildings, and the promotion of companies. The company commenced business as a country bank in Northamptonshire, with an office in London. After a few months its name was changed to the Crown Bank (Limited); it gave up its country business, ceased to do banking business, and carried on in London (in addition to some land speculation) the business of investing in shares and securities. On a petition by a shareholder to wind up the company,—*Held*, that the company was not carrying on a business authorised by the memorandum of association, and that it was

Company (continued)—

just and equitable that it should be wound up. *Ibid.*
 Where minutes of an order for winding up a company had been delivered out, but the order had not been passed and entered, the Court by consent dismissed the petition. *Ibid.*

23. — winding-up: shareholder's petition: substratum of company gone: reserve capital: companies act, 1879 (42 & 43 Vict. c. 76), s. 5]

—A banking company, incorporated in 1884, had an issued share capital of 24,000*l.*, in 2,400 shares of 10*l.* each, 5*l.* being paid up, and the other 5*l.* being, by virtue of the Companies Act, 1879, not capable of being called up except in the event, and for the purposes, of the company being wound up. The company had never earned a dividend, and from the last balance-sheet it appeared that all the paid-up capital except 337*l.* had been exhausted. The shares had been sold at a nominal price, and returned to the Inland Revenue as worthless, and the business was now carried on in humble premises with a very slender staff. A shareholder presented a winding-up petition, which was supported by 40 shareholders holding over 1,000 shares, and opposed by the company and shareholders holding over 600 shares. No creditors appeared:—*Held*, that under the circumstances the subject-matter of the company had failed, and that a winding-up order ought to be made upon a shareholder's petition. *In re Bristol Joint Stock Bank*, 722

24. — winding-up: surplus assets: distribution: preferences shareholders: shares partly paid up: companies act, 1862 (25 & 26 Vict. c. 89), s. 133, sub-ss. 1 and 10]—Where in the winding-up of a limited company the assets are more than sufficient to return to the shareholders the amounts paid up on their shares, the surplus assets ought, in the absence of any direction in the articles of association, to be distributed among the shareholders, preferred and ordinary, in proportion to the nominal value of their shares, whether fully paid up or not. *Birch v. Cropper*; *In re Bridgewater Navigation Co. (Lim.)* (H.L.), 122
 Decision of the Court of Appeal reversed. *Ibid.*

25. — winding-up: surplus assets: distribution: shares fully paid up: shares issued at a discount]—The articles of association of a limited company contained no provisions as to the distribution of surplus assets on the winding-up of the company. The company issued 2,917 shares of 10*l.* each, all of which were fully paid up in cash. Afterwards, pursuant to special resolution, the company issued 1,631 additional shares of 10*l.* each, "with the sum of 10*l.* as paid up thereon," at the price of 5*l.* per share. The certificates of these shares did not state that they were

fully paid up. There were no creditors. The company was being wound up voluntarily, and there were assets for distribution:—*Held*, that these assets must be applied—first, in repaying 7*l.* per share to each of the original shareholders; and, then, in distributing the balance rateably between the two classes of shareholders. *In re Weymouth and Channel Islands Steam Packet Company (Limited)* 714

26. — winding-up: transfer or sale of business: dissentient member: notice of dissent: continuing notice: companies act, 1862, ss. 51 and 161]—After the passing of resolutions by a company for voluntary liquidation, the transfer of its business, and the appointment of the company's secretary as liquidator, but before the subsequent confirmation of such resolutions, a shareholder served notice of dissent on the secretary of the company. The notice was not objected to until one month after the confirmation of the resolutions, and was not returned:—*Held*, that the notice was a valid notice of dissent within section 161 of the Companies Act, 1862. *In re London and Westminster Broad Co. (Lim.)*, 155

— life assurance company. See LIFE ASSURANCE COMPANY.

— prospectus: foreign lottery. See LOTTERY ACTS.

Compromise. See ACTION.

Compulsory Purchase of Land. See LANDS CLAUSES CONSOLIDATION ACT.

Consent Order—compromise by counsel. See PRACTICE.

Contempt of Court—pending petition for winding up a company: newspaper comments]—When a petition has been presented for the winding up of a company, and, with knowledge of this fact, comments on the case from the point of view of one of the litigants are published in a newspaper, a contempt of Court has been committed, and the responsible parties are liable to fine and imprisonment, even though the comments would not be likely to affect the decision of the Court on the petition. *In re Crown Bank (Lim.)*. *In re O'Malley*, 767

Contingent Remainder—possibility on a possibility. See REMOTENESS, 1.

Contract—agreement by correspondence: subsequent negotiation]—The defendant by letter offered to sell his business on certain terms to the plaintiffs, which the plaintiffs by letter accepted. On a formal memorandum being submitted to the plaintiffs, they added a clause prohibiting the defendant from carrying on a similar business within a certain radius. Subsequent negotiations followed as to this clause, and the defendant declined to complete. The plaintiffs then offered to complete on the original terms in the letters, omitting the disputed clause. In an action by the plaintiffs for specific performance, — *Held*, that, looking to the subsequent negotiations, there was no concluded agreement constituted by the original letters, and the action was dismissed. *Bristol and Swansea Aerated Bread Company (Lim.) v. Maggs*, 472

Hussey v. Horne Payne (48 Law J. Rep. Chanc. 846; Law Rep. 4 App. Cas. 311) followed, and the criticism on that case in *Bolton Partners v. Lambert* (58 Law J. Rep. Chanc. 425; Law Rep. 41 Ch. D. 295) dissented from. *Ibid*.

2. — validity: illegal consideration: public offence: compromise: stifling a prosecution]—At the trial of the defendants on the prosecution of the plaintiffs for obstructing a highway, an agreement was entered into between the parties, with the approval of the Court, that the defendants should restore the highway, and that in the meantime the indictment should lie in the office, and that on the fulfilment of the agreement the plaintiffs should consent to an acquittal. In pursuance of this agreement the defendants covenanted to restore the highway:—*Held* (affirming the decision of STIRLING, J.), that the covenant was founded on an illegal consideration, and was void. *Windhill Local Board v. Vint* (App.), 608

Kotr v. Leoman (9 Q.B. Rep. 371; 15 Law J. Rep. Q.B. 360) followed and approved. *Ibid*. *Dictum* of JAMES, L.J., in *Fisher v. The Apollinaris Company* (44 Law J. Rep. Chanc. 500, 502; Law Rep. 10 Chanc. 297, 302) not followed. *Ibid*.

— infant. See INFANT.

— necessities. See LUNATIC.

— specific performance: memorandum in writing. See FRAUDS, STATUTE OF.

Conveyancing Act, 1881—infant: maintenance. See INFANT, 3.

Copyholds — enfranchisement: confusion of boundaries: rentcharge: enquiry as to land charged: substitution of lands of equal value: personal action for arrears: copyhold acts,

1852 (15 & 16 Vict. c. 51), s. 24, and 1887 (50 & 51 Vict. c. 73), ss. 16-42: *conveyancing and law of property act, 1881* (44 & 45 Vict. c. 41), s. 44]—Copyhold lands were compulsorily enfranchised at the instance of the lord in 1880, in consideration of the payment of annual rentcharges. At that date the boundaries of the copyhold lands were, and had been for some time previously, confused and incapable of identification, but no proceedings were taken on the enfranchisement, either by lord or tenant, under section 24 of the Copyhold Act, 1852, to identify the parcels charged. The rentcharges were paid down to February, 1887, since which time no payment had been made:—*Held*, that the enfranchisement, while it put an end to the relationship of copyhold tenant and lord, and to all incidents of copyhold tenure in the future, did not relieve the former copyhold tenant from liability for any past breach or neglect of his duty as such; that, accordingly, he remained liable in respect of the confusion of boundaries which had occurred during the subsistence of the copyhold tenure; and that S., the owner of the rentcharges by purchase from the former lord, was entitled to a personal judgment for payment of the rentcharges and arrears, and to an enquiry to ascertain the parcels subject to the rentcharge, and, in the event of the non-ascertainment of such parcels, to substitution of other lands of the defendant equal in value to the enfranchised lands; and that the fact that the enfranchisement was compulsory, and at the instance of the lord, and that the lord had not availed himself of the statutory means of having the parcels identified, was no bar to the granting of such relief. *Searle v. Cooke* (App.), 259

Decision of KAY, J., affirmed. *Ibid*.

Corporation—trustee: Trust Investment Act. See TRUSTEE, 5.

Corporation Bonds—mortmain. See CHARITY, 3.

Costs—administration action: summons taken out and prosecuted by leave of judge: right to indemnity: priority]—A limited company having the conduct of an administration action, with the sanction of the Court prosecuted a summons on behalf of the estate against B., C. & B., claiming payment by them of certain moneys alleged to form part of the estate. The summons was dismissed with costs. The company subsequently became insolvent and was ordered to be wound up. The balance of the estate under administration was insufficient to pay the costs of either party to the summons. B., C. & B. moved that their costs of the summons might be declared to be a charge on the balance, in priority to all other claims:—*Held*, that the company, having prosecuted the summons

Costs (continued)—

under the authority of the Judge on behalf of the estate, were entitled to be indemnified out of the estate for the costs incurred by them; and that B., C. & B., by reason of the company's right to such indemnity, had a right directly against the estate; and that by reason of the judgment dismissing the summons they were entitled to be paid their costs in priority to the costs of the company. *In re Blundell; Blundell v. Blundell* (App.), 269 Decision of NORTH, J., reversed. *Ibid.*

2. — *agreement as to costs: solicitor and client: mortgage: mortgagee's costs: reference for taxation: solicitors' remuneration act, 1881 (44 & 45 Vict. c. 44), s. 1, sub-s. 3, s. 2, and s. 8, sub-s. 1 and 4*—A mortgagor wrote to his solicitor as follows, "I hereby request and instruct you to raise, or endeavour to raise, for me the sum of 300*l.*, at ten per cent. per annum, on the security of all my estate and interests under the will and in the property of the late T. S., and I hereby undertake to pay your costs (which I agree at 20*l.*, exclusive of costs out of pocket) incurred, or to be incurred, in or about doing what is necessary in your opinion for the purpose of carrying out these instructions." The solicitor carried out the mortgage, in which he acted as solicitor for the mortgagor and mortgagees, and he retained out of the money advanced 20*l.* for costs, including the mortgagee's costs. The mortgagor subsequently took out a summons that the solicitor might be ordered to deliver to him a bill of costs and charges claimed by the solicitor to be due or paid or to have been deducted by him out of the mortgagee's money:—*Held*, first, that the letter constituted an agreement within the Solicitors' Remuneration Act, 1881, s. 8, sub-s. 1, and although the remuneration agreed to was with reference, so far as the mortgagee's costs were concerned, to matters in which the solicitor was not engaged as solicitor for the mortgagee, yet he was engaged to do business for him as solicitor, and therefore the relation of solicitor and client was created within the meaning of section 1, sub-section 3; secondly, that in the absence of evidence impeaching the agreement, there ought not to be a reference for taxation under section 8, sub-section 4. *In re Palmer* (App.), 575 Decision of NORTH, J., affirmed. *Ibid.*

3. — *conveyancing: lease partly in consideration of a premium, and partly of a rent: general order under solicitors' remuneration act, 1881: schedule I., part II., rules 1 and 5*—A lease was granted for a term of ninety years from September, 1883, in consideration of a rent of 50*l.* and a premium of 4,400*l.* No title was deduced. The lessor's solicitor, in his bill of costs, charged a scale fee of 14*l.* in respect of the rent, and a scale fee of 42*l.* in respect of the premium. The Taxing-

Master disallowed the 42*l.* On a summons to review taxation,—*Held*, that the direction in rule 5, that (in addition to the scale fee for the rent) "there shall be paid a further sum equal to the remuneration on a purchase at a price equal to" the premium, was not meant to narrow the application of the rule only to a case in which, if the transaction had been a purchase at the price of the premium, the solicitor could have claimed the scale fee; and consequently, that the 42*l.* must be allowed. *In re Robson*, 627

4. — *mortgage: action by puisne incumbrancers: plaintiffs' costs of action: apportionment: costs of commissioners: right of indemnity: commissioners' clauses act, 1847 (10 Vict. c. 16), ss. 60-64*—An action was brought by judgment creditors against harbour commissioners, in which the plaintiffs were found entitled to a charge on the undertaking, a receiver was appointed, and the priorities of other incumbrancers (some of whom were prior to the plaintiffs) were ascertained, and certain funds arising from the undertaking paid into Court. The funds now available being insufficient for all the payments required,—*Held*, that the plaintiffs were entitled to be paid in priority to prior incumbrancers their costs of the action, so far as the other incumbrancers had had the benefit thereof in securing the fund or in determining the rights of the parties to it, but that their other costs of the action (if any) must be added to their security, and the Taxing Master was directed to distinguish such costs accordingly. *Held also*, that under the Commissioners' Clauses Act, 1847, s. 60, the commissioners were entitled to be paid their costs as between solicitor and client out of the fund in priority to all parties, and that it made no difference that the fund had not actually come to the hands of the commissioners, but had been paid into Court by the receiver. *Batten, Praffitt & Scott v. Dartmouth Harbour Commissioners*, 700

5. — *solicitor-mortgagee: profit-costs*—A solicitor who advances money to a client on mortgage is not entitled to charge the mortgagor profit-costs for the preparation of the mortgage. *In re Roberts; ex parte Evans*, 25

6. — *taxation: attempted sale of real estate: general order under solicitors' remuneration act, 1881 (44 & 45 Vict. c. 44), rule 2 (c): schedule 1, part 1, rule 2, and schedule 2*—Where after an attempted sale by auction the sale is indefinitely postponed, the costs in respect of the attempted sale must be taxed under rule 2 (c) of the General Order under the Solicitors' Remuneration Act, 1881. If the same solicitors afterwards were employed to effect a sale they would be paid on

Costs (continued)—

a *quantum meruit*, or otherwise the costs allowed would be deducted from scale costs.
In re Smith, Pinsent & Co., 590

Schedule 1, part 1, rule 2 of the same Order does not apply to such a case. *Ibid.*

7. — *taxation: separate proceedings for similar objects: same solicitor for different plaintiffs: duplicate copies: counsel's fees: rules of court, order LXV. rule 27, sub-rule 8*]
 —Where the same solicitor is employed by different persons to conduct proceedings for the same or a similar purpose, he is entitled to such costs as would have been allowed in either action if he had not been engaged in the other, except as regards attendances or other matters which might have been done at the same time in both actions; and if the same counsel appear in both actions they ought in each action to have such fees as if they had not been instructed in the other.
In re Metropolitan Coal Consumers' Assoc.; Grieb's Case, 532

— shorthand notes. See PRACTICE, 3.

Counsel's Fees. See COSTS, 7.

Covenant—breach: public-house: covenant to take beer: right to sue: running with land]
 In a lease of a public-house by brewers, therein described as the lessors, including in such term "assigns," the lessee covenanted not to buy or sell on the premises any ale or stout other than such as should be *bona fide* purchased of the said lessors, or from them or either of them, either alone or jointly with any other person or persons who might thereafter become a partner or partners with them or either of them, provided they or he should at such time deal in or vend such liquors, and should be willing to supply the same of good quality and at the fair market price. The lessors sold the goodwill of their business and the reversion of the public-house to a brewer carrying on business at a neighbouring brewery, and expressly assigned to him the benefit of this covenant. In an action by the lessors and their assignee to restrain a breach of the covenant, — *Held*, that the covenant was assignable, and was not confined to persons carrying on business at the lessors' brewery, and that the plaintiffs were entitled to an injunction. *Clegg v. Hands* (App.), 477
Doe dem. Calvert v. Reid (10 B. & C. 849; 7 Law J. Rep. K.B. 328) distinguished. *Ibid.*
Semble, the covenant ran with the land, and could be sued upon by an assignee of the reversion. *Ibid.*

2. — *restrictive covenant: building estate: deed-poll: restrictive covenants by purchasers: power of vendors to depart from: implied agreement*]
 —The plaintiffs, in 1867, bought

part of a building estate from trustees for sale, subject to certain restrictive conditions as to building, which provided that all the plots were sold subject to the general stipulations contained in a deed-poll which had been, or was intended to be, executed by the trustees, and would be executed by each of the purchasers. The deed-poll was executed by the trustees, and the plaintiffs, and some sixty-six purchasers in all from time to time down to 1889. It recited that it was intended to be a part of all future contracts for sale, that the purchasers respectively should execute the deed and should thereby be severally bound by the stipulations thereof, and it witnessed that each of the purchasers covenanted with the other purchasers and the trustees to build only one house or two semi-detached houses on each lot. The trustees had recently divided fifteen lots remaining unsold into 101 lots, and offered them for sale for the erection of continuous rows of artisans' cottages, and the plaintiffs brought this action to restrain them from so doing: — *Held*, that the trustees were bound either by actual covenant or by implied agreement not to deal with the land in violation of the scheme, and an injunction was granted restraining them from authorising any purchaser from them to build more than one house or two semi-detached houses, contrary to the terms of the scheme. *MacKenzie v. Childers*, 188

3. — *restrictive covenant: covenant not to carry on particular business: sale of certain articles comprised therein: overlapping business*]
 —The sale by a hosier in the ordinary course of his business of certain articles sold by a ladies' outfitter, is not a breach of a covenant not to carry on the business of a ladies' outfitter, even if the articles sold form a substantial part of the business of a ladies' outfitter. *Stuart v. Diplock Brothers* (App.), 142
Fielden v. Slater (38 Law J. Rep. Chanc. 379; Law Rep. 7 Chanc. 523) distinguished. *Ibid.*
 Decision of *KEKEWICH, J.*, reversed. *Ibid.*

Damages — jurisdiction of Palatine Court. See PATENT, 5.

— right to injunction: death of plaintiff: transmission of interest. See PRACTICE, 9.

— undertaking as to. See INJUNCTION.

Debtor and Creditor—assignment in favour of creditors: surplus: resulting trust]
 —By a deed of assignment executed by a firm in favour of their creditors, after a recital of the inability of the firm to pay their debts in full, the business was assigned to trustees upon trust either to carry on or sell the same, and, after payment of costs, to pay and divide the

Debtor and Creditor (continued)—

residue of the profits and proceeds of sale unto and among all and singular the creditors in rateable proportions, according to the amount of their respective debts, subject, nevertheless, to the provisions thereafter contained, and the creditors granted a release of the debts. The deed contained a provision empowering the trustees to pay off or make arrangements with creditors under 30*l*. The profits of the business were more than sufficient to pay the creditors in full:—*Held*, that there was a resulting trust of the surplus for the assignors. *Cooke v. Smith* (App.), 577

Directors. See BUILDING SOCIETY, 3; COMPANY, 1-4.

Discovery—examination of witness under Companies Act. See COMPANY, 14.

Donatio Mortis Causa—*banker's deposit note: money withdrawn upon presentation of cheque: form of cheque indorsed on note*—A banker's deposit note is a good subject of *donatio mortis causa*; nor is it the less so because it purports to be "not transferable," or because the depositor for the purpose of withdrawing the money is required by the bank to sign a cheque indorsed upon the note. The death of the donor before presentation of the cheque by the donee does not defeat the *donatio mortis causa*. *In re Dillon; Duffin v. Duffin* (App.), 420

The principle according to which equity will not render its assistance in perfecting an incomplete voluntary gift has no application to a *donatio mortis causa*, and an instrument that does not pass by delivery may be the subject of a *donatio mortis causa*, and the executors of the donor will be considered as trustees for the donee for the purpose of giving effect to the gift. *Ibid*.

Whether a cheque on a donor's own account can be a subject of *donatio mortis causa*, *quære*. *Ibid*.

In re Mead; Austin v. Mead (50 Law J. Rep. Chanc. 30; Law Rep. 15 Ch. D. 651) distinguished. *Ibid*.

Easement. See LIGHT.

Ecclesiastical Law—*benefice: resignation: acceptance: condition: validity*—It is not essential to the validity of a deed of resignation of an ecclesiastical benefice that it should be executed by the clerk in the presence of a notary public. *Reichel (pauper) v. Bishop of Oxford* (H.L.), 66

When a clerk has executed an absolute deed of resignation of a benefice, upon an understanding that the formal declaration of acceptance by the ordinary is to be postponed for a time,

he cannot afterwards revoke his resignation. *Ibid*.

The rule that the resignation of a benefice (except in the case of an exchange) must be absolute does not prevent a bishop accepting a resignation, but fixing a future time at which it shall come into operation. *Ibid*.

The fact that a resignation has been made at the request of the bishop in order to avoid the scandal of a commission to enquire into the moral conduct of the clerk does not render the resignation void. *Ibid*.

Decision of the Court of Appeal affirmed. *Ibid*.

Equitable Execution—judgment debt. See PRACTICE, 14, 15.

Equitable Mortgage—notice. See MORTGAGE, 1.

Evidence. See PRACTICE, 6, 6.

Executor—*advertisements for creditors and claimants: lord St. Leonard's act (22 & 23 Vict. c. 35), s. 29: sufficiency of local or London newspapers: advertisements abroad: notice of claim by persons out of the jurisdiction*—The executors of C., a farmer, who at his death, and for the forty years previous, was residing in the parish of Tatham, in the county of Lancaster, issued the statutory advertisement for creditors and other claimants against his estate, in the usual form, dated the 16th of September, 1875, and inserted one in the *London Gazette* of the 21st of September, and one in each of the following papers:—the *Lancaster Guardian* of the 18th of September, and the *Lancaster Observer* of the 17th of September (weekly papers), and the *Lancaster Gazette* of the 18th of September (a bi-weekly paper), all circulating in Tatham:—*Held* (affirming the decision of NORTH, J.), that such advertisements were sufficient, and that there was no rule of practice that required the advertisement to be inserted in any London newspaper in addition to the *London Gazette*; that the time of one month as limited from the date of the advertisement was also sufficient, notwithstanding that, having regard to the dates of issue of the several papers, a full month's notice was not given; and that, consequently, a claim brought against the surviving executor of C. by a person alleging that C.'s estate was liable was rightly dismissed. *In re Bracken; Doughty v. Townson* (App.), 18

The question what notice is sufficient to require advertisements in foreign countries considered. *Ibid*.

Whether, having regard to the terms of section 29 of the 22 & 23 Vict. c. 35, an appeal lay from the decision of NORTH, J., *quære*. *Ibid*.

Executor (continued)—

2. — retainer: right of preference: rules of supreme court, 1883, order XV. rule 1]—An executor's right to prefer creditors in the payment of debts is not taken away by an order under Order XV. rule 1, for taking the executor's accounts and reserving further consideration; and where, after such an order, the executor became trustee of a settlement to which money was owing from the testator, it was held that the money so owing might be retained by the executor in the character of trustee. *In re Barratt; Whitaker & Co. v. Barratt*, 218

— advertisements for creditors: notice of claim. See LIMITATIONS, STATUTE OF.

— power: renunciation of probate: exercise of power. See WILL, 11.

— power to mortgage. See TRUSTEE, 4.

— retainer. See ADMINISTRATION, 7; PRACTICE, 14.

Foreclosure Action—parties. See PRACTICE, 10, 11.

Foreign Judgment—*final or interlocutory: foundation of action in England*—According to Spanish law two kinds of proceedings may be taken to recover a debt—first, summary or executive proceedings, in which no defence contesting the validity of the contract can be set up; secondly, plenary proceedings, in which all defences can be raised. A judgment in executive proceedings called a “re-mate” judgment is final in those proceedings, but does not prevent the unsuccessful party from resorting to plenary proceedings in the same Court. A “re-mate” judgment may be enforced, if security be given, though plenary proceedings are pending:—*Held*, that a “re-mate” judgment could not be enforced by action in England. *Nourion v. Freeman* (H.L.), 337

Judgment of Court of Appeal affirmed. *Ibid*.

Forfeiture—lease. See LEASE.

— See WILL, 6.

Frauds, Statute of—*specific performance: partnership: agreement to retire: interest in land: informal agreement: right to use name of retiring partner*—G., S. & B. being engaged in a partnership which owned leaseholds, B. signed the following document, “Rough draft memorandum from Gray, Smith & Bennett. This is to record that, in consideration of

Gray or his executors paying Bennett or his assigns the sum of 100*l.* on the 1st of January, 1890, and the sum of 100*l.* on every 1st of January for the nine succeeding years, Bennett agrees to withdraw from the firm of Gray, Smith & Bennett”:—*Held*, that there was a concluded agreement that Bennett should retire from the partnership, and that his withdrawal should be immediate; that as part of the partnership assets consisted of leaseholds, the agreement came within section 4 of the Statute of Frauds, but that it contained all the essential terms of the contract, and was a sufficient acknowledgment in writing by Bennett within the statute, and was enforceable against him. *Gray v. Smith* (App.), 145

Decision of KEKEWICH, J. (reported 58 Law J. Rep. Chanc. 863), affirmed. *Ibid*.

2. — specific performance: sale of land: memorandum in writing: separate documents: parol evidence—Where a memorandum alleged to constitute a contract in writing is contained in two or more separate documents which are not connected together by internal evidence, parol evidence is admissible to supply the connection. *Oliver v. Hunting*, 255

Vendor and purchaser signed a document containing all terms necessary to constitute a contract for the purchase of land, except a description of the land itself. The vendor subsequently signed a receipt for a sum of money paid by the purchaser as paid on account of certain land expressly described. In an action by the purchaser for specific performance,—*Held*, that parol evidence was admissible to connect the two documents, and on such evidence specific performance was decreed. *Ibid*.

Garnishee—attachment of debt. See COMPANY, 15.

Goodwill—sale: use of vendor's name. See TRADE NAME.

Heirlooms—sale by tenant for life. See SETTLED LAND ACT, 1.

Husband and Wife—*marriage settlement: covenant to settle after-acquired property: whether extending to property acquired by the husband after the death of the wife*—A covenant in a marriage settlement by the husband to settle future property acquired by him in right of his wife includes property coming to him through his wife after her death. *Fisher v. Shirley*, 29

In re Edwards (43 Law J. Rep. Chanc. 265; Law Rep. 9 Chanc. 97) explained and distinguished. *Ibid*.

Husband and Wife (continued)—

2. — *marriage settlement: covenant to settle property vesting in wife: reversionary interest vesting in wife liable to be divested by the exercise of a power of appointment*—A marriage settlement contained a covenant by the intended husband for the settlement of all personal estate which at any time during the coverture should come to or vest in him in right of his intended wife, or in her by bequest, gift, or otherwise:—*Held*, that a reversionary interest which during the coverture became vested in the wife, liable to be divested by the exercise of a power of appointment, was included in the covenant. *In re Ware. Cumberlege v. Cumberlege-Ware*, 717

3. — *married woman: separate examination: settled estates act, 1877 (40 & 41 Vict. c. 18), ss. 26 and 50*—On a petition under the Settled Estates Act, 1877, for the confirmation by the Court of a proposed lease of a settled estate, a married woman beneficially interested in the estate, who has been served with a notice of the petition as provided by section 26 of the Act, and who, in reply thereto, states that she submits her rights and interests to be dealt with by the Court, need not be separately examined. *In re Stanley's Settled Estates*, 82

4. — *property of wife: restraint on an anticipation: forfeiture: gift of life interest for separate use without power of anticipation: gift over "on her anticipating" the income: mortgage of life interest*—A married woman, who was under a will entitled to a life interest in a fund for her separate use without power of anticipation, with a gift over on her death or "on her anticipating the income," executed a mortgage of her life interest:—*Held*, that "anticipating" could not be treated as meaning "attempting to anticipate," and that, as the assignment was wholly inoperative by reason of the restraint on anticipation, there had been no forfeiture. *In re Wormald; Frank v. Muzeen*, 404

5. — *property of wife: "title": "contingent title": spes successionis: married women's property act, 1882, section 5*—A testator bequeathed a fund to trustees upon trust, in case his daughter should die leaving no issue, "for such person or persons as at the time of the failure of the preceding trusts would be my next-of-kin and entitled to my personal estate under the statutes for the distribution of the personal estate of intestates if I had then died intestate, and in the proportions in which they would be so entitled." The daughter died in 1886, without leaving any husband or having had issue. One of the persons entitled to a share of the fund was a woman who had married in 1857, and died in 1889, having made

a will and leaving her husband surviving. On summons taken out to determine who was entitled to the fund,—*Held*, that the married woman before 1886 had not a contingent interest or title to the fund, but a mere *spes successionis*; and that therefore her interest in the fund, having accrued since the Married Women's Property Act, did not belong to her husband, but was her separate estate and passed by her will. *In re Parsons; Stockley v. Parsons*, 666

In re Beauprè's Trusts (21 Law Rep. Ir. Ch. D. 397) disapproved. *Ibid.*

6. — *will of wife having no testamentary capacity: general grant of probate: action of husband against executor in chancery division: title of executor*—The mere appointment of an executor, and the grant by the Probate Division of probate to the person named as executor, does not amount to an admission of the capacity of the testator or testatrix to dispose beneficially of the property which the executor gets in by virtue of the probate. So, where a married woman who was entitled to two *choses in action* had, without any testamentary capacity, by assent of her husband or otherwise, made a will appointing an executor and bequeathing her property away from her husband, and probate of the will had been granted to the executor in general form, in accordance with the Probate Rules, March, 1887:—*Held* (reversing the decision of KAY, J.), that although her husband could not have sued the person liable to his wife in respect of the *choses in action* without taking out administration to her estate, such *choses in action* forming part of her assets, yet, having the beneficial interest in them when got in by the executor, he could sue such executor in respect of such interest in the Chancery Division without taking proceedings to recall probate or obtain administration to his deceased wife. *Smart v. Tranter* (App.), 363

Improvement Rentcharge—redemption. See SETTLED LAND ACT, 2.

Infant—*apprenticeship: covenant to serve: negative covenant: void contract: injunction*—An indenture of apprenticeship entered into between the plaintiff, a teacher of stage-dancing, and an infant and her mother, contained covenants that during the term of the apprenticeship the services of the apprentice should be at the plaintiff's disposal, that the apprentice should not enter into any professional engagement without the written consent of the plaintiff, and that the plaintiff should have the right to make professional engagements for the apprentice, and pay her for such services at rates mentioned. The infant having, without the plaintiff's consent,

Infant (continued)—

entered into a professional engagement, the plaintiff applied for an interim injunction:—*Held*, that the application must be refused, as no action at law could lie against an apprentice. *De Francesco v. Barnum*, 151

Gylbert v. Fletcher (Cro. Car. 179) followed. *Ibid*.

Fellows v. Wood (59 Law Times, 513) explained. *Ibid*.

2. — *marriage settlement: contract by infant: voidable contract: infants' relief act, 1874 (37 & 38 Vict. c. 62)*—The Infants' Relief Act, 1874, does not apply to a marriage settlement executed by an infant; but such a settlement is, as against the infant, voidable only—that is to say, valid until repudiated within the time and in the manner allowed by law. *Dunoon v. Dizon*, 437

Ex parte Jones (50 Law J. Rep. Chanc. 673; Law Rep. 18 Ch. D. 122) explained. *Ibid*.

3. — *past maintenance: life interest: accumulations: conveyancing and law of property act, 1881, s. 43, sub-s. 2: two funds*—Property was bequeathed to trustees, upon trust to pay the income to R. W., an infant, during her life, with remainders over. R. W. attained twenty-one:—*Held*, that the accumulations of income during her minority belonged to her absolutely, and were not to be held for the benefit of remaindermen. *In re Wells; Wells v. Wells*, 113

A fund was bequeathed to trustees, upon trust, if R. W. should attain twenty-one, to pay the income to her during her life, and there was an express power in the will to apply the income of this fund for maintenance. Another fund was bequeathed, by the same will, to the trustees, upon trust to pay the income to R. W. during her life:—*Held*, that the past maintenance of R. W. was primarily payable out of the former fund, that being most for her benefit; and that, as the trustees had not exercised any discretion in the matter, the Court could now exercise it for them, upon an application made after R. W. had attained twenty-one. *Ibid*.

Injunction—undertaking as to damages: extent of—An undertaking as to damages is the price which a person asking for an injunction has to pay for it; and such an undertaking should not be confined to the damages that may be sustained only by the party enjoined, but should extend to all the defendants asking for it. *Tucker v. New Brunswick Trading Co. of London* (App.), 551

But the Court has no power to extend an undertaking given by a plaintiff so as to cover damages that may be sustained by a party who never asked for it when the injunction was granted. *Ibid*.

— See PRACTICE, 9.

Interest—compensation for minerals wrongfully taken: interest upon: 3 & 4 Will. 4. c. 42. s. 29—By a decree made in 1871 the defendants were declared to be liable in respect of certain minerals removed by them from under adjoining land of the plaintiffs, and an enquiry was directed as to the quantity of minerals taken, and their value, with an allowance for the cost of carrying to the pit's mouth, but none for working. After the decree the defendants died. The enquiry was continued as against their representatives, and the official referee had reported the value of the minerals taken. On the further consideration of the suit the plaintiffs claimed to be entitled to interest on the sum named in the report, with half-yearly rests:—*Held* (1), that the action must be treated as in the nature of an action for money had and received, and interest could not be given as damages under section 29 of 3 & 4 Will. 4. c. 42, which did not apply to such an action; (2) that there was no fiduciary relation between the parties upon which the claim could be based; (3) that the claim ought to have been made at the trial, so that directions might have been inserted in the decree as to how the interest was to be ascertained, and it was too late to make it on the further consideration. *Phillips v. Homfray*, 547

— on legacy. See WILL, 9.

Judgment Creditor—interest in land: sale: dispensing with enquiries: judgment law amendment act, 1864 (27 & 28 Vict. c. 112), ss. 4 and 5—Upon a petition by a judgment creditor, who had obtained equitable execution of the debtor's interest in certain land by the appointment of a receiver of the rents and profits thereof (the land being subject to a legal mortgage), the Court ordered an immediate sale without directing enquiries, the mortgagee consenting to the sale, and there being evidence that there was no other charge on the land. *In re Bithray*, 66

Judgment Debt—equitable execution. See PRACTICE, 14, 15.

Jurisdiction—originating summons. See PRACTICE, 8; POWER, 6.

Landlord and Tenant—assignment: underlessees: payment of rent by one: contribution by others—A tenant of part of the land comprised in a lease, holding under an assignment by the original lessee of the whole term therein at an apportioned rent, paid, under threat of distress, the entire rent to the lessor, and sought to obtain contribution thereto from the tenants of another part of the land who held under an underlease by the original

Landlord and Tenant (continued)—

lessee at an apportioned rent, which rent they had afterwards bought up from their under-
lessor:—*Held*, that there being no one en-
titled to sue the defendants for their share
of the rent, the parties were not liable to a
common demand so as to give rise to a right
to contribution. *Johnson v. Wild*, 322

— lease. See LEASE.

Lands Clauses Consolidation Act—compulsory purchase of land: payment into court: conversion of national debt: redemption of consols: payment of amount into court: “cash under control of court:” *Lord St. Leonard's act* (23 & 24 Vict. c. 38), s. 10: *lands clauses consolidation act*, 1845 (8 Vict. c. 18), s. 69: *rules of supreme court*, 1883, order XXII. rule 17, as altered by *rules of the supreme court*, November, 1888: *costs of investment*—Money in Court paid for the redemption of Three per Cent. Consols, representing money paid into Court under the Lands Clauses Consolidation Act, 1845, is “cash under the control of the Court” within the meaning of the Act 23 & 24 Vict. c. 38. s. 10, and may be invested as such. *In re Brown* (App.), 530
Ex parte St. John the Baptist College, Oxford (52 Law J. Rep. Chanc. 268; Law Rep. 22 Ch. D. 93), followed. *Ibid*.

Where a change of investment of a fund representing money paid into Court by a railway company under the Lands Clauses Consolidation Act, 1845, is rendered necessary, not by any caprice of the holder, but by the act of the Government, the railway company ought to pay the cost of the reinvestment. *Ibid*.

2. — *compulsory purchase of land: payment into court: costs of subsequent incumbrancer: section 80*—After payment into Court by a corporation of the purchase-money of land (taken by them under compulsory powers) belonging to a tenant for life and remaindermen, one of the latter mortgaged his reversionary interest in the fund. Upon the death of the tenant for life, the remaindermen presented a petition for payment out of the fund:—*Held*, that the corporation must pay the costs of the subsequent mortgagee (not exceeding 42s. for his costs of appearance), and the costs of serving the petition upon him. *In re Olive's Estate*, 360

— See RAILWAY COMPANY.

Lease—usual covenants: proviso for re-entry: conveyancing act, 1881, s. 14—The rule that under an agreement for the grant of a lease, to contain the usual and proper covenants, the proviso for re-entry by the lessor is to be limited to breach of the covenant for payment of rent—*Hodgkinson v. Crowe* (44 Law J. Rep.

Chanc. 680; Law Rep. 10 Chanc. 622)—is unaltered by the Conveyancing Act, 1881, s. 14, although the Court is thereby enabled to relieve against forfeiture of leases for breach of covenants other than for the payment of rent. *In re Anderton and Milner's Contract*, 765

Life Assurance Company—deposit: change of investment: power of court: life assurance companies act, 1870, s. 3: *life assurance companies act*, 1872, s. 1: *board of trade rules*, 1872, rule 4: *rule of supreme court*, November, 1888—Where moneys have been deposited in Court under section 3 of the Life Assurance Companies Act, 1870, the Court has power under rule 4 of the Board of Trade Rules, 1872 (made under the Life Assurance Companies Act, 1872), to authorise the investment of such moneys in annuities Class B of the East Indian Railway Company. But whether such annuities will be accepted by the Court for the investment of funds under its control, *quere*. *In re Blue Ribbon Life's Accident Mutual and Industrial Assurance Company*, 276

Light—implied grant: railway company: injunction—A railway company sold a house in fee to the plaintiff and retained the adjoining land; and the conveyance recited that the whole of the land so retained would be actually required for the construction of the railway. The windows on the ground floor and basement of the house derived their light through one of the arches of a viaduct over which the railway ran. The defendant subsequently acquired through the company an interest in the adjoining land and the arch, which he blocked up:—*Held*, that there was an implied obligation on the part of the railway company not to interfere with the plaintiff's lights except so far as required for the construction of the railway, and that the plaintiff was entitled to an injunction. *Myers v. Catterson* (App.), 815
Decision of KEKEWICH, J., affirmed. *Ibid*.

2. — *obstruction: mandatory injunction: injury completed before writ issued*—The fact that a building which obstructs ancient lights has been completed before writ issued, will not prevent the granting of a mandatory injunction for its removal. The material point for consideration is the state of the new building when the plaintiff first complains. *Lawrence v. Horton*, 440

Limitations, Statute of—administration: charge of debts on real estate: lapse of more than six but less than twelve years: remedy against real estate: 37 & 38 Vict. c. 57. s. 10—Testator, by his will, gave all his property to the plaintiff, his executor, in trust to sell and

Limitations, Statute of (continued)—

convert, and after payment thereof of his debts to divide the residue as therein mentioned. The testator died in 1882 possessed of real estate. The defendant, who claimed to be a creditor of the testator, in 1883 sent in his claim in answer to the plaintiff's advertisements, under 22 & 23 Vict. c. 55. s. 29, but took no other steps. The plaintiff in 1887, when more than six years, but less than twelve years, had elapsed since the alleged debt was incurred, took out an originating summons to have the defendant's claim adjudicated on, and set-up the Statute of Limitations:—*Held*, that the alleged claim was barred as against the personal estate, but not as against the real estate. *In re Stephens; Warburton v. Stephens*, 109

Notice by a creditor of his claim in answer to advertisement by an executor under 22 & 23 Vict. c. 35. s. 29, does not prevent the Statute of Limitations from running. *Ibid*.

2. — *principal and surety: mortgage: joint and several covenant by mortgagor and surety: payment by mortgagor: real property limitation act, 1874 (37 & 38 Vict. c. 57), s. 8: co-contractor: mercantile law amendment act, 1856 (19 & 20 Vict. c. 97), s. 14*—A mortgage-deed was executed on the 10th of December, 1872, by E. F., to secure a sum of 800*l.*, and E. F. and M. F. as the surety for E. F., jointly and severally covenanted to pay the aforesaid sum and interest. E. F. paid the interest up to the 10th of December, 1880. On the 5th of April, 1889, the mortgagee claimed to rank as creditor against the estate of the surety, who had since died, for the mortgage-debt and unpaid interest:—*Held* (affirming the decision of KAY, J.), that the claim was not barred as against the surety's estate; for assuming that section 8 of the Real Property Limitation Act, 1874, applied to the case of a surety, the debt was kept alive as against him by the payment of interest by the mortgagor, and the surety was not within the protection of section 14 of the Mercantile Law Amendment Act, 1856, that section not referring to 3 & 4 Will. 4. c. 27, nor, consequently, to the Act of 1874. *In re Frisby; Allison v. Frisby* (App.), 94
Held, by COTTON, L.J. (differing from KAY, J., and BOWEN, L.J.; FRY, L.J., expressing no opinion on the point), that section 8 of the Act of 1874 does apply to an action brought against a surety, and is not confined to an action brought against the mortgagor himself or his representatives. *Ibid*.

The payment necessary to satisfy the words in section 8 is a payment by any one liable to pay. *Ibid*.

— See PRACTICE, 19; TRUSTEE, 1.

Literary Society—winding-up. See COMPANY, 16

Lottery Acts—*company: foreign lottery: 9 Geo. 1. c. 19. s. 4: 6 & 7 Will. 4. c. 66*—A company, acting within the objects for which it had been incorporated, had agreed to purchase a concession by the Shah of Persia for initiating and conducting all operations in the nature of lottery loans throughout the Persian empire, and had issued and advertised a prospectus offering its shares to the public, containing statements enlarging upon the value and importance of the lottery concession, and that "at least five issues had to be made annually in Persia, with minimum drawings of 10,000*l.*" Upon an application by a shareholder, suing on behalf of himself and other the shareholders of the company, for an injunction to restrain the company from acquiring or dealing with the concession and from advertising any such prospectus,—*Held*, that the lottery enterprise of the company was not an erection of a foreign lottery within 9 Geo. 1. c. 19. s. 4, as that statute contained no prohibition against the erection of foreign lotteries in foreign countries, and that the publication of the prospectus was not an advertisement of a foreign or other illegal lottery within 6 & 7 Will. 4. c. 66, and that the plaintiff had no interest sufficient to support his application. *Macnee v. Persian Investment Corporation (Limited)*, 695

Lunatic — *maintenance: necessities: implied contract*—The law implies an obligation on behalf of a lunatic, though not so found by inquisition, to pay for necessities supplied. *In re Rhodes; Rhodes v. Rhodes* (App.), 298
Dictum in In re Weaver (Law Rep. 21 Ch. D. 615, 619) dissented from. *Ibid*.

Per THE COURT OF APPEAL:—Where a lunatic is maintained at a cost and in a manner suitable to his condition in life, the fact that he might have been maintained at a less cost is not an answer to a claim for necessities. *Ibid*.

Claim for necessities against the estate of a deceased lunatic not so found disallowed on the evidence. *Ibid*.

Decision of KAY, J., affirmed. *Ibid*.

Maintenance—infant. See INFANT.

— lunatic. See LUNATIC.

Maritime Lien. See SHIP.

Marriage Settlement. See HUSBAND AND WIFE, 1, 2; INFANT, 2.

Married Woman—restraint from anticipation: forfeiture of life interest. See HUSBAND AND WIFE, 4.

— separate examination. See HUSBAND AND WIFE, 3.

— See HUSBAND AND WIFE.

Married Women's Property Act. See **HUSBAND AND WIFE**, 5.

Marshalling. See **ADMINISTRATION**, 5; **BUILDING SOCIETY**, 4.

Medical Practitioner—removal from register: *judicial enquiry: domestic forum: general medical council: medical practitioners act, 1858 (21 & 22 Vict. c. 90), s. 29: jurisdiction of court: personal interest of member of forum*—The General Medical Council held an enquiry upon a complaint made by the Medical Defence Union against the plaintiff, a registered medical practitioner, that he had been "guilty of infamous conduct in a professional respect," in that he had acted as "cover of" or by his advice and assistance had enabled one H. to carry on the business or profession of a medical electrician, and to practise as if he were duly qualified under the style of —. On the enquiry the charge was read by the solicitor to the General Medical Council, and the solicitor to the Medical Defence Union then stated the facts alleged against the plaintiff, who was present with his solicitor, and was heard in reply. The General Medical Council found that the plaintiff had committed the offence charged against him, that the offence was "infamous conduct in a professional respect," and directed the registrar to erase the plaintiff's name from the medical register. Two of the members of the General Medical Council were subscribers to and guarantors of the Medical Defence Union, an association having for its objects the protection of members, the prevention of unprofessional conduct, and the punishment of offenders, but were not members of the council of that union, by whom the charge against the plaintiff was made, and who had full power under the articles of the association to act. The plaintiff brought this action against the defendants for an injunction to restrain them from removing his name from the register:—*Held*, that the offence charged against the plaintiff was within the jurisdiction conferred on the General Medical Council by the Medical Practitioners Act, 1858, and that as the council had acted honestly within its jurisdiction, the Court had no power to interfere with its decision. *Leeson v. General Council of Medical Education and Registration of the United Kingdom* (App.), 233

Held, by COTTON, L.J., and BOWEN, L.J. (FRY, L.J., *dissentiente*), that the fact that two members of the General Medical Council were subscribers to the Medical Defence Union, by whom the charge was made against the plaintiff, did not invalidate the decision of the General Medical Council, as they were not actually or constructively accusers or *quasi* accusers of the plaintiff. *Ibid*.

Decision of NORTH, J., affirmed. *Ibid*.

The Queen v. Allan (4 B. & S. 915; 33 Law J. Rep. M.C. 98) considered. *Ibid*.

Meeting—conduct of business. See **COMPANY**, 5.

Mine—royal mine: gold mine: mines of copper, iron, or lead: rights of crown: 1 Will. & M. c. 30. s. 4; 6 Will. & M. c. 6. ss. 2 and 3—Section 2 of the Act 6 Will. & M. c. 6, provides that the owner of any mine wherein any ore shall be found or wrought, and in which there is copper, iron, or lead, may hold and enjoy, and continue in possession of, and dig and work the same mine and ore, notwithstanding that such mine or ore shall be claimed to be a royal mine. Section 3 of the same Act provides that the Crown may have the ore of any such mine, paying to the owner of the said mine wherein such ore shall be found, within thirty days after the said ore shall be raised and laid upon the banks of the said mine, and before the same be removed from thence, for all ore "washt, made clean, and merchantable," where there is copper, iron, or lead, certain specified rates per ton. And, in default of payment of such respective sums, it shall be lawful for the owner of the said mine wherein such ore shall be found to sell and dispose of the said ore to his own uses:—*Held*, that the true object of the Act was to secure to the subject the copper, iron, and lead ores found in his soil, or the full value thereof as fixed by section 3; and, at the same time, to secure to the Crown (if it chose to take it) all the gold and silver found in the mine, paying the value of the copper, iron, or lead ores, which accompanied it, at the specified rates. *Attorney-General v. Morgan*, 772 The defendant was the owner of a mine in Wales, which he was working for gold, and which he claimed the right to work without paying any royalty to the Crown. The defendant had never worked the mine as a copper, lead, or iron mine; and no one had ever so described it:—*Held*, first, that the defendant, therefore, was not within the protection of the Act; secondly, that, even if he was, as he had only offered to the Crown quartz rock in the rough state, and not ore "washt, made clean, and merchantable," there had been no default of the Crown in payment of the statutory price; and that the defendant, therefore, was not entitled "to sell and dispose of the ore for his own use" without paying a royalty. *Ibid*.

— See **RAILWAY COMPANY**, 3.

Misdescription—sale by mortgagee. See **MORTGAGE**, 6.

Mortgage—equitable mortgage: real estate: priority: notice—*R.*, a solicitor, in 1883 received money from a client for the purpose of investment, and represented to him that he had invested it upon the security of a particular mortgage. The mortgage, however, was one which *R.* had previously taken in his own name, and it was never transferred to the client. He afterwards deposited the title-deeds of the mortgaged property with his bankers to secure his overdrawn account, and paid interest on the mortgage to the client down to the death of the latter in 1885, and subsequently to his executors. *R.* died in 1888, his account being overdrawn to an extent exceeding the value of the mortgaged property, and the bank immediately gave notice of their claim to the mortgagors. The bank had no notice of the client's claim at the date of the deposit, and their notice to the mortgagors was prior to any notice given by the client's executors:—*Held* (1) that *R.* was a trustee of the mortgage for his client, and that neither the client nor his executors had been guilty of negligence so as to deprive them of their priority, and (2) that the principle of *Dearle v. Hall* (3 Russ. 1) did not apply, and therefore the bank were not entitled to priority by virtue of having given notice to the mortgagors before the executors. *In re Richards. Humber v. Richards*, 728

2. — **foreclosure action: successive incumbrances: annuitant: conveyancing and law of property act, 1881 (44 & 45 Vict. c. 41), s. 15; conveyancing act, 1882 (45 & 46 Vict. c. 39), s. 12: form of order**—In a foreclosure action the plaintiffs were first mortgagees, and also third mortgagees. The defendants were the second incumbrancer, who was a jointress, and several subsequent incumbrancers, whose priorities had not been ascertained. An order was made on the hearing of the action giving the jointress a period of six months within which to redeem; in case she did not redeem, the subsequent incumbrancers were to have one period of three months within which to redeem; but in case the jointress did redeem, the plaintiffs, as third mortgagees, were to have a period of three months within which to redeem subject to the jointure; and a further period of three months was given to the subsequent incumbrancers within which to redeem. *Smithett v. Hesbeth*, 567

3. — **mortgagee in possession: right to give up possession: right to appointment of a receiver: judicature act, 1873, section 25, sub-section 8]**—The power given by section 25, sub-section 8, of the Judicature Act, 1873, to appoint a receiver, can be exercised at the trial of the action as well as upon an interlocutory application. *In re Prytherok. Prytherok v. Williams*, 79

A legal mortgagee, who has taken possession of the mortgaged property, cannot give up possession whenever he likes; and, as a general rule, the Court will not appoint a receiver at his instance. *Ibid.*

4. — **priorities: first equitable mortgages: negligence: title-deeds: trustees: legal estate: getting in after notice of prior equity: costs]**—By indenture dated the 15th of February, 1883, *T.* mortgaged freehold land to the plaintiffs, purporting to make a title under a forged deed of conveyance from Smithsons' trustees dated the 3rd of November, 1882. *T.* had previously mortgaged other property in the same neighbourhood to the plaintiffs under a genuine title from Smithsons' trustees, and the plaintiffs' solicitor, who acted for the plaintiffs on the former occasion, and who on this occasion acted for both parties, and believed in *T.*'s honesty, required no other abstract of title than that of the forged conveyance, and made no requisition as to identity of the property. The property in 1882 in fact belonged to Surtees' trustees, subject (together with other property of greater value) to a legal mortgage made by them in 1862 to Legard's trustees; but Surtees' trustees by indenture dated the 30th of January, 1883, conveyed it to *T.* as if free from incumbrances, and the title-deeds, which, notwithstanding the mortgage to Legard's trustees, had remained in the possession of Surtees' trustees, were then handed over to *T.* In 1887 *T.* mortgaged the property to the defendants, concealing the plaintiffs' mortgage, and handing over the genuine title-deeds to the defendants. In 1888 the defendants, having heard of the plaintiffs' mortgage, induced Legard's trustees to reconvey the legal estate in the property to Surtees' trustees, who, in turn, reconveyed it to the defendants:—*Held*, that the plaintiffs, who had obtained a good equitable title under their security, had not been guilty of negligence sufficient to postpone that security to the defendants' security. *Held also*, that the defendants could not, under the circumstances, rely on the legal estate got in after notice of the plaintiffs' security. *Held also*, that the title-deeds must be delivered to the plaintiffs. *Taylor v. Russell*, 756

The negligence necessary to postpone the first equitable mortgagee, in such a case, must be so gross as to render him responsible for the fraud committed upon the second mortgagee. Mere carelessness or want of prudence is not enough. *Ibid.*

The Northern Counties of England Fire Insurance Company v. Whipp (53 Law J. Rep. Chanc. 629; Law Rep. 26 Ch. D. 482) explained. *Ibid.*

The costs of each party were ordered to be added to their debts, but without interest. *Ibid.*

Mortgage (continued)—

5. — *redemption : policy of assurance : stipulation that it should belong to lenders in certain events*—The trustees of an assurance company advanced 10,000*l.* to C. on the security of a bond securing the principal and interest and premiums upon a policy, with a charge upon a reversionary interest in certain Scotch estates contingent on his surviving his father. By a document of the same date it was agreed that the terms on which the loan was made were that the lenders should insure the life of C. against the life of his father for 31,500*l.*, that they should pay the premiums for the next five years, and should allow the premiums and interest to accumulate for that period, and afterwards, if the premiums and interest were not paid by C., the lenders might pay them themselves and be entitled to proceed against C. and his estate, and it was provided that if C. should pay the principal and interest in the lifetime of his father the lenders should forthwith be bound to assign the policy to him, and certain provisions were made for bringing the policy moneys into account. By a third document it was agreed that, in case C. should predecease his father without having paid all the principal money and interest and premiums, the policy should belong to the lenders absolutely. C. died intestate in the lifetime of his father, without having made any payment for principal or interest or premiums. His father, as his administrator, claimed to be entitled to the policy less what was due to the lenders for principal, interest, premiums, and costs:—*Held*, by COTTON, L.J., and LINDLEY, L.J. (BOWEN, L.J., *dissentiente*), that the three documents constituting the charge must be read together, that upon the true construction the policy effected on the life of C. was part of the security given, and was subject to an equity of redemption, and that the attempt to confine the right to redeem to a certain event was against the well-established principles of equity. *Marquis of Northampton v. Pollock* (App.), 745
Decision of NORTH, J., affirmed. *Ibid*.
6. — *sale under power : misdescription : compensation to purchaser : liability of mortgagee*—A mortgagee who, in the exercise of his power of sale, personally or by his agent commits a mistake, such as a misdescription of the property, whereby a material diminution is caused in the price realised, is liable to the parties interested in the equity of redemption for the loss so occasioned; but the amount of that diminution is not necessarily the measure of the compensation payable by the mortgagee. *Tomline v. Luce* (App.), 164
So, where mortgaged property was sold for 20,800*l.*, and, in consequence of a misstatement in the particulars by the auctioneer employed by the mortgagee, a compromise was come to between the purchaser and mortgagee, which the Court held to be a reason-

able one, whereby 895*l.* was allowed to the purchaser out of the purchase-money,—*Held*, by the Court of Appeal (reversing the decision of KEKEWICH, J.), that that sum was not necessarily to be taken as the measure of compensation to be allowed as between the mortgagee and the owners of the equity of redemption, and an enquiry was directed whether the property would have sold for any, and (if any) what sum in excess of 19,905*l.* (the original purchase-money less the sum allowed to the purchaser), in case the property had been sold without the misstatement in the particulars. *Ibid*.

7. — *solicitor : future costs : construction : professional charges by mortgagee : special contract : collateral advantage : redemption*—By an indenture made in 1885 between two mortgagors and two mortgagees, of whom one was an auctioneer and the other a solicitor (after reciting an agreement that the mortgagees should be entitled to make the same charges and receive the same remuneration respectively for all business done by them respectively "in or about these presents" as they would have been entitled to make and receive if they had not been mortgagees), the mortgagors covenanted to pay to the mortgagees the principal moneys advanced, and every other sum which might thereafter be advanced or paid by the mortgagees or either of them to, "or become owing to them or him by, the mortgagors or either of them"; and the mortgagors thereby charged the lands comprised in the mortgage with payment of these sums and interest. The solicitor mortgagee in foreclosure proceedings claimed to add to the principal moneys certain costs owing to him by the mortgagors respectively for business done after the date of the mortgage-deed and not in connection therewith. He also claimed to be allowed remuneration paid to the auctioneer mortgagee for a report and valuation of the property made on the occasion and for the purpose of the mortgage:—*Held*, that the solicitor's future costs were not included in the security. *Held also*, that the remuneration paid to the auctioneer mortgagee must be disallowed, notwithstanding the special contract contained in the recital. *Field v. Hopkins*, 174

- action by puisne incumbrancers : costs of action. See COSTS, 4.
- foreclosure action. See PRACTICE, 10, 11.
- joint and several covenant by mortgagor and surety : payment of interest by mortgagor. See LIMITATIONS, STATUTE OF, 2.
- Looke King's Act. See ADMINISTRATION, 6.

Mortgage (continued)—

— patent: right of mortgagor to sue. See PATENT, 6.

— priority: originating summons. See PRACTICE, 2.

— sale under power. See VENDOR AND PURCHASER, 4.

— solicitor mortgagee. See COSTS, 5.

Mortmain. See CHARITY.

Necessaries—implied contract. See LUNATIC.

Negligence. See BUILDING SOCIETY, 3.

Newspaper—comment on pending litigation. See CONTEMPT OF COURT.

Next-of-Kin—time for ascertaining class. See SETTLEMENT.

Palatine Court—jurisdiction. See PATENT, 5.

Parliamentary Deposit. See RAILWAY COMPANY, 1.

Partition Action—*form of judgment: request for sale by owners of the moiety: proof of title at hearing: enquiry as to persons interested*]—As a general rule, when, at the trial of a partition action, a request is made for a sale of the property, the Court will not make an immediate order for sale, but an enquiry will be directed to ascertain who are the persons interested. *Wood v. Gregory*, 232

Partnership—*dissolution: deed providing that one partner should wind up affairs of firm: debt due to firm: arrangement to take shares in limited company in satisfaction of debt: appointment of one partner receiver: jurisdiction*]—On the dissolution of a partnership between the plaintiff and defendant, it was by deed agreed that the defendant should have sole management of the liquidation of the firm; that neither of the partners should make any claim on the other of them, but the defendant should pay all debts of the firm, and indemnify the plaintiff against the same, and should also pay and account to him for the share of any dividends which might be received in respect of any debts, after all the firm debts had been paid out of the existing assets of the firm. Among the assets of the firm was a debt due from a firm in Java. A Dutch company was formed for the purposes of taking over the property of the Java firm, subject to an arrangement being come

to with the creditors of that firm to accept shares in the company in payment or part payment of their debts. In an action by the plaintiff against the defendant for an account of the partnership, and to restrain the defendant from compromising the claim of the firm against the Java firm, Kekewich, J., made an order appointing the defendant receiver, with liberty to compromise the claim in question, upon terms to be approved by the Judge in chambers:—*Held*, that there was no power, express or implied, in the deed of dissolution enabling the defendant to enter into the arrangement in question, and that the Court could not appoint the defendant receiver, and give him as such receiver greater power than he had under the deed of dissolution, without the consent of the plaintiff. *Niemann v. Niemann* (App.), 220

Decision of KEKEWICH, J., reversed. *Ibid*. Statement in *Lindley on Partnership* (5th ed. p. 141) and *In re The Land Credit Company of Ireland; v. Weikersheim's Case* (42 Law J. Rep. Chanc. 435; Law Rep. 8 Chanc. 831) explained. *Ibid*.

— agreement to retire: right to use name of retiring partner. See FRAUDS, STATUTE OF, 1.

— foreign partner: service of writ. See PRACTICE, 17.

Patent—*action: particulars of objections: costs of meeting objections: no certificate that objections were reasonable and proper: disallowance of costs: patents, designs, and trade marks act, 1883 (46 & 47 Vict. c. 57), s. 29, sub-s. 6: rules of supreme court, 1883, order LXV. rule 27, sub-rule 20*]—Where in a patent action the defendant pleaded no infringement of the plaintiff's patent, and that it was invalid, and delivered particulars of objections to the validity of the patent, and the action was dismissed on the ground of no infringement, and the question of the validity of the patent was not considered by the Court, the disallowance by the Taxing-Master of the defendant's costs of his particulars of objections to the validity of the patent, on the ground that there was no certificate that the particulars were reasonable and proper as required by the Patents, Designs, and Trade Marks Act, 1883, s. 29, sub-s. 6, is not such a disallowance of the costs under Order LXV. rule 27, sub-rule 20, as to give the Taxing-Master jurisdiction to deal with the costs occasioned to the plaintiff by these particulars. In such a case the plaintiff ought, if he desires to raise the point, to ask the Judge to direct the Taxing-Master to see whether, by reason of any proceedings which have been improperly, vexatiously, or unnecessarily taken by the defendant, he has been put to extra

Patent (continued).—

costs, and to tax these costs and to allow them. *Garrard v. Edge* (App.), 379

Decision of KAY, J., affirmed. *Ibid.*

2. — *action for threats: action for infringement by patentee "prossouted" and discontinued: "due diligence:" patents, designs, and trade marks act, 1883, s. 32*—In September, 1888, C. brought an action (under section 32 of the Patents, Designs, and Trade Marks Act, 1883) against H. to restrain him from issuing circulars threatening legal proceedings. H. then commenced an action against C. for infringement of his patent. In November, 1889, H. discovered (from a report made by an expert under an order of the Court) that the articles sold by C. were not an infringement of H.'s patent, and H. thereupon discontinued his action:—*Held*, that as H. had "with due diligence commenced and prosecuted" his action down to the time of discontinuance, he was exactly in the same position (with regard to the protection afforded by the proviso) as if he had prosecuted his action to trial, and then failed; and that, as the proviso applied, C. had no cause of action under section 32. *Colley v. Hart*, 308

3. — *action for threats: pending action for infringement against licensee: staying vexatious proceedings: patents &c. act, 1883, s. 32: practice: order XXV. rule 4*—An action to restrain threats in respect of an alleged infringement of a patent ought not, having regard to section 32 of the Patents &c. Act, 1883, to be commenced after an action to restrain the alleged infringement has been instituted and is being prosecuted with due diligence; and if it is so commenced, all proceedings in it may be stayed as being vexatious. *Barrett & Elers (Lim.) v. Day. Day v. Foster*, 464

An action by a patentee against a licensee brought *bona fide* for royalties in respect of articles manufactured, as the patentee alleges, but the licensee denies, in accordance with the patent, and for an injunction to restrain the licensee from manufacturing the articles, except subject to the terms of the licence, is an action to restrain the infringement of the patent within section 32, notwithstanding that the validity of the patent cannot be contested by the licensee. *Ibid.*

Any action may be stayed as being vexatious when it is clear that no relief can be obtained at the trial. *Ibid.*

4. — *infringement: damages: reduction of price by patentee: loss by competition*—A patentee had obtained an injunction restraining the defendants from infringing his patent, and an enquiry as to damages. The official referee found, as facts, that the patentee had

from time to time, in consequence of previous reductions by the defendants, reduced his own prices down to, but never below, the defendants' prices for the time being; that he had done so in order to prevent himself from being driven out of the market by the defendants; and that, but for the defendants' competition and underselling, the patentee would (subject to certain allowances for probable increase of sales in consequence of the reduction in price and the connection and industry of the defendants) have made the sales which were made by him and also those made by the defendants at his own original prices:—*Held* (reversing the decision of KEEWICH, J.), that the patentee was entitled to recover by way of damages (subject to the above allowances), not only the sums found to represent the profits on sales made by the defendants, calculated at the patentee's original prices, but also the loss caused to the patentee by the reduction in price which he was obliged to make in consequence of the defendants' illegal competition. *American Braided Wire Co. v. Thompson & Co.* (App.), 425

The United Horse Shoes and Nail Co. v. Stewart (Law Rep. 13 App. Cas. 401) commented upon and distinguished. *Ibid.*

5. — *infringement: experimental use abandoned: injunction in aid of legal right: damages: jurisdiction of palatine court*—The plaintiff, the owner of a patent the validity of which had been established in a previous action, brought an action against the defendant claiming an injunction and damages for the use of certain machines which infringed the plaintiff's patent. The defendant alleged that the machines complained of had been put up on trial, and, being found unsuccessful, had been taken down five years before the plaintiff brought his action, and had been removed from the defendant's premises three years before; and he denied any threat or intention to use machines which infringed the plaintiff's patent:—*Held*, that the facts did not shew an intention on the part of the defendant to renew or continue the infringement of the plaintiff's patent, and therefore an injunction ought not to be granted; and that, as the case for an injunction failed, the Palatine Court had no jurisdiction to give damages. *Proctor v. Bayley* (App.), 12

Decision of the Vice-Chancellor of the County Palatine reversed. *Ibid.*

Millington v. Fox (3 Myl. & Cr. 338) and *Geary v. Norton* (1 De Gex & S. 9) considered. *Ibid.*

6. — *infringement: mortgage: right of mortgagor to sue: parties: patents &c. act, 1883 (46 & 47 Vict. c. 57), ss. 23, 46, and 87: patents &c. act, 1888 (51 & 52 Vict. c. 50), s. 21: rules of supreme court, order XVI. rule 11*—The mortgagor of a patent is entitled to maintain an action for infringement

Patent (continued)—

without making the mortgagees parties. *Van Gelder, Apsinum & Co. (Lim) v. Sowerby Bridge United District Flour Society (Lim.)* 292; (App.), 583

Where an action appears to the Court to be defective for want of parties, it is the duty of the Court, under rule 11 of Order XVI., to order the necessary parties to be added. *Ibid.* Decision of KEKEWICH, J., reversed. *Ibid.*

7. — *petition to revoke: patents, designs, and trade marks act, 1883, section 26: patentee (respondent) out of the jurisdiction: notice: service*—A patentee, the sole respondent to a petition for the revocation of a patent, was resident and domiciled in Scotland. A copy of the petition and of the particulars of objections had been delivered to him personally, and he had written to say that he did not intend to appear on the hearing of the petition. Upon an application by the petitioners for directions as to the trial of the petition, the Court made an order nisi that, unless the respondent should before a named day appear and shew cause to the contrary, the petition should be heard as an action with witnesses, and set down in the list of witness actions. *In re Drummond's Patent*, 102

Perpetuity. See POWER, 6; REMOTENESS.

Power—appointment: power given by will: objects designated nominatim: gift over to objects nominatim in default: death of some of objects during life of donee of power: effect of, on power: "representatives": meaning of]—Where power is given by will to appoint a fund among several persons designated *nominatim*, with a gift over in default of appointment to the same persons *nominatim*, or their representatives, and all the objects of the power survive the testator, the power is valid as to the whole fund, notwithstanding that some of the objects die during the life of the donee of the power. *In re Wars. Cumberlege v. Cumberlege-Wars*, 717

The principle of *Boyle v. The Bishop of Peterborough* (1 Ves. jun. 299) applied. *Ibid.*

A gift in a will to the "representatives" of a person is a gift to his legal personal representatives, in the absence of any context in the will shewing that the word is to have a different meaning. *Ibid.*

re Crawford's Trusts (2 Drew. 230; 23 Law T. Rep. Chanc. 625) followed. *Ibid.*

2. — *exercise: power to appoint in any manner. general bequest: wills act (1 Vict. c. 26), ss. 10 and 27*—There is nothing in the Wills Act which prevents the creator of a power of appointment from imposing con-

ditions upon the exercise of that power by will, not being conditions as to the form of execution, which are invalid under section 10. Consequently, a power to appoint property by a will expressly referring to the power itself—or to the settlement creating the power—is not exercised by a general bequest contained in the will of the donee of the power. The words in section 27, "power to appoint in any manner he may think proper," do not mean "any power to appoint," nor "power to appoint by any will in any manner he may think proper," but mean "power to appoint by the will in question." *Phillips v. Cayley* (App.), 177

Decision of KEKEWICH, J. (58 Law J. Rep. Chanc. 569), affirmed. *Ibid.*

3. — *exercise: real estate: power to appoint among children in tail: appointment to a child for life with remainder to grandchildren: validity: absence of express reference to power: general reference*—By a deed of the 5th of September, 1837, real estate was conveyed to such uses as Mr. and Mrs. P. should by deed appoint. By a deed of the 9th of September, 1837, Mr. and Mrs. P. in exercise of the power conferred by the deed of the 5th of September appointed the property to the use of themselves successively for life with remainder to the use of such of their children in tail as they should jointly by deed appoint, with remainder to such children as tenants in common in tail. By a deed of the 10th of March, 1855, Mr. and Mrs. P. in exercise of the power conferred by the deed of the 5th of September, and of every power and authority enabling them in that behalf, appointed the property successively to themselves for life, and after the death of the survivor to the use of their son E. for life, with remainder to his children and remoter issue as he should appoint and with a power of jointuring, with remainder to his children as tenants in common in fee:—*Held*, affirming the decision of NORTH, J., that assuming the power conferred by the deed of the 9th of September authorised an appointment to E. for life, there was no intention on the face of the deed of the 10th of March, 1855, to exercise the power, and that the appointment was wholly bad. *In re Porter. Porter v. De Quetteville* (App.), 595

Per LINDLEY, L.J., a power to appoint in tail does not authorise an appointment for life. *Ibid.*

4. — *exercise: will: codicil: confirmation*—By a marriage settlement of 1853 personal estate was settled upon trusts for the husband and wife during their lives, and then upon trust for the children as the husband and wife should jointly appoint, and, in default of such appointment, as the survivor should appoint.

Power (continued)—

By his will, dated in 1854, the husband bequeathed the ultimate residue of his property "of which he might be possessed at the time of his decease, or over which he might have any power of bequest or disposal," for the benefit of his children other than the eldest son, who was specially provided for. The will contained a direction for the maintenance of infant children out of the income of such children's shares. By another settlement, executed a few days after the will, further personal estate was settled on the same trusts as the property settled by the original settlement. The wife died in 1882, and by two codicils, both executed shortly after her death, the husband confirmed his original will:—*Held*, that the codicils incorporated and repeated the provisions of the will, and that by the combined operation of the will and codicils the settled property passed under the dispositions originally contained in the will, but which would have been inoperative without the codicils, inasmuch as during the wife's lifetime the power of appointment was joint only and not separate. *In re Blackburn; Smiles v. Blackburn*, 208

—*fraud upon power*—A., who had, under a deed of 1828, a power to appoint 35,000*l.* among his children, executed his will in 1865, by which, after reciting the power, he appointed that 10,000*l.*, part of the 35,000*l.*, should go and belong to his daughter B.; but his will was that the same should be paid to the trustees of another legacy thereinbefore bequeathed to B., and be held by them upon the same trusts. Those trusts were for B. for life, then for her children as she should appoint, or in default of appointment equally, with other remainders and provisions usual in settlements. Then, after other appointments of shares of the 35,000*l.* to other children, and a gift of the residue of that sum to his son C., the testator declared that in case he had exceeded his power in not appointing the 10,000*l.* to B. unconditionally, and in case B., or others entitled to object, should object to the settlement thereof, then he appointed the 10,000*l.* to C. absolutely, who would, he was assured, settle the same voluntarily in the manner in which he, the testator, had attempted to settle the same. After the testator's death, B. and C. joined in executing a deed to carry out the testator's wishes, but there was no evidence that C. had had any knowledge of the terms of the testator's will until after his death:—*Held*, that the appointment of the 10,000*l.* to B., but to be paid to and held by the trustees for purposes in excess of the power, being invalid, the gift over to C., an object of the power, took effect, notwithstanding the expression of the testator's confidence that he would settle the fund, there being nothing to shew that such confidence was based upon any arrangement

between A. and C. so as to make the appointment a fraud upon the power. *In re Cranshaw; Cranshaw v. Cranshaw*, 395

6. — *validity: perpetuity: originating summons: jurisdiction: rules of supreme court*, 1883, *order LV. rule 3*—A testatrix devised real estate unto and to the use of trustees, upon trust to receive the rents and pay the same to her sister M. during her life, and after her death to pay the rents to her children as therein mentioned; and after the death of M. and all her children, upon trust to pay the rents to her sister E. for life, and after her death to pay the rents to her children as therein mentioned; and after the death of M. and E. and their children, the trustees to hold the property on trust for such person or persons as the longest liver of M. and E. and their children should by deed or will appoint. The question having been raised whether the power of appointment was invalid as infringing the rule against perpetuities,—*Held*, reversing the decision of *KAY, J.*, that there was jurisdiction to determine the question on an originating summons under *Order LV. rule 3*, and that the power of appointment was invalid, as the person to exercise it might not be ascertained within the period prescribed by law. *In re Hargreaves; Midgley v. Tatley* (App.), 384
Avern v. Lloyd (37 Law J. Rep. Chanc. 489; Law Rep. 5 Eq. 383) overruled. *Ibid.*

**Practice—appeal: final order in chambers: "further consideration": motion to discharge: time: rules of court, 1883, *order LVIII. rule 15: judicature act*, 1873, s. 50]—The rules which relate to appeals to the Court of Appeal do not relate to motions to discharge orders made in chambers, and the Court will not act by analogy and give a party moving to discharge a final order made in chambers the same time—one year—as a person would have to appeal from a final order made in Court to the Court of Appeal. No longer time will be given in the case of a final than in that of an interlocutory order in chambers. *In re Johnson. Manchester and Liverpool Banking Co. v. Beales. Johnson v. Hooley*, 99
An order on further consideration made in chambers which does not wind up the action, and gives liberty to apply, is not a final order. *Ibid.***

2. — *appeal: final order in chambers: judicature act*, 1873 (36 & 37 Vict. c. 66), s. 50: *originating summons: dispute as to priorities: jurisdiction: rules of supreme court*, 1883, *order LV. rules 3 and 5a*—The time for giving notice of motion to discharge a final, not less than an interlocutory, order made in chambers is to be limited to twenty-one days

Practice (continued).—

In re Giles; Real and Personal Advance Company (Limited) v. Mitchell (App.), 226

The decision of KAY, J., in *Johnson v. Hooley*; in *re Johnson* (ante, p. 99; Law Rep. 42 Ch. D. 505) approved. Ibid.

A question of disputed priority as between two mortgagees, even assuming that the Court has jurisdiction to decide it on originating summons—as to which, *quære*—is not such a question as ought to be determined by such a mode of procedure. Ibid.

3. — *appeal: shorthand notes: evidence: judgments: application after order passed and entered*—After an order of the Appeal Court has been passed and entered, the Court will not direct the costs of the transcripts of shorthand notes of the evidence in the Court below and of the judgments in a Case in the House of Lords used on the hearing of the appeal to be allowed. To do so would be to alter a final order of the Court, which will only be done where, through a slip, the order does not express the intention of the Court at the time when the order was made. An application for that purpose should be made at the hearing of the case, or immediately after judgment is given. *Glasier v. Rolls* (App.), 63

Semble, except in extreme cases, the costs of shorthand notes of the evidence will not be allowed. The Judges' notes, coupled with the notes of counsel, ought generally to be sufficient. Ibid.

4. — *consent order: compromise by counsel: authority of counsel*—The rule that parties are bound by terms agreed to by their counsel when the case is altogether in the hands of counsel, does not apply when, general terms of compromise having been contemplated by one of the parties and communicated to his legal advisers, counsel is instructed to arrange the specific terms of the compromise. *Lewis v. Lewis*, 712

Matthews v. Munster (57 Law J. Rep. Q.B. 49; Law Rep. 20 Q.B. D. 141) distinguished. Ibid.

5. — *evidence: affidavit: jurat: defect: omission of words "sworn before me": order XXXVIII. rules 6 and 14*—The Court being satisfied that an affidavit was sworn before the person who signed the jurat, though it was not so stated in it, made an order under Order XXXVIII. rule 14 that the affidavit should be received. *Eddowes v. Argentine Loan and Agency Co.* (App.), 392

Decision of KKEWICH, J., affirmed. Ibid.

6. — *evidence: enquiry at chambers: order for cross-examination: time for closing evidence: discretion of judge*—As there is no provision in the Rules of the Supreme Court, 1883, fixing the time at which the evidence

is to close on any enquiry in chambers, the matter is one in the discretion of the Judge. In the chambers of CHITTY, J., the general practice (not as a hard and fast rule) is that the evidence must be closed before an order for the cross-examination of one of the parties to an enquiry will be made; and after the cross-examination of one party, the other party will not be allowed to file further affidavits; and the Court will not interfere with this practice except under special circumstances. *In re Davies; Issard v. Davies* (App.), 516

Decision of CHITTY, J., affirmed. Ibid.

7. — *official referee: judicature act, 1873, s. 56: reference for enquiry and report: administration action: account: form of report*—Where in an administration action the accounts are referred to an official referee, he is not bound to adopt procedure usual in the Chancery chambers, although he may do so if he finds it convenient and likely to advance the ends of justice. *In re Taylor. Turpin v. Pain*, 803

Accounts in an administration action, after having been ineffectually prosecuted in chambers for two years, were referred to an official referee, under section 56 of the Judicature Act, 1873, to enquire and report. The referee stated in his report the total amounts of receipts and payments, and found a balance, without detailing items; but the Court was satisfied that the report contained sufficient materials to enable the parties to attack it on points of substance:—*Held*, that the report ought not, under the circumstances of the case, to be remitted for want of particularity. Ibid.

8. — *originating summons: jurisdiction: question as to validity of gift made by testator in his lifetime: rules of supreme court, 1883, order LV. rule 3*—The Court has no jurisdiction under Order LV. rule 3 to determine, on an originating summons, questions which could not have been determined under a judgment for administration of a testator's estate or the execution of a trust. Consequently, there is no jurisdiction, on an originating summons, to determine the question of the validity of a gift of money made by a testator to his wife in his lifetime, the money being in her possession at the time of his death. *In re Royle; Royle v. Hayes* (App.), 1

Decision of KKEWICH, J., reversed. Ibid.
In re Davies; Davies v. Davies (57 Law J. Rep. Chanc. 759; Law Rep. 38 Ch. D. 210) approved. Ibid.

9. — *parties: death of party: order to carry on proceedings: transmission of interest: cause of action: survival of: injury to freehold: mandatory injunction: damages: 3 & 4 Will. 4. c. 42. s. 2: rules of supreme*

Practice (continued)—

- court*, 1883, *order XVII. rules 1-4: order XXXVI. rule 58*—The plaintiff in an action for a mandatory injunction and damages for obstruction of light to freehold property, died more than six months after the commencement of the action, and three months after her death B. J., her executor and devisee, obtained the common order, under Order XVII. rule 2, to carry on proceedings against the defendant. The defendant moved to discharge the order on the ground that the cause of action did not survive:—*Held*, that the plaintiff's equitable right to a mandatory injunction devolved to B. J. as her devisee, and that B. J., as her executor, was at least entitled to continue the action for the recovery of damages in respect of injury committed during a period of six months prior to the plaintiff's death. *Jones v. Simes*, 351
10. — *parties: mortgage: foreclosure action: trustees: rules of supreme court*, 1883, *order XVI. rule 8*—Foreclosure action by a first mortgagee against the mortgagor, and a second mortgagee, who had become bankrupt. The second mortgagee was a trustee of the money secured by his mortgage, for various persons:—*Held*, that, notwithstanding Order XVI. rule 8, the persons beneficially interested under the second mortgage were necessary parties to the action. *Francis v. Harrison*, 248
11. — *parties: numerous persons having the same interest: foreclosure action: persons interested in the equity of redemption: rules of supreme court*, 1883, *order XVI. rule 9*—In a foreclosure action an order had been made in chambers, under Order XVI. rule 9, authorising two of a large class of persons, all having the same interest in the equity of redemption, to defend in the action on behalf and for the benefit of the others:—*Held*, that a foreclosure order could not be made unless all the persons interested in the equity of redemption were parties to the action. *Griffith v. Pound*, 522
12. — *pleading: motion for judgment in default: foreclosure: allegation of amount due: admission by not pleading: form of judgment: rules of supreme court*, 1883, *order XIX. rule 13; order XXVII. rule 11*—On a motion for judgment in default of defence in a foreclosure action the plaintiff (an equitable mortgagee of leaseholds) asked for a personal judgment against the defendant, the mortgagor, for the amount which the plaintiff, by his statement of claim, alleged to be due, on the ground that the defendant, by not putting in a defence, had admitted that that amount was due from him. The plaintiff had not asked for a personal judgment by his statement of claim. The defendant did not appear at the hearing:—*Held*, that the defendant's admission by not pleading could only be treated as made for the purpose of the relief asked by the statement of claim. The Court, therefore, merely directed an account of what was due to the plaintiff for principal and interest under his mortgage. *Faithfull v. Woodley*, 301
13. — *pleading: non-delivery of statement of claim: order dismissing action: order not drawn up or served: rules of supreme court*, 1883, *order XXVII. rule 1; order LXIV. rule 7*—When an order has been made in chambers dismissing an action, unless the next step is taken by the plaintiff within a specified time, and the plaintiff does not take that step within the specified time nor appeal against the order, the order takes effect, and the time for taking the step cannot subsequently be extended, the action having become dead, notwithstanding that the order has not been drawn up or served upon the plaintiff before it became operative. *Script Phonography Co. (Lim.) v. Gregg*, 406
- Dickinson v. Metcalfe v. The British Tea Association* (46 Law Times Rep. N.S. 31) not adopted. *Ibid.*
14. — *receiver: creditor's administration action: executor: retainer*—A creditor in an administration action is only entitled to the appointment of a receiver as against the executor when it can be shewn that the assets are being wasted. The Court will not interfere with the executor's right of retainer, and a receiver will not be appointed merely on the ground that it is probable the executor will exercise such right of retainer to the prejudice of the general body of creditors. *In re Wells. Molony v. Brooks*, 810
15. — *receiver: judgment debt: death of debtor: "equitable execution": rules of supreme court*, 1883, *order XVII. rules 1 and 4, order XLII. rule 23*—A creditor who has obtained judgment against a debtor in an action in which the debtor and another were defendants cannot as of right and *ex parte*, after the death of the debtor, obtain a receiver of the deceased debtor's estate. The effect of Order XVII. rule 1 is to keep the action alive against the other defendant; but it does not keep the action alive against the deceased debtor so that proceedings can be taken against persons entitled to the property of the dead man who are not parties to the action, without notice to them. *In re Mark Sheppard. Atkins v. Sheppard* (App.), 83
- Quare*, whether execution at common law could be had without notice after the death of a judgment debtor against his estate. *Ibid.*
- Decision of CHITTY, J., affirmed. *Ibid.*
- Cash v. Parker* (48 Law J. Rep. Chanc. 671; Law Rep. 12 Ch. D. 293) distinguished. *Ibid.*

Practise (continued)—

The Judicature Act does not give any right to equitable execution where there is no impediment in the way of legal execution. *Ibid.*

16. — *service: notice of motion to attach: service where no appearance: rules of supreme court, 1883, order XLIV. rule 2; order LXVII. rule 4*—Notice of motion to attach held to have been sufficiently served by filing pursuant to Order LXVII. rule 4, the respondent not having entered appearance. *In re Morris* (deceased). *Morris v. Fowler*, 407

17. — *service of writ: partnership foreign partner: rules of supreme court, 1883, order IX. rule 6, and order XVI. rule 14*—Where a partnership between a foreigner residing abroad and a British subject has, before the commencement of an action against the partnership, been dissolved, without the knowledge of the plaintiff, and the business has been carried on in England under the style of the firm by the foreigner alone, service of the writ on the partnership can be effected under Order IX. rule 6, and Order XVI. rule 14, by service at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the management of the business. *Shepherd v. Hirsch, Pritchard & Co.*, 819

Pollesfen v. Sibson (55 Law J. Rep. Q.B. 217; Law Rep. 16 Q.B. D. 792) discussed and followed. *Ibid.*

A plaintiff, being ignorant of the dissolution of a partnership, served his writ under Order IX. rule 6 at the place of business where a former partner purported to carry on the business of the partnership firm, but which was not the place of business of the firm during the subsistence of the partnership:—*Held*, that the service was good service on the partnership. *Ibid.*

18. — *service out of jurisdiction: discretion of the court: convenience: rules of court, 1883, order XI. rule 1 (f), and rule 2*—In an action to restrain the infringement of the plaintiffs' trade mark and the sale of the defendants' goods as those of the plaintiffs', the defendants being resident in Ireland, and having neither property nor place of business nor agents within the jurisdiction, the Judge discharged an order which he had made in chambers on an *ex parte* application for service of the writ out of the jurisdiction, on the ground that the action could have been more easily and cheaply tried in Ireland than in England, notwithstanding that a motion was pending in this Court, on behalf of the plaintiffs, for the registration of their trade mark and the removal from the register of the defendants' trade mark. *Kinahan v. Kinahan*, 705

19. — *staying proceedings: abuse of process of court: frivolous and oppressive action: inherent jurisdiction to dismiss: statute of limitations (3 & 4 Will. 4. c. 27), s. 26: concealed fraud*—The exercise by a Court of its inherent jurisdiction to dismiss an action as an abuse of its process is not justified merely by great improbability in the case made by the pleadings. But all the circumstances may be considered. *Lawrance v. Lord Norreys* (H.L.), 681

Where, in a statement of claim, a charge of concealed fraud, within section 26 of the Statute of Limitations (3 & 4 Will. 4. c. 27), was stated vaguely and generally, and previous litigation with reference to the same subject-matter led to the conclusion, which was confirmed by an affidavit filed on the plaintiff's behalf, that the allegations were an afterthought and wholly incapable of proof,—*Held*, that the action was properly dismissed as an abuse of the process of the Court. *Ibid.* The decision of the Court of Appeal affirmed. *Ibid.*

— arbitration: motion to set aside award. See ARBITRATION, 1.

— discovery: examination under Companies Act. See COMPANY, 14.

— foreclosure action. See MORTGAGE, 2; PATENT, 1.

— originating summons. See ADMINISTRATION, 2; POWER, 6.

— parties. See PATENT, 6.

— parties: claim against estate of deceased: assets in hands of trustee. See TRUSTEE, 1.

— receiver: Judicature Act, 1873, s. 25 sub-s. 8. See MORTGAGE, 3.

— service: petition to revoke patent. See PATENT, 7.

Principal and Agent—money had and received: commission received by agent upon orders on principal's behalf: investments made by agent with money so received: right of principal to follow money into—The defendant was employed by the plaintiffs as their foreman, and was intrusted by them with the purchase of materials used in their business. From one of the firms from which he had purchased, he had received commissions upon the amounts of the orders he had placed with them. In an action to recover the money so received, the plaintiffs moved, before the trial, for an injunction restraining the defendant from dealing with certain real estate bought with such money,

Principal and Agent (continued)—

and an order directing him to pay into Court the residue of the money:—*Held*, affirming the decision of STIRLING, J., that a debt was due from the defendant to the plaintiffs, but the money he had received was not the money of the plaintiffs in his hands as trustee for them, and the order asked for could not be made. *Lister & Co. (Lim.) v. Stubbs* (App.), 570

Semble (per COTTON, L.J.), that the plaintiffs would have a right to set aside the contract with the firm supplying the goods, and to sue such firm for the purchase-money paid to them. *Ibid*.

Principal and Surety—indemnity given by principal debtor to one of several co-sureties: payment of principal debt by all co-sureties: right of co-sureties to benefit of indemnity]—Five sureties executed a guarantee to a bank, by which they jointly and severally undertook to repay to the bank the balance for the time being owing to them by a customer on his current account, to the extent of 2,000*l*. Afterwards the principal debtor deposited with one of the sureties a policy of insurance on his own life to secure that surety against all liability in respect of the suretyship. The principal debtor became bankrupt, owing more than 2,000*l*. to the bank, whereupon the bank called upon the sureties to pay them 2,000*l*. under the guarantee. The sureties paid this sum in unequal amounts. The principal debtor afterwards died, and the policy money was received by the surety with whom the policy had been deposited:—*Held*, that inasmuch as the surety with whom the policy had been deposited was bound, upon the principal of *Steel v. Dixon* (50 Law J. Rep. Chanc. 51; Law Rep. 17 Ch. D. 825), to bring the policy money into hotchpot for the benefit of his co-sureties, the deposit in effect ensured for the benefit of all the co-sureties to the full extent of the principal debt, and that the policy money must accordingly be applied in repaying to the five co-sureties the amounts which they had respectively paid under the guarantee. *Berridge v. Berridge*, 533

— mortgage: covenant by mortgagor and surety: payment by mortgagor. See LIMITATIONS, STATUTE OF, 2.

Probate—grant: married woman: choses in action: right of husband to sue executor. See HUSBAND AND WIFE, 6.

Promissory Note. See BILL OF EXCHANGE.

Public Health Act—local government: paving of streets: notice to "owner": validity: public health act, 1875 (38 & 39 Vict. c. 55), ss. 150 and 4]—The term "owner," as defined in sec-

tion 4 of the Public Health Act, 1875, does not include a receiver of rents and profits appointed by the Court, and service on him of a notice under section 150 of the Act is invalid. *Corporation of Bacup v. Smith*, 518

2. — street improvements: expenses of paving and metalling: charge upon "premises": land subject to a restrictive covenant: public health act, 1875 (38 & 39 Vict. c. 55), ss. 4 and 257]—The charge created by section 257 of the Public Health Act, 1875, for expenses incurred by a local authority, for the repayment whereof the owner of the premises in respect of which the same are incurred is liable under the Act, is a charge upon "the premises," that is, the land itself, not the interest of any particular owner of the land, and such a charge takes precedence of a restrictive covenant affecting the premises. *Guardians of Tendring Union v. Denton*, 528

Public-house. See COVENANT, 1.

Railway Company—abandonment: winding-up petition: parliamentary deposit: notice to treat: exercise of compulsory powers]—A railway company was incorporated by Act of Parliament in 1881, a section of which provided that if the company did not complete and open the railway before the time fixed, then the deposit money, or so much thereof as might not have been required for certain specified purposes, should be forfeited, &c., or, "in the discretion of the Chancery Division, if the company is insolvent, and has been ordered to be wound up, shall wholly or in part be paid or transferred to the liquidator of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors." An Abandonment Act was passed in 1888, which provided (*inter alia*) that forthwith, after the passing of the Act, the company should proceed to wind up their affairs, and pay, satisfy, and discharge all their debts, liabilities, and engagements, and that when the debts of the company were discharged and the affairs of the company wound up the company should be dissolved. Neither in 1881 nor 1888 was there any Act or procedure in existence under which a railway company, incorporated after 1867, could be wound up:—*Held*, that the above provisions of the Act of 1888, although not such as to enable the company or a creditor to present a petition for the winding-up of the company under the Act of 1869, nevertheless operated as a legislative order to wind up the company, and entitled creditors to the protection which they would have had, had the company been wound up under the Companies Act and a liquidator appointed. *In re Uzbridge and Rickmansworth Railway Acts* (App.), 409

Railway Company (continued).—

A mere notice to treat served by a railway company on landowners, and not followed up by any other action in consequence of such notice, is not an exercise of compulsory powers, although a necessary step towards the exercise of such powers; and a landowner who has received such a notice is not thereby entitled to be paid compensation out of a Parliamentary deposit, in priority to other creditors, as a person "subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company." *Ibid.*

A Parliamentary deposit forms no part of the assets of the company. *Ibid.*

Decision of STIRLING, J., reversed. *Ibid.*

Guest v. The Poole and Bournemouth Railway Company (39 Law J. Rep. C.P. 329; Law Rep. 5 C.P. 553) approved. *Ibid.*

2. — *lands: limits of deviation: land reasonably required for the construction of the line: railways clauses act, 1845* (8 Vict. c. 20), s. 15: *lands clauses act, 1845* (8 Vict. c. 18), ss. 84 and 92]—A railway company, authorised by its special Act to take such of the lands shewn and described in the deposited plans and books of reference as might be required for the purposes mentioned in the special Act, has power to take lands outside the limits of deviation, if such lands are reasonably required for the construction of the line of railway within the limits of deviation, provided such lands have been properly shewn and described in the deposited plans and books of reference. *Finch v. The London and South-Western Railway Company* (App.), 458

Wrigley v. The Lancashire and Yorkshire Railway Company (4 Giff. 352; 9 Jur. N.S. 710) explained; *Dowling v. The Pontypool & Railway Company* (43 Law J. Rep. Chanc. 761; Law Rep. 18 Eq. 714) approved. *Ibid.*

The deposited plans and books of reference shewed two tenements of land (numbered thereon as Nos. 122 and 123), which consisted of two houses with their respective curtilages. One of the houses, and part of the other house, as well as parts of the curtilages of both, were within the limits of deviation, but the remaining parts of the two tenements were outside those limits. The tenant of the house partly within and partly without the limits required the company to take the whole of his tenement, but the plaintiff, the landlord, refused to sell the whole of the two tenements to the company:—*Held*, that, under such circumstances, it became reasonably necessary for the company to take the whole of the two tenements numbered 122 and 123, and that, as they were shewn and described in the deposited plans and books of reference, the company were entitled to take them. *Ibid.*

Pulling v. The London, Chatham, and Dover Railway Company (3 De Gex, J. & S. 661;

33 Law J. Rep. Chanc. 505) distinguished. *Ibid.*

Decision of KAY, J. (reported 58 Law J. Rep. Chanc. 350), affirmed. *Ibid.*

3. — *mines and minerals under and near railway: ironstone and limestone: open quarrying: notice by owner of intention to work: railways clauses consolidation act, 1845* (8 & 9 Vict. c. 20), ss. 77, 78, and 79]—*"Minerals"* in sections 77 and 78 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), includes minerals which are got by open quarrying:—*So held*, by LORD WATSON and LORD HERSCHELL, dissentiente LORD MACNAGHTEN. *Midland Rail. Co. v. Robinson* (H.L.), 442

Limestone is a mineral within the same sections. *Ibid.*

An owner is not justified in giving a notice under section 78 unless he has a *bona fide* present intention to work the minerals, but it is immaterial whether he intends to work them himself or by lessees or licensees. *Ibid.* Decision of the Court of Appeal affirmed. *Ibid.*

4. — *scheme of arrangement: petition for confirmation: railway companies act, 1867* (30 & 31 Vict. c. 127), ss. 6, 12, 13, 16, and 17: *the regulation of railways act, 1868* (31 & 32 Vict. c. 119), s. 13: *companies clauses act, 1863* (26 & 27 Vict. c. 118), ss. 13 and 14: *splitting of ordinary shares: preferred and deferred half shares: preference shares*]—A company was incorporated with a capital of 72,000*l.*, divided into 7,200 ordinary shares of 10*l.* each. Under a power contained in the company's special Act, 4,960 shares had been split into preferred and deferred half shares. The holder of any two halves was entitled in respect thereof to such right of voting and other advantages as were incident to one entire share, but two half shares did not become one entire share. Upon a petition being presented under section 16 of the Act of 1867 for the confirmation by the Court of a scheme of arrangement,—*Held* (reversing the decision of NORTH, J.), that the holders of the preferred half shares could not be treated as a class of preference shareholders within section 12 of the Act of 1867 whose assent was required to the scheme of arrangement, but that any rights of priority belonging to the holders of the preferred half shares as between themselves and the holders of the deferred half shares would be protected by the provisions of section 17 of the Act of 1867. *In re Brighton and Dyke Rail. Co.* (App.), 329

— sale of house: implied grant of light. See LIGHT.

Receiver. See PRACTICE, 14, 15.

Remoteness—contingent remainder: possibility on a possibility—Testator gave freehold lands to the use of trustees during the life of his daughter, in trust for his daughter for her separate use, and after her death to the use of any husband she might thereafter marry, and after the death of the survivor of them to the use of the children of his daughter as she should appoint, and in default of appointment to the use of the children of his daughter living at the death of such survivor or previously dead leaving issue then living, and if there should be no such child, to the use of the testator's sons and other daughters then living or previously dead leaving issue then living. The daughter, after the testator's death, married a person living at the testator's death, and died without having had issue:—*Held*, that the limitations in default of appointment, after the death of the survivor of the daughter and her husband, were void for remoteness. *In re Frost. Frost v. Frost*, 118

The application of the rule against perpetuity to contingent remainders considered and defined, and *Cole v. Sewell* (4 Dr. & W. 1; 2 H.L. Cas. 186) distinguished. *Ibid*.

2. — *Limitation to use of unborn children of unborn person: restriction within the limits of rule against perpetuity: void limitation: possibility on a possibility*—The old real property rule, prohibiting a legal limitation of an estate to the issue of an unborn person to take as purchasers, has not been abrogated or superseded by, or merged in the more modern rule against perpetuities, but the two rules are independent and co-existing rules. Consequently, a limitation offending against the old rule is not validated by the fact that it is so framed as necessarily to take effect within the period of a life in being and twenty-one years after. *Whitby v. Mitchell* 8; (App.), 485

— See POWER, 6.

Rentcharge—liability on terre-tenant: possession of land subject to charge. See COMPANY, 19.

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Savings Bank—winding-up: contributory: trustee and manager: liability: misfeasance: savings banks act, 1863 (26 & 27 Vict. c. 87), ss. 2, 3, 6, 10, 11, 21, 38, 39, and 55: *savings banks act, 1880* (43 & 44 Vict. c. 36), ss. 2 and 3: *savings banks act, 1887* (50 & 51 Vict. c. 47): *companies act, 1862* (25 & 26 Vict. c. 89), ss. 165 and 200—D., a trustee and manager of a savings bank regulated by the Savings Banks Act, 1863, omitted to comply with the requirements of the Act as to the maintenance of checks in transactions of deposit and repayment, and as to the examination of accounts, and entrusted the business of the bank to the actuary, who committed frauds which resulted in the winding-up of the bank:—*Held*, that he was liable under section 165 of the Companies Act, 1862, to make compensation to the bank on the ground of misfeasance, but that he was not liable under section 200 as a contributory. *In re Cardiff Savings Bank; Davies's Case*, 450

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Sequestration—to enforce payment into court : death of contemnor insolvent : effect on sequestration : *judicature act*, 1875, s. 10 : *bankruptcy act*, 1883, s. 45]—Sequestration to enforce payment into Court is not discharged by the death of the contemnor, on the ground that the process has issued for the non-performance of a duty. *Pratt v. Inman*, 274

Hyde v. Greenhill (1 Dick. 106) followed. *Ibid.*

The provisions in the Bankruptcy Act, 1883, s. 45, restricting the rights of creditors under an execution, are not imported by section 10 of the Judicature Act, 1875, into the administration of insolvent estates in the Chancery Division. *Ibid.*

Settled Estates Act—petition for confirmation of lease : separate examination of married woman. See HUSBAND AND WIFE, 3.

Settled Land Act—*heirlooms : sale : exercise of discretion of tenant for life : settled land act*, 1882 (45 & 46 Vict. c. 38), ss. 37 and 53]—Section 37 of the Settled Land Act, 1882, gives a tenant for life a discretion to sell heirlooms, but in the exercise of that discretion, and when determining whether they ought to be sold or not, he is to act as trustee not for himself only, but for himself and all the persons entitled under the settlement, and must take into consideration all the circumstances of the particular case. *In re Earl of Radnor's Trusts* (App.), 782

2. — *improvement rentcharge : redemption : bonus to compensate owner of rentcharge for reduced rate of interest on re-investment : application of capital money in payment : settled land acts amendment act*, 1887 (50 & 51 Vict. c. 30, s. 1)]—Where a rentcharge has been created upon settled land in pursuance of an Act of Parliament, with the object of paying off money advanced to defray the expenses of improvements authorised by the Settled Land Act, 1882, the trustees of the settlement may, upon the true construction of the 1st section of the Settled Land Acts Amendment Act, 1887, out of money in their hands which is applicable as capital money arising under the Settled Land Act, 1882, properly pay, in addition to the amount of the unpaid principal money, a reasonable sum by way of bonus such as is necessary to redeem the rentcharge. *In re Lord Egmont's Settled Estates* (App.), 768

In re Lord Sudeley's Settled Estates (57 Law J. Rep. Chanc. 182; Law Rep. 37 Ch. D. 123) disapproved. *Ibid.*

Settlement—*construction : gift to wife's next-of-kin after death of husband and wife : time of ascertaining class to take*]—By a marriage settlement, property of the wife was vested in trustees, upon trust, in default of appointment by the wife, after the death of husband

and wife, "for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto, in case the said M. Robinson" (the wife), "having survived the said R. Beach" (the husband), "were to die possessed thereof respectively and intestate, and to be divided between or among such persons, if more than one, in the shares and proportions in which the same would be divisible under the same statutes." The wife died in 1848, without making any appointment. The husband died in 1887. The question was raised on summons at what period the next-of-kin, who were to take in default of appointment by the wife, were to be ascertained:—*Held*, that the persons to take were those who would have been entitled to the wife's personal estate if she had survived her husband and died immediately after him. *In re Beach*; *Clarke v. Hayne*, 195

Druitt v. Seward (55 Law J. Rep. Chanc. 239; Law Rep. 31 Ch. D. 234) and *In re Bradley*; *Brown v. Cottrell* (58 L.T. N.S. 631) not followed. *Ibid.*

Ship—tonnage : maritime lien]—Mere towage services are not the subject of a maritime lien. *Westrup v. Great Yarmouth Steam Carrying Company (Lim.)*, 111

Shorthand Notes. See PRACTICE, 3.

Solicitor—*London agent and country solicitor : interest on costs*]—As, according to the "usual agency terms" between a country solicitor and London agent, the London agent is only entitled to payment in full of all out-of-pocket expenses and to a share (one half or one third, as may be agreed) of the profit charges, he is not, in the absence of special agreement, entitled to share in any other profits made by the country solicitor in the business, or in interest paid to the solicitor on unpaid costs. *Ward v. Lawson. Lawson v. Ward* (App.), 323

An agreement by a country solicitor with a London solicitor, that the London solicitor should be his London agent on the usual agency terms, but that the London agent should not call upon the country solicitor to pay any of his agency bills until he had obtained payment of his bill of costs from his client, does not entitle the London agent to share in interest paid to the country solicitor on unpaid costs. *Ibid.*

Decision of CHITTY, J., reversed. *Ibid.*

— mortgagee : profit-costs. See MORTGAGE, 7.

— remuneration. See COSTS.

— solicitor-mortgagee : profit-costs. See COSTS, 5.

Solicitor and Client—agreement as to costs.
See COSTS, 2.

Specific Performance—partnership: agreement to retire. See FRAUDS, STATUTE OF.

— See CONTRACT.

Streets—paving: notice to owner. See PUBLIC HEALTH ACT.

Towage. See SHIP.

Trade Mark—*registration: essential particular: claim in application: prize medal: distinctive device: distinctive label: patents, designs, and trade marks acts, 1883 to 1888, s. 64*—In order to support an application for the registration of a trade mark, it must be shewn, not merely that the trade mark consists of or contains an essential particular, as defined by section 64 of the Patents &c. Acts, 1883 to 1888, but that such essential particular has been claimed as such in the application in accordance with the same section. *In re Bryant & May (Lim.)*, 763

A representation of an exhibition prize medal is not such a "distinctive device" as to be capable of constituting an essential particular, even though no other similar medal was granted for the same class of goods at the same exhibition. *Ibid.*

Semble, that a label which contains only elements which are themselves incapable of constituting essential particulars is not, as a whole, a "distinctive label" within the Act, even though those elements are combined and arranged in a manner which is new and has been used by no other trader. *Ibid.*

2. — *registration: old trade mark: special and distinctive word: pattern: descriptive word: rectification of register: costs: trade marks registration act, 1875 (38 & 39 Vict. c. 91), s. 10: patents &c. act, 1883 (46 & 47 Vict. c. 57), ss. 64 and 90*—A word which has been used as indicating a pattern or type of manufacture, and not the manufacture of a particular individual or firm, is not, although used prior to the 13th of August, 1875, a special and distinctive word used as a trade mark before the passing of the Trade Marks Registration Act, 1875, and the registration of such a mark will, under section 90 of the Patents &c. Act, 1883, be expunged at the instance of a person aggrieved. *In re Harrison, McGregor & Co.'s Trade Mark*, 22
- H. & Co., in 1884, registered the word "Albion" as an old mark used by them prior to 1875 in connection with the manufacture of agricultural machines. It was proved that the word had been used to designate machines of

particular pattern:—*Held*, that the word had not been used as a trade mark, and the registration must be expunged, and H. & Co. must pay the costs of the application to rectify. *Ibid.*

3. — *registration: protection limited to goods for which mark is registered: patents &c. act, 1883, ss. 62, 65, 70, 76, and 77: passing off goods by former servant*—The owner of a trade mark can only sue in respect of an infringement of that trade mark in connection with the particular goods or classes of goods for which his trade mark is registered. *Hart v. Colley*, 355

A servant is entitled, when he leaves his employment, to carry on a business of the same character as his former employer's, and to obtain the custom of his former employer's customers, and to use trade wrappers and other trade papers, notwithstanding that his former employer does so, and to employ the same printer; but in exercising these rights it is especially incumbent upon him to do so in such a manner as not to represent that his business and goods are the business and goods of his former master; and if he does so represent, an injunction will be granted to restrain him from so doing. *Ibid.*

4. — *registration: "satinine": "invented word": "word having no reference to character or quality": descriptive word: patents &c. act, 1888, s. 10*—The word "Satinine" being a descriptive word, not being an "invented word," and having reference to the character and quality of the goods (in this case starch, blue, perfumery, &c.) to which it was proposed to apply it, is not a word which can be registered under section 10 of the Patents &c. Act, 1888, which is substituted for section 64 of the Patents &c. Act, 1883. *In re Meyerstein's Trade Mark*, 401

Trade Name—*sale of goodwill of business carried on in vendor's name: right of purchaser to use vendor's name*—The plaintiff sold to the defendant his business premises, and the goodwill of the business carried on by him there. The deed by which the sale was carried out contained no express assignment of the right to use the plaintiff's name:—*Held*, that the defendant had, by virtue of the assignment of the goodwill, the right to use the plaintiff's name in the business, so as to shew that the business was the one formerly carried on by him, but not so as to expose him to any liability by holding him out as the owner of the business, or as one of the persons with whom contracts were to be made. *Thynne v. Shore*, 509

Levy v. Walker (48 Law J. Rep. Chanc. 273 Law Rep. 10 Ch. D. 436) distinguished. *Ibid.*

Trustee—investment: breach of trust: practice: parties: amendment: statute of limitations: trustee act, 1888 (51 & 52 Vict. c. 59), s. 8, sub-s. 1 (a) (b), sub-s. 3: rules of supreme court, order XVI. rule 8]—In an action commenced after the 1st of January, 1890, to render trustees liable for a loss arising from an improvident investment of the trust funds, where the breach of trust is committed more than six years before the commencement of the action, —*Semble*, clause (a) of sub-section 1 of section 8 of the Trustee Act, 1888, does not apply, but, *held*, that clause (b) applies. *In re Bowden*; *Andrew v. Cooper*, 815

Where a claimant against the estate of a deceased person seeks to follow the assets into the hands of a trustee, it is not necessary to make the beneficiaries parties. *Ibid*.

Dictum of MALINS, V.C., in *Clegg v. Rowland* (36 Law J. Rep. Chanc. 137, 140; Law Rep. 3 Eq. 368, 373) dissented from. *Ibid*.

2. — **investment: improper investment: sale of trust funds: liability of trustee to replace stock sold**—Trustees, having power to invest in real securities and to vary investments, in 1875 sold bank annuities forming part of the trust funds, and invested the proceeds of sale on a contributory mortgage of real estate, which was subject to a jointure and portions. It was admitted that this mortgage was an improper investment. The tenant for life having since died, the money on mortgage was now being called in, and the whole of the principal was forthcoming, so that no loss would follow directly from the investment; but the remaindermen, who were now entitled to the capital, claimed that the trustees ought to replace the bank annuities sold in 1875, which at that time stood at a much lower value than their present value:—*Held*, that the sale being made for the purpose of making another investment which was improper, the sale was improper also, and the trustees were liable either to replace the stock or to repay the proceeds of sale, at the option of the remaindermen. *In re Massingberd's Settlement*; *In re Clark's Settlement*; *Clark v. Trelawny*, 107

3. — **investment: insufficient security: mortgage of buildings: report of able practical surveyor: trustee act, 1888 (51 & 52 Vict. c. 59), ss. 4 and 5: trust legacy: appropriation: change of investment**—When a trust legacy has been appropriated it is a breach of trust to vary the investment without reasonable cause; and upon the legacy falling into possession, the trustee is liable to indemnify the legatee against any loss resulting from the change of investment. *In re Walker*; *Walker v. Walker*, 386

A trustee is not entitled to the protection afforded by section 4 of the Trustee Act, 1888, unless the report or valuation upon

which he acted in making an investment, which ultimately proves insufficient, was made upon his own instructions and directed to the particular investment. *Ibid*.

A trustee is not entitled to the protection afforded by section 5 of the Trustee Act, 1888, unless the investment which has proved deficient was a proper investment at the time in all respects other than value. *Ibid*.

The duties of trustees with respect to the appropriation and investment of trust legacies considered. *Ibid*.

4. — **mortgage: power for trustees "to make any sales and arrangements they shall judge expedient": power to mortgage testator's real estate**—A testator appointed Hignett and Jones executors and trustees of his will, and directed that the trustees or trustee for the time being of his will should have full power to settle his accounts and wind up his affairs as they or he should think fit, and, in so doing, "to make any sales and arrangements they or he shall judge expedient." And the testator devised all his real estate unto and to the use of his trustees upon the trusts therein declared. After the testator's death, Jones (Hignett having renounced probate and disclaimed the trusts of the will), in order to meet some pressing claims against the estate, borrowed a sum of 500*l.* upon the security of a mortgage of a portion of the real estate:—*Held*, that, under the terms of the will, Jones, being both executor and trustee, had power to mortgage the testator's real estate. *In re Jones*; *Dutton v. Brookfield*, 31

5. — **trust investment act, 1889 (52 & 53 Vict. c. 32), ss. 3, 5, 6, 7, and 9: corporation holding funds for charitable purposes**—A corporation incorporated by special Act of Parliament and holding funds for charitable purposes is a trustee within the meaning of the Trust Investment Act, 1889, and consequently is entitled to invest any trust moneys in its hands on any of the securities specified or referred to in section 3 of the Act, unless expressly forbidden to do so by the instrument creating the trust. A trustee, however, who has not, under the instrument creating his trust, power to vary the investments comprised in such instrument, cannot sell existing investments for the purpose of reinvesting the proceeds in the securities specified or referred to in section 3 of the Act. *In re Manchester Royal Infirmary. Manchester Royal Infirmary v. Attorney-General*, 370

6. — **trust investment act, 1889 (52 & 53 Vict. c. 32): scope of act: building society**—The powers of investment conferred on trustees by the Trust Investment Act, 1889, are not applicable in the case of the funds of a building society incorporated under the Build-

Trustee (continued)—

ing Societies Act, 1874, whether such funds are standing in the name of the society or in the names of its trustees. Those powers are only exercisable by trustees who have funds in their hands for the purpose of investment. *In re National Permanent Mutual Benefit Building Society*, 403

Trustee Act—appointment of new trustee: vesting order: jurisdiction: trustee act, 1850, ss. 35 and 43: rules of court, order LV. rule 13a, rules of December, 1888]—Proceedings instituted by originating summons under the Rules of December, 1888, Order LV. rule 13a, for the appointment of a new trustee, constitute a "matter" within the meaning of the Trustee Act, 1850, s. 43, and the Court obtained under that rule jurisdiction to make a vesting order upon a motion in such matter. *In re Jones*, 157

Trustee Act, 1888. See TRUSTEE, 1.

Undertaking—damages. See INJUNCTION.

Vendor and Purchaser—contract for sale: acceptance of title: default of purchaser: forfeiture of deposit: subsequent discovery of defect in title]—A purchaser, after accepting the vendor's title, which was fully disclosed to him, made default in payment of the purchase-money, and thereby forfeited his deposit. The vendor resold three years afterwards, and on a summons under the Vendor and Purchaser Act the title was held to be bad, by reason of a defect which had existed at the time of the earlier sale:—*Held*, that the first purchaser could not recover back his deposit. *Soper (pauper) v. J. Arnold (H.L.)*, 214

2. — contract for sale: failure to shew title according to contract: substitution of new contract]—Although a vendor who has no title to a property at the date of the contract can enforce the contract against the purchaser, if he is able to shew a good title in himself at the time fixed for completion, he cannot impose on the purchaser a different vendor, or compel him to accept a different contract in substitution for that into which he has entered. *In re Bryant and Barningham's Contract (App.)*, 636

*Trustees under a trust for sale, which arose on the death of B., contracted to sell a property as trustees for sale during the life of B.:—*Held*, that they could not compel the purchaser to accept a title from B. as tenant for life selling under the powers of the Settled Land Act. *Ibid*.

3. — contract for sale: sale by trustees with no immediate power of sale: offer to make title with concurrence of beneficiaries]—Trustees and executors entered into a contract for the sale of part of their testator's real estate, under the belief, which proved to be erroneous, that they had an immediate power of sale. The purchaser objected to the title; and after the time fixed for completion had passed, the vendors offered to obtain the concurrence of the beneficiaries, and make a title in that way:—*Held*, that the purchaser could not, after the time for completion was passed, be compelled to take a title which was different from that which he had agreed to take, and which required investigation; and that the vendors must repay to him the deposit that he had paid, with interest, and pay his costs of investigating the title. *In re Head's Trustees and MacDonald's Contract (App.)*, 604

Decision of CHITTY, J., affirmed. *Ibid*.

4. — mortgage: power of sale: notice: waiver of notice: conveyancing act, 1881, ss. 19, 20, and 21: variation of title offered by vendor]—Mortgagees sold under their power, without formal notice to the second mortgagees or to the trustee in bankruptcy of the mortgagor, subject to conditions which stated that the vendors were mortgagees selling under a power of sale, and that the assignment was to be accepted from them under such power, without the concurrence of other persons. The purchaser repudiated the contract on the ground of the absence of the three months' notice required by section 20 of the Conveyancing Act, 1881. Subsequently the vendors offered to procure the concurrence of the second mortgagees and the trustee in bankruptcy of the mortgagor:—*Held*, that the concurrence of the other parties did not prevent the title from being a title under a mortgagee's power of sale; and that the purchaser was bound to complete notwithstanding the variation in the title offered. *In re Thompson and Holt's Contract*, 651

— mortgage: sale under power: misdescription. See MORTGAGE, 6.

— specific performance: memorandum in writing. See FRAUDS, STATUTE OF.

Vesting Order. See TRUSTEE ACT.

Water Company—water supply: charge: meter: rateable value: domestic purposes: the new river company's act, 1852 (15 & 16 Vict. c. clx.), ss. 35-41: waterworks clauses act, 1847 (10 & 11 Vict. c. 17), s. 53]—The expression "consumer of water" in section 41 of the New River Company's Act, 1852 (15 & 16 Vict.

Water Company (continued)—

c. clx.), means, not any person who desires to consume the company's water, but one who either already has a supply, or has taken the necessary steps entitling him to demand a supply from the company. *Cooke, Sons & Co. v. Governor and Company of the New River* (H.L.), 333

Decision of the Court of Appeal affirmed. *Ibid.*

Will—charge of debts on real estate: devise of real estate to trustees: authority to trustees to adjust and pay all claims upon testator's estate: power of sale: 22 & 23 Vict. c. 35. s. 14—Testator, who died on the 7th of November, 1889, by his will, gave certain real estate, and also the residue of his estate of whatever nature, to two persons upon certain trusts, and he authorised his said trustees or trustee to release or compound any debts owing to him or his estate, or to give time, or take security for payment, "and to adjust and pay all claims made upon my estate." The two trustees were appointed executors of the will.—*Held*, that the will did not create a charge of debts upon the real estate. *In re Head's Trustees and Macdonald's Contract* (App.), 604

2. — class: illegitimate relations: "named": "relatives hereinbefore named"—A testator gave a series of legacies in trust for the respective children of several named persons whom he respectively described as his cousins, some of whom were not legitimately related to him, and he gave other legacies in trust for persons whom he described as nieces, some of whom were related by affinity only; and he directed his residuary estate "to be equally divided amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest." By a codicil he revoked the legacies in favour of the persons described as his nieces, and directed that they should not participate in the division of his residuary estate as directed by the will. At the date of the codicil there was only one person legally related to the testator and mentioned by name in the will who was entitled to take under the residuary bequest:—*Held*, reversing the decision of STIRLING, J., that the children of persons named as cousins, whether legally related or not, were "relatives hereinbefore named" within the meaning of the residuary clause. *In re Jodrell. Jodrell v. Seale* (App.), 538

Principles of construction discussed. *Ibid.*

3. — class: next-of-kin of person dead at date of will: when ascertained: statute of distributions: lapse—Testatrix bequeathed a sum of money "to such person or persons as would have become entitled to my said husband's personal estate under or

by virtue of the Statute of Distributions had he died intestate and without leaving any widow him surviving"—*Held*, that the persons to take, and the shares and proportions in which they were to take, were to be ascertained at the death of the husband, and that the share of one of the husband's next-of-kin who predeceased the testatrix lapsed. *In re Rees; Williams v. Davies*, 305

4. — conditional bequest: marriage with consent: implied consent—Bequest in trust for testator's son absolutely from and after his marriage with the consent of two of the trustees for the time being. In reply to a verbal request by the son to the trustees for such consent, one of the trustees said that they had no objection; but they required him to make an application in writing. In reply to his written application, the trustees wrote that they were prevented for the present from acceding to his request, as they understood that the lady had rejected his suit. The marriage took place without any further consent. The trustees deposed that at the time of the son's first application they had no objection to the lady, but that they objected to his marrying at that time:—*Held*, that the trustees had substantially given their consent, and that the son was entitled. *In re Smith. Keeling v. Smith*, 284

5. — estate or interest: vested or contingent: "from and after" the death of the tenant for life—A testator gave all his real and the residue of his personal estate to a trustee (as to a specified leasehold house), upon trust to permit his daughter, Elizabeth Jobson, to receive the rents thereof for her life, and "from and after her decease the same premises shall be in trust for all the children of the said Elizabeth Jobson, in equal shares as tenants in common, on their respectively attaining the age of twenty-one years." The will contained no direction as to the application of the rents of the leasehold house after the death of Elizabeth Jobson and during the minority of her children:—*Held*, that, notwithstanding the words "from and after," the interest of the children in the leasehold house was contingent on their attaining twenty-one. *In re Jobson. Jobson v. Richardson*, 245

6. — forfeiture clause: repugnancy: absolute interest: life interest: contingent life interest: bankruptcy at death of testator: annulment of bankruptcy—The time for determining whether a forfeiture clause is or is not applicable to a gift under a will, is the time when, independently of all accidental or extraneous causes of postponement of payment or delivery, receipt of the gift by the legatee becomes possible in fact. *In re Metcalfe; Metcalfe v. Metcalfe*, 159

▲ testator gave to a class of beneficiaries—

Will (continued).—

first, absolute interests; secondly, immediate life interests; and thirdly, contingent life interests, in certain property, and he declared that if by any operation of law the interest of any of the beneficiaries should be aliened whereby the same would but for that clause vest in any other person, a certain gift over in respect of that interest should take effect. One of the beneficiaries was a bankrupt at the death of the testator, and the bankruptcy was not annulled until the third year afterwards. The contingent life interest of that beneficiary fell into possession within a year after the testator's death:—*Held*, that the forfeiture clause was void for repugnancy to the gift of the absolute interest, but operated upon the immediate life interest. *Held also*, that the forfeiture clause was inapplicable to the contingent life interest. *Ibid*.

Seem, if the beneficiary had been in a position to claim annulment of the bankruptcy before the immediate life interest became payable, the forfeiture would not have operated. *Ibid*.

7. — *implied gift: gift for life: gift over on death without leaving issue*—Testator devised three houses in trust to pay the rents to his niece for life for her separate use, and after her death, she leaving no child, he devised one house to A. and the others to B., and he gave his residuary estate to A. and B. equally. The niece died leaving children:—*Held*, that there was no implied gift in favour of the children. *In re Rawlins* (App.), 599

8. — *legacy: abatement: specific legacies out of sale money: deficiency: lapse of one legacy: abatement of other for benefit of residue*—Specific bequest of jewels upon trust to sell for the best price obtainable, and to pay thereout two legacies of fixed amounts; there was a residuary bequest, but no other gift of any surplus sale money. The price obtained was insufficient to pay both legacies, but one of them lapsed:—*Held*, that the other legacy was not liable to abate in favour of the residuary legatee, as it would have done in favour of the other legatee, if his legacy had taken effect. *In re Tunno*. *Raikes v. Raikes*, 573

Page v. Leapingwell (18 Ves. 463) distinguished. *Ibid*.

9. — *legacy: interest on: legacy to widow: declaration that it is to be accepted in lieu of dower*—A testator devised and bequeathed his real and residuary personal estate to trustees, upon trust to sell, and out of the proceeds to set apart and invest 2,000*l.*, and permit his wife to receive the income during widowhood. And the testator declared that the provision made for his wife should "be

accepted by her in lieu of all claim to dower or freebench":—*Held*, that interest on the legacy was only payable from the end of a year from the death of the testator. *Bignold v. Bignold*, 737

10. — *legacy: satisfaction: direction to pay debts only*—When a testator directs debts to be paid, without mentioning legacies, the presumption of satisfaction of a debt by a legacy is rebutted. *In re Huish; Bradshaw v. Huish*, 135

A lady gave a bond to her nephew for 1,000*l.*, to be paid within twelve calendar months of her death, if he should then be living or should have died leaving issue him surviving, but not otherwise, with interest at five per cent. from her death. The bond was given on his marriage, and assigned to the trustees of his marriage settlement. There was evidence that the aunt knew this. She was not *in loco parentis* to her nephew. By her will she bequeathed 3,000*l.* to this nephew. In a codicil she directed that "all just and lawful debts" should be paid at once:—*Held*, that there was no satisfaction of the bond by the legacy, but that both were payable. *Ibid*.

Edmunds v. Low (3 Kay & J. 318; 26 Law J. Rep. Chanc. 432) disapproved. *Ibid*.

11. — *power: executors named: executor renouncing*—A testator having appointed three executors, one of whom renounced probate, gave the residue of his estate to such charitable institutions as his executors therein "named" might select, to be divided in such proportions as they might approve of:—*Held*, that one of the persons named as executor, but who renounced probate, was entitled to take part in the selection of the charities. *Cramford v. Forsham*, 348

Keates v. Burton (14 Ves. 434) explained and distinguished. *Ibid*.

12. — *substitution: legatee dead at date of will*—Testatrix directed her residuary estate to be equally divided between her nephews and nieces not before named, "but should any of them be dead before me I then direct that his or her share shall be equally divided between his or her children":—*Held*, that the children of nephews and nieces dead at the date of the will were not entitled to take under the bequest. *In re Musker; Groves v. Musker* (App.), 296
Christopherson v. Naylor (1 Mer. 320) approved and followed. *Ibid*.

— confirmation: codicil: exercise of power. See POWER, 4.

— power: exercise. See POWER, 1-4.

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ERRATUM.

At p. 730, Chanc. Div., column 1, line 26, *for* mortgagee *read* mortgagors.

